Real Property Ownership: A Comparative Analysis of the Legal Provisions under English Common Law and Kuwaiti Civil Code(*)

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Abstract

The prospect of rights in land exercises most minds with an interest in real property investment. All communities have a land regulatory system. Generally, the state is the ultimate custodian with a strict utilitarian management approach. As a matter of law, land ownership confers a measure of economic and social status not least for its inherent insufficiency relative to the population and means. Regulations defer to ownership rights under such equitable mechanisms as adverse possession and the unique perspective of restoration under which the principle of restoration prevails against monetary compensation.

This paper engages in a comparative study of land ownership under English common law and the provisions of Kuwaiti Articles, which is an Islamic civil law jurisdiction. The ambit of the study embraces Mortgages, Common-ownership, and Land Ownership. It does so in the context of their inherent complexities relative to cultural, religious, and statutory limits. Specifically, this paper utilizes the analytical and comparative methodology to explore their respective provisions of mortgages on property rights by juxtaposing land title and the impact of a mortgage on co-ownership rights in both equity and law.

The paper seeks to demonstrate that the Kuwaiti system, devoid of revolutionary foundations, provides a clearer, albeit, nascent, understanding of land ownership. Yet, in its reality, is commercially cautious. A position not totally abhorred by the English system as it developed over the years.

English law, by comparison, precisely due to its undulating evolution and piecemeal origins, divested itself of the vestige of tribal dogma, thus developing an economically enabling persona. Both are logical with regards to social control. Both converge at the intersection of enduring economic facilitation.

Keywords: Land, Land Law, Private Property Rights, Real Property, Real Estate, and Land Estate.

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1. Introduction

The point of contrast is that 'Common law' is that part of the law of England which was formulated, developed and administered by the King's Courts(1). Specifically, English common law is steeped in history and revolutions spanning centuries and giving rise to rules whose origins are lost to antiquity. This is noted to forewarn the reader that much of these nuances are outside the scope of this paper. The paper will, instead, offer a brief historical narrative of the central points. The assiduous scholar with a penchant for history will find no shortage of scholarly material for in-depth grasp of English land law. Conversely, Kuwait is a civil law jurisdiction with an amalgam of Egyptian and French law traditions(2).

A. Background Check

It is observed, *abinitio*, that in sharp contrast to the Kuwait Civil Code, the English legal system is largely not codified in although there are several very large statutes consolidating parts of property law. These include the Law of Property Act 1925 and the Trustee Act 1925 which have been substantially amended. These statutes do not essentially define property. The Law of Property Act 1925 s1(1) classifies types of property in a way that departs from the Roman Law distinctions between real and personal property.

Estates (Freehold - ownership) and leasehold - tenancies)(3) are not defined, but are both classified as "estates," the most strongly protected form of land rights. Thus, most European lawyers are baffled that a tenant under a lease is in possession of a property right, even though in Germany, tenants have been held by the *Bundesverfassungsgericht*, to have the benefit of the constitutional right to property(4).

Equally, short-term tenants in England are generally less secure than their French or German counterparts even though French tenants have no property right(5).

(1) English land law is to be found, largely, in common law and is replete with complexities and technical rules that, often, defy logic and exhaust patience. As distinguished from (1) Custom, which was the body of rules administered by the manorial courts, (2) Statute, the law enacted by Parliament, (3) Special law, such as ecclesiastical law and the law merchant which were administered by special courts, (4) Civil law, the law of Rome (in Latin corpus juris civilis) and in particular (5) Equity. See Land Law and Registration by S. Rowton Simpson, HMS Office.

(2) «Kuwaiti Constitution, 1962»; World Intellectual Property Organization.

(3) Rebert Abbey and Mark Richards, Property Law 2020-2021, Oxford University Press, UK, 2020, p. 15.

(4) Reported in Press mitteilung des BvertG nr.46/2000 vom 13.4.2000, NJW-Informationen Heft 19/2000; Also see Beschluss des Ersten Senatsvom 26 Mai 1993, - 1 BvR 208/93 - NJW 1993, 2035.

(5) Jane Ball, "Renting Homes: Status and Security in the UK and France – A Comparison in the Light of

Having set the stage by the askance appeal to continental Europe, the paper notes that the English legal jurisdiction has been evolving over centuries. Law common to the land as applied by the judges developed alongside legislative provisions, becoming the foundation of laws in many international jurisdictions(6). English common law is based on a judicial foundation of stare decisis(7). It informs and often, clarifies Acts of Parliament. It enjoys much deference and is only interfered with when the legislature considers the need for clarity(8).

By contrast, emerging legal jurisdictions, without a pervasive legal origin and often working from a more urgent contemporary framework, are almost entirely based on the pronouncements of the legislature(9). The laws are often echoes of other jurisdictions, religious or cultural affectations(10). To be sure, many of these systems have their origins in customary laws which are, in turn, based on culture and, in many cases, religion. In contrast to the common law, the urgency to address the needs of a complex modern society in a fast-moving environment, means that legislatures must act quickly, decisively and with clarity.

This paper is concerned with the legal jurisdictions of Kuwait as a contrast to English common law. Specifically, we focus on laws that regulate ownership of real property rights.

Modern Kuwait(11) is, in comparison, a relatively recent nation(12) whose laws(13)

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the Law Commission's Proposals",The Conveyancer and Property Lawyer (2003), Vol. 67, January/ February, pp. 36-58.

(6) This is traced to colonialism by the English government and explorers back in time. See, also, The Boundaries of Property Rights in English Law - Report to the XVIIth International Congress of Comparative Law, July 2006. Jane Ball

(7) Past decisions made by higher courts that are binding on lower courts.

(8) Clarity often means a change in the law or the adoption of judicial dicta

(9) Or decree of the sovereign in cases where the ruler is supreme and parliament is largely subservient. Yet, that cultural appendages not only inform but, also often co-exist with legislation is not totally contested. Legislation, after all, reflects cultural heritage.

(10) In some religious jurisdictions, much of the laws is based on religious beliefs with some attempt to amalgamate them with social perspectives. Such is the case with Kuwait.

(11) For an informative discussion of Modern Kuwaiti history, see Kuwait's Legal System and Legal Research *By Ahmed Aly Khedr,* https://www.nyulawglobal.org/globalex/Kuwait.html#thejurisdictionofadministrative.

(12) Kuwait is, actually, an ancient kingdom with history going back to antiquity and ruled by the Al-Sabah family since the 1800. However, the modern nation gained independence in 1961 from Great Britain. Ibid.

(13) There are two separate systems of law in Kuwait. The first system is based on Sharia, or Islamic

are founded, in some ways, much like common law, in religion and customs. Its statutory provisions embrace civil law principles. Its land law and family provisions are based on Sharia or Islamic law(14). This religious foundation represents a shift of consciousness from the platform of the common law(15). Kuwait is no less social in its approach and latterly, appears to be developing capitalist tendencies(16). English law was informed by its Christian heritage. However, the trajectory of its land law altered to embrace the economic and social realities, thus ensuring both its flexibility and its extant format adoption.

It is observed that while English land law has much merit, it remains unwieldy. This makes it more flexible than codified law as it shuns the arrogation of infallibility by avoiding the straight jacket of language on a given subject of law. Instead, it builds on case law principles, allowing for evolution. This both enshrines its flexibility. This also makes it a challenge to understand. Yet, the simplicity and singularity of statutory provisions, as exemplified in the Kuwaiti Articles, is no less admirable and elegant.

2. Legal Contrasts

There is a sharp contrast between the approaches of both jurisdictions relative to the foundation and the extent to which the diverging nuances are informed by cultures with different emphasis and values as well as modern economic realities.

English law (England & Wales) is and has remained the jurisprudential reference point pervading common law jurisdictions(17). Having been exported, almost *enmass*, to various parts of the world, albeit with permutations, it maintains some dominance in international commercial law and treaties.

law emanating from the Qur'an. The Sharia courts handle family and personal matters, and the laws are rarely codified. In the second civil law system, the Court of First Instance handles civil and commercial matters, as well as some criminal cases. See Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of The World, Thomas Reynolds & Arturo Flores, pp. 1-39, (2004).

(14) Nicholas S. Hopkins and Saad Eddin Ibrahim, *Arab Society: Class, Gender, Power, and Development* (3rd. ed.). American University of Cairo, Egypt, (1997), p. 417.

(15) English common law developed on a platform of common beliefs and traditions. It evolved in response to internal feuds between parliament and the monarch and, in later years, developed along the lines of social and utilitarian values. Along the way, it divested itself of its religious affectations as its capitalist tendencies sought to balance ideologies of fairness.

(16) The term is used advisedly to refer to the pivot of English land law towards an efficient economic pursuit capable of adding value to the economy as opposed to maintaining an ideological doctrine based purely on doctrine.

(17) Alisdair Gillespie and Siobhan Weare, The English Legal System, 7th ed, Oxford University Press, UK, 2019, p. 1535.

The classical view is that it developed incrementally by the building up of structures first established in the days of Henry II or Edward 1"[18]. Further, Harold Berman observed that it was a part of the ideology of the English Revolution itself that the history of the English common law consists of the gradual elaboration of premises laid down at a very early date[19].

Such sentiments suggest the absence of serious legislative intervention with the impression that the common law developed, almost exclusively, at the pleasure of judges at best and haphazardly, at worst. This, however, is only a part of the reality. In truth, it was somewhat, gradual. However, the development was no less violent or, at the very least, had its share of statutory interventions as well as judicial[20] watershed moments that forced compromise[21].

Fifteenth Century England experienced several upheavals that also swept Europe of the time. These directly threatened those who had the most to lose – the landed gentry. They set about exacting not only authority by way of parliament but, also, restoration of their rights by ridding themselves of undesirable Regis powers. In the midst of it, Charles I was overthrown and executed, at least in part, for the threat he posed to the property of his subjects.

The gentry then set about constructing a system of property law that would

(18) This is represented by eminent scholars including T.F.T. Plucknett and William Holdsworth and expounded in the scholarship of historians such as S.F.C. Milsom, See T.F.T. Plucknett, A History of The Common Law 75-76 (5th ed., 1956) (tracing the «gradual formation» of the English state and law from the Anglo-Saxon kings to Edmund Burke›s «appeal to history, to experience, and to the traditional English habit of compromise and cautious reform .... in the wake of the disruptions of the French Revolution); I William Holdsworth, A History of English Law 2 (7th ed., rev., 1956) (referring to the "gradual evolution" of the English law).

(19) See generally Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 YALE L.J. 1651 (1994). The peculiarly English belief that the development of the common law consists of a gradual and faithful evolution from first premises is on vivid display in Berman›s treatment of Sir Edward Coke›s historicism. See id. at 1681-1694 and Sir Matthew Hale›s response to Thomas Hobbes›s attack on the common law. Id. at 1714-18. Very often, biological metaphors were made use of to describe the nature of this gradual growth. See, for instance, Berman›s treatment of Thomas Hedley›s speech to Parliament in 1610. Id. at 1686, n.93 ("The common law, being the ‹work of time,› is accommodated to the kingdom as ‹the skin to the hand, which groweth with it'). See Charles J. Reid Jr., The Seventeenth-Century Revolution in the English Land Law, 43 Clev. St. L. Rev. 221 (1995)

(20) See the House of Lord decision reversing Denning, MR in National Provincial Bank v Ainsworth [1965] AC 1175, HL where Lord Upjohn observed that "it has been the policy of the law to simplify and facilitate transactions in real property".

(21) Milsom describes the history of the English land law's development as occurring «step by forward step. «S.F.C. Milsom, Historical Foundations of The Common Law 168 (1969). See also, Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 18-33 (1983) (setting out a general theory of revolution and the relationship of revolution to law).

accomplish two essential aims: It would be secure from irrational seizure by the Crown; and it would promote the gentry's essential interests. It would prove to be a durable system. Large parts of the system erected by the gentry remain in effect even today …in Great Britain..."[22].

Thus, we see the development, indeed, revolution, of English law and, specifically, English land law. It is not a development that escapes the challenges of *real politick* and constitutional evolution nor an exercise in sterling precision. It has been informed both by revolution and economics and bears the hallmarks of social considerations with capitalist underpinning – even in its statutory provisions. Given the unique nature of land, changes have been driven as well by constructive considerations of social preoccupations as by economic concerns.

In this regard, the state of Kuwait is beginning to recognize the limits, as did England, of the ideological approach[23]. The one main disadvantage of the common law, compared to the Kuwaiti Civil Code, is that it developed upon litigation on the merit[24]. This impacts developmental vision despite the herculean efforts of judges[25]. Codified law such as the Kuwaiti Civil Code in the instant case, has the advantage of learning and even borrowing from established principles to advance its legislative agenda albeit with a watchful eye on local religious heritage.

This proactive approach, however, is not without its own limitations. Law, by definition, is reactive and to this extent, English common law may, indeed, be of a more practical benefit even if it is haphazard. There are limits to vision. Being overly prescriptive risks exposure to dictatorship and inflexibility. Outside the restrictions of a constitution which is often open to wide interpretations, Common law develops and does so on the back of events and experience. This can be a messy process. Clearly, both the utilitarian approach to land law-making and the ideological limb, have merits within the context of their applications[26].

(22) Charles J. Reid Jr., ibid. at page 232.

(23) There are signs that the state is beginning to consider ways to attract much needed investment into the country by relaxing its laws on land ownership. See Kuwaiti Land Ownership and Agriculture Laws Handbook, International Business Publications, (2011) infra.

(24) In other words, the law was not proactive simply because there was no need until a matter came up for trial.

(25) We must appreciate the fact that judges are not necessarily concerned with economic development. That is a matter for the state. They are, however, concerned with rights and the exercise of those rights.

(26) We submit that both law making by the government and judicial interpretations can be underpinned

3. Land records, statutory intervention, and freedom of trade

For good reason, Holmes called the English land law "an ungodly mess"[27].

The summation is that English land law is incoherent at times and owing to violent interspersions, is a product not of rational law making but of struggles for political survival and dominance.

The upheavals that bedeviled English land law can be traced to William, The Conqueror who, upon his conquest of England, considered the entire realm his spoils of war[28].

The Doomsday Survey archived every piece of land in England and some parts of Wales[29]. The Domes Day Book, as it was known, records some 13,418 pieces of land"[30].

Even in the fifteenth century, the gentry[31] came to be defined by their relationship to the land. The possession of a substantial estate conferred status, power, and privilege. Thus, more than an economic resource, land was a political resource, which, when held in substantial amounts, conferred on its possessor, authority within society[32].

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by social reasons. Equally, judges in their own interpretation in the absence of statutory guidance can be just as brutish. Law, in its wider context, is ideological even if constrained by other considerations.

(27) Williams on Real Property by Joshua Williams, QC, first published in 1844. Lecturing on the English land law in 1878. See Williams "The Seisin of the Freehold 1." Williams observed that "Some of the most remarkable of these laws, viewed by themselves, apart from their history, and judged only by the benefits which now result from them, appear to me to be absolutely worthless. Others are more than worthless, they are absurd and injurious.

(28) Consequently, he undertook a comprehensive survey of his new realm by commissioning his administration to comply a book showing the extent of land held by each landowner, what livestock they had and how much it was worth.

(29) The Domesday Book (1086) - an unique and almost complete survey of landowners, at least at manorial level, it is the crowning achievement of the administrative system of Anglo-Saxon England.

(30) See: A Short history of Land Registration in England and Wales. The entries evidence the County and Hundred where each piece was located: http://webarchive.nationalarchives.gov.uk/20110615075340/http://www1.landregistry.gov.uk/upload/documents/bhist-lr.pdf.

(31) This group formed the largest group of the kingdom›s landowners in terms of numbers. See J.M.W. Bean, Landlords, in 1h The Agrarian History of England And Wales 526 (Edward Miller, ed., 1991). See, also, C.E. Moreton, A Social Gulf? The Upper and Lesser Gentry of Later Medieval England, 17 J. Medieval Hist. 255 (1991) (exploring the social differences that existed within fifteenth-century gentry society); Mary L. Robertson, ‹Sires remembre we are neyghbours:› English Gentry Communities in the Fifteenth Century, 34 J. Brit. Stud. 112 (1995) (reviewing recent scholarship on the fifteenth-century gentry).

(32) See Kate Mertes, Aristocracy, in Fifteenth-Century Attitudes: Perceptions of Society in Mate Medieval England (Rosemary Horrox, ed., 1994). Mertes states: Landholders, once the gods of the little land they ruled, still retained political authority over their manors. They had a limited but

The granting of land was a tool by which the King rewarded those loyal to him[33]. In time, these tenants-in-chief would also grant lands to their supporters in exchange for duties and services[34]. This system of *subinfeudation*, eventually came to an end, in 1290[35] when the law[36] observed that the practice was "very hard and *extream* unto those Lords and other great men." It decreed that "it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them; that the *feoffee* shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his *feoffer* held before"[37].

Thus, if S held land from a L, post *QuiaEmptores*[38], S could transfer his land to another N but not by way of subinfeudation. Upon a transfer, N would hold the land of L, not S, thus preserving L's economic rights[39].

3.1 Contrasts – Doctrines of Tenure and Estate

The current twin doctrines of tenure and estate developed from the feudal system of land ownership. These have become lasting features of the common law. Under the doctrine of tenure, all land is held in some tenure, of the Crown. That is to say that real property, ultimately, belongs to the Crown. Enshrined

important judicial role in manorial courts, deciding many cases of petty personal and property crime; and it was their status as landholders that got them appointed to commissions of the peace that played such a large role in county affairs, and sometimes brough them to parliament.

(33) Land was thus held with deference to the King as their landlord. They were; therefore, the King›s principal tenants or tenants-in-Chief. Since such grants of land were not unconditional, the tenant had to be and remained loyal to the King. In most cases, he provided services to the royal suffrage in exchange for the land. Such services included joining the King's army on military expeditions as medieval kings were wont to do.

(34) Like their masters, these supporters would, in turn, make further grants, just like their intermediate lords (or «mesne lords»), to their own servants.

(35) After this statute, a conveyance passed all the grantor's interest to the grantee, and the grantor dropped out of the feudal chain between the tenant in possession of the land and the lord. See para17 1 Pol. & M. Hist. Eng. Law, 288; Dig. Hist Real Prop. (4th Ed.) 40, 48, 80, 120; 2 Bl Comm. 65, 87; Co. Litt. 76a, S3a. The Statute of Westminster, the QuiaEmptores

(36) Until then, this subinfeudation had a huge adverse economic impact on land. The practice was preventing the "Lords and other great men" from obtaining their entitlements by way of "Escheats, Marriages, and Wardships of Lands and Tenements."

(37) See John Raithby, Statutes of the Realm, Printed by Command of his Majesty King George the Third in Pursuance of an Address of The House of Commons of Great Britain, Volume the First, (London: Dawsons of Pall Mall, 1810), 106.

(38) Also called Third Statute of Westminster, English law of 1290 that forbade subinfeudation, the process whereby one tenant granted land to another who then considered the grantor his lord.

(39) See J.M.W. Bean, *The Decline of English Feudalism*, Manchester University Press, UK, 1968. Such was the legislative agenda of Edward 1 who, it has been argued, sought to strengthen the powers of the crown through legislation.

in the old concept of*escheat* or*return*, is the mechanism that delivered the estate of a deceased who died intestate and without heirs into the hands of the Crown. This has now been replaced by the doctrine of *bonavacantia*(40). However, as the Australian case indicates, social developments of the modern society mean that the relevance of the doctrine has diminished(41). The concept concerns the terms upon which land was held in the realm.

Conversely, the doctrine of estates addresses the period during which land was held(42). It remains the case that only the Crown, actually, owns land and everyone else can only own an estate subject to a tenure(43). We also observe that Acts of Parliament that specifically addressed land ownership were sparse until recently. Further, they were introduced not with the purpose of decisively regulating land ownership and transfer but, in most cases, to boost the royal coffers or emasculate the monarch(44).

By contrast, Kuwait land law was created to consolidate the practice common amongst the people and as inherited by its religious considerations, to regulate future transactions in land.

Where the common law lacked a definitive statutory provision designed to regulate land ownership and title (until the Land Act of 1925), Kuwaiti law regulating title to land can be found readily in Articles 810-817 of the Kuwaiti Civil Code(45).

The Articles observe that title is a *general* right in the sense that it authorizes the owner to obtain all the benefits of the matter(46). It further expounds on the definitions of the elements of title by classifying them as the rights to use, exploit and dispose.

(40) This is a concept whereby ownerless property, by law, passes to the Crown. See section 1012 of the Companies Act 2006. See also: *Ilott v Mitson (No 2) (sub nom Ilott v The Blue Cross)* [2017] UKSC 17; [2018] AC 545 per Lord Hughes JSC. There are exclusions, as with the Dutchy of Cornwall and opthers.

(41) Mabo v Queensland (No 2) (1992) 175 CLR 1. As noted by Toohey J in Wik Peoples v The State of Queensland (1996) 141 ALR 129.

(42) See Megary and Wade: M & W 15. These are the principles that underpin the English land law which can be quite startling in their scope and breath.

(43) See Law of Property Act 1925.

(44) See para17 1 Pol. & M. Hist. Eng. Law, 288, infra at 31.

(45) The code states that "the owner of a thing has the right to use, exploit and dispose of it within the limits of the law."

(46) The "matter" here, refers to the subject with which we are concerned - land, but, in the Kuwaiti context, addresses a wider definition within its scope.

Article 810-817 of the Kuwaiti Civil Code offers a parallel to the Edwardian*QuiaEmptores Act*. Both recognized the rights of a landowner (Freeholder) to exercise full rights over his land and to sell at will and to whomsoever, subject, in the former case, to other decrees.

However, this provision contrasts sharply with English case law in the 1965 dictain Ainsworth(47) over-ruling the Court of Appeal(48) in several cases relating to title. The Kuwaiti position is explicit and is a result of a direct interpretation of its jurisprudential position on title. Yet, in some ways, it aligns itself with a commercial consideration of land law but with an ideological divergence.

Where the English common law defers to commercial considerations explicitly stated in the mentioned case, the Kuwaiti decree adopts a deliberate but religiously pragmatic perspective by appealing to the Almighty. English law creates a trust of land as a mechanism of royal ownership and, thus, guardianship. Kuwaiti law, by contrast, introduces divine trust anchored upon an ap preciation and understanding of the limitations of man.

The implications of the right of ownership in Islam is that the right of man over things is limited and qualified…man is entrusted with the role of being a vicegerent(49). In its wider application, much of land comes under the ownership of the government. This is a position that the Kuwaiti government appears eager to abandon as it considers privatization of land as an economic mechanism for drawing in more investors and diversifying its economy(50). What is more, until this new approach is implemented, the "right of perpetual free simple ownership of real property is restricted to Kuwaitis"(51) thus, excluding, to all practical purposes, the commercial or capitalist consideration beyond the narrow confines of the Gulf Countries(52).

(47) National Provincial Bank v. Ainsworth [1965] AC 1175, HL. Per Lord Upjohn, the rights of the wife over property re purely personal between herself and her husband.

(48) See Denning, MR in National Provincial Bank v. Ainsworth (Sub nom National Bank v Hastings Car Mart &ors [1964] Ch 665 CA. Dicta in this case had recognized and favoured the "Abandoned wife" equity doctrine developed in prior years by the Court of Appeal as a social mechanism for protecting the domestic arrangement following the 1st world war

(49) Kuwait Land Ownership and Agriculture Laws handbook, (2011) IBP USA.

(50) Kuwait Land Ownership handbook, ibid. (2011), pp 28. In this regard, Kuwait can be seen to be departing or setting the stage, from its reliance on the religious and utilitarian approach to a capitalist approach as adopted by the English courts in the 1960s.

(51) Ibid. Arab and Foreign countries are only permitted to own the immediate area of their allocated consulates and embassies.

(52) Under Kuwaiti law, only Kuwaiti and Arabs from the GCC countries may own real property and, in the case of GCC citizens, there must be a reciprocal arrangement with their countries and any such real property must be owned as a primary residence. Other restrictions apply.

By contrast, in the 1965 English case was a social policy decision that undertook to protect the wider principle of unfettered commercial transactions in real property as enabled by the financial institutions. This was a move that would continue to facilitate general, and commerce as opposed to making a social decision that protected a narrow minority without an identified or identifiable real property rights(53).

In his dictum, Lord Upjohn opined that "it is of the utmost importance that people should be able to freely raise money on the security of their property". Lord Wilberforce, in sympathy, observed that "before a right or interest can be admitted into the category of property of a right affecting property, it must be definable, identifiable by third parties, capable, in its nature, of assumption by third parties and have some degree of permanence or stability." The ruling invited an Act that would recognize the rights of "deserted wives." Parliament responded accordingly(54).

In 1996, the Family Law Act granted the right to occupy a matrimonial home to both spouses. The Civil Partnership Act of 2004 extended the same right to civil partners. This latter law, designed to protect non-traditional "marital relationships', is quite inconceivable in Kuwait due to its strict adherence to Sharia law that forbids unorthodox home relationships. As a matter of convergence, the right of a wife to occupy the matrimonial home where children are concerned is present in both jurisdictions(55).

The common law enunciated the capitalist approach as a repudiation of the strictly dogmatic stance, itself, a social construct, to encourage free trade in real property. Kuwait, owing to its unique nature(56), religious inheritance and other factors of real concern, has just begun to discuss the issue of removing the fetters that prevent laws that help to build up its economy using land. The nascent provisions would allow foreigners to hold a mortgage.

(53) National Provincial Bank v. Ainsworth [1965] AC 1175. HL. Ibid.

(54) The Matrimonial Act of 1967 effectively, overruled the House of Lords and reinstated Dennings, MR's decision in *Bendall* v *McWhirter* [1952] 2 QB 466 which was later affirmed by him in *National Provincial Bank Ltd* v *Ainsworth* [1965] AC 1175. This 1967 Act was, itself, repealed by the Matrimonial Homes Act 1983 and the County Courts Act 1984.

(55) Kuwaiti Civil Code 873 and The Family Law Act of 1996 in England and Wales.

(56) The country has 17,820 square kilometers (6,880 square miles) of land with a 2017 population estimated at 4.14 million, which includes over one million Kuwaitis and more than two million expatriates. See http://worldpopulationreview.com/countries/kuwait-population/ . Thus, Kuwait uses land ownership not only to regulation its population but, also, to ensure real estate prices do not escape the grasp of Kuwaitis. This is a practice that is not lost on the English as practiced in the English Channel Islands.

However, the security holder of that mortgage must be a Kuwaiti. Yet, it is clear that since law is, by definition, a dynamic instrument, its continued development will always be evolutionary(57). England draws from a rich heritage of trials and errors. In the civil and Islamic jurisdiction of Kuwait, it has the advantage of responding to its unique circumstances and, in an increasingly global village, draw from the experiences of other jurisdictions.

3.1.1 Estates in Land

The common law doctrine of estates in land and future interests was a product of many events that pitched the monarchy against the landed gentry(58). These necessitated the creation of legal instruments that allowed a landowner to preserve his estate for inheritance without hindrance(59). It is observed that the term "estate" in land law indicates an interest during a particular period. It is the degree, quantity, nature, or extent of interest which a person has in land or in real property. It is an ownership interest in a physical area of land with a set geographic location(60).

Such a term is recognized by both English and Kuwaiti jurisdictions. Ownership of real estate is the exclusive preserve of Kuwaitis. Concessions are made to citizens of the Gulf Cooperative Council (GCC) member states and the diplomatic world. Real estate is governed by the Kuwaiti Civil Code 810-817(61).

Essentially, there are two ways to demonstrate land ownership: A title deed(62) that can be verified under the land registration system and through a special form of power-of-attorney, giving the attorney-in-fact the right to contract with oneself.

Under the Kuwaiti Civil Code, there are two estates in land. These are

(57) In essence, law cannot engage in overreach and must wait for matters to develop needing clarification. The danger with proactive legislation is rigidity that, at best, may cause unfairness and at worst, may be inadequate to address a given situation.

(58) Gary Watt, Trusts & Equity, Oxford University Press, UK, 2020, p. 10.

(59) The common law also developed other means that allowed a landowner to share his wealth with members of his family thus giving them a degree of economic protection if he predeceased them.

(60) For example: a life estate, an easement, a leasehold or fee simple absolute.

(61) Land laws in Kuwait come under the following: Law No. 5 or 1959 governing real estate registration, Law No. 15 of 1960 that governs commercial companies, Law No. 35 05 1978 that governs the leasing of property, Law No. 74 of 1979 that regulates foreign ownership of real property in Kuwait and Law No.67 of 1980 – the Civil Code.

(62) Anne Roddell, Property Law and Practice 2019-2020, College of Law Publishing, UK, 2019, P 1.3-1.4.

Freehold[63] under which a Kuwaiti may freely own real property in any estate and Leasehold[64] under which a lease may be granted for a limited time[65]. Given that land ownership, in the main, is the exclusive right of Kuwait citizens to the exclusion of others, we can contrast this with England which does not directly restrict ownership of land. This, perhaps, like many other aspects of land law, has ensured not just free commerce in land but also attracted investments and growth to the English economy.

However, the Kuwaiti restrictions on land ownership is not entirely without precedent[66]. The British Channel Islands employ a similar feature. The law that regulates housing ownership on the Island of Guernsey was introduced shortly after the Second World War. Designed to preserve the Island's limited housing stock for the descendants of the island, it is quite complex compared to other jurisdictions and can be challenging for migration purposes. Given the small size of Kuwait by land mass, it is not altogether surprising that the country would use such a device.

Under the Kuwaiti code, all land must be registered, and a lease of more than 10 years may risk a challenge if not registered.

Common law courts recognize certain "estates" in land. The holder of such an estate was deemed to hold a "legal estate." This gave him the rights to exclude anyone or to do with the land as he saw fit[67]. In English law, there are only two legal estates in land[68] – The Freehold (fee simple, absolute in

(63) Law No. 5 of 1959 and Law No. 74 of 1979.

(64) Law No. 35 of 1978

(65) Not more than 25 years. Any lease granted for more than 10 years must be registered. Leases of shorter duration cannot and need not be registered and need not be notarized by a court notary public.

(66) The Island of Guernsey has a population of approximately 61,000 and there are limits on who can live and work here. These had previously focused on population numbers and maintaining the availability of local market housing but there is a new political will to see this change from a housing control/ population cap to a focus on ensuring that the population mix supports strategic objectives. This requires the ability to be able to manage the population, something that will befacilitated by the draft legislation which is due to come into force in April 2017. See http://www.mondaq.com/guernsey/x/491494/real+estate/The+implications+of+Guernseys+new+popuation+management+law .

(67) A legal estate grants the holder rights of ownership over the piece of property the title to which could be conveyed to another.

(68) Under the English common law, there were three estates of freehold: the fee simple; the fee tail and the life estate. The fee tail (or entail) was introduced by the statute *De DonisConditionalibus* in 1285. A fee simple was an estate which could be inherited by the heirs of the first holder and was the closest thing to an absolute ownership. It was almost held in perpetuity subject to the availability of heirs. Fees simple could be absolute or determinable or subject to a condition. The distinction here is not entirely clear. The restrictions of a fee tail meant that it could only be inherited by lineal descendants of the original tenant. A life estate lasted only for the life of the person to whom it was

possession[69]) which endures without limitation of time and the Leasehold which is time bound[70].

This was given a statutory footing in 1925 when Parliament sought to sustain the position of the common law[71]. This law regulates land estates and various other elements of in England[72]. The Law of Property Act 1925 and the Land Registration Act 2002 provide key regulations of real property in England & Wales.

For its part, Article 810-8176 of the Kuwaiti Civil Code is equally resolute in its recognition of an owner's right to do with title to land as he pleases. In contrast, however, it provides us with a welcome single source of legislation[73].

The two approaches differ in the mechanism of law that grants such a right. Common law led with judicial dicta and then, moved to Acts of Parliament. The Kuwaiti jurisdiction, by contrast, being the product of civil law, codifies the same provision without the piecemeal evolution. In this instance, it is the Civil Code first, then opinions of the Court of Cassation in interpretation. This is a more practical and transparent approach.

Further, "title", under Article 810 of the Kuwaiti law deals, not exclusively with land per se, but with title to a piece of property in a rather existential way. In other words, its definition of title embraces land and everything else that can be owned although it recognizes the unique nature of land ownership rights. The difference is subtle but no less holistic. In some sense, where the Kuwaiti law is clear as to its application and scope with regards to land law, thus leaving no doubt as to an owner's rights, common law makes it quite the

granted. However, there could also be a life estate limited by another life - referred to as a life estate purautre vie (for another life).

(69) An interest in land. Land owned in *fee simple* is owned completely, without any limitations or conditions. This type of unlimited estate is called absolute. A fee simple is generally created when a deed gives the land with no conditions, usually using the words like "to John Doe" or "to John Doe and his heirs".

(70) S.1 (1) Law of Property Act, 1925. Land is held for a limited time.

(71) Law of Property Act, 1925, ibid.

(72) The Act is one of a plethora of acts that provided piecemeal legislation of land in England. These legislations include The Administration of Estates Act 1925 which regulates intestate succession and the procedure or handling the estate of the deceased, The Trustee Act of 1925 later amended in 2000 which governs the remit of trustees, the now obsolete Settled Land Act 1925 dealing with landed estates, the Land Charges Act 1925, re-enacted in 1972, establishing a firmer ground for registration of land encumbrances and the Land Registration Act 1925 as now comprehensively restated in the land Registration Act 2002.

(73) As opposed to the common law which is replete not just with judicial dicta but, also, much statutory provisions. See 60, ibid.

challenge for landowners to know their legal position and thus, must resort to experts in the field(74). The Kuwaiti position, however, appears to be further evolving in recent times with a plethora of statutory proposals designed to streamline land law and attract investment(75).

Thus, at common law, the courts recognized title as an explicit element of ownership peculiar to land. Kuwaiti law, on the other hand, defines title in its broader sense to embrace its normative form. In many ways, the Kuwaiti position reflects the French Civil Code which, unlike the English position, contains basic property definitions of things that can be owned(76), even though, strictly speaking, in both French law and English law, "property" describes the right to the thing rather than the thing itself, a common idea from Roman law(77).

It is observed that the three powers granted to a title holder under Kuwaiti law - possession, exploitation and enjoyment(78) bear some resemblance to the provisions recognized at common law where a landowner may do with his land as he pleases…subject to other legal provisions.

Under Kuwaiti law however, the powers are defined without equivocation and go on to embrace ideas that may be startling in breath to common law. The nuance is as authoritative as pronouncements from the House of Lords(79).

Whereas common law '*finds the law* 'without being prescriptive, the Kuwaiti Civil Code explicit and codified under legislative authority. Thus, the term "*usage*" under Kuwait law is defined as "undertaking the required material *acts* to obtain the benefits of the matter as permitted by its nature(80).

Per the Article, the use of the land is done by planting or building on it. The use of the house shall be by living in it, the use of the clothes, by wearing them etc." These are not terms necessarily derived under statute in English law. They are, instead, to be found in dicta in most cases if ever so widely

(74) Sir Frederick Pollock pointed out that it was often said that in no country were landowners so ignorant of their legal position and so dependent on legal advice as in England. See Pollock The Land Laws. Adamant Media Corporation (November 30, 2005).

(75) See The Report, Kuwait 2013, Oxford Business Group.

(76) French Civil Code, articles 517-528.

(77) François Terré and Philippe Simler, *Droit civil, les biens,* Paris, Dalloz, 1998.

(78) Article (810) of the Kuwaiti Civil Code: the owner of a thing has the right to use, exploit and dispose of it within the limits of the law

(79) The Judicial Committee of the House of Lords now commonly known as the UK Supreme Court.

(80) The Kuwaiti Civil Code Provisions of the right of ownership Section I – scope of property rights.

prescribed. The English common law often defers to *reasonable expectation* or such terms as may be wise to use.

Thus, "usage" assumes that obtaining the benefits of the thing without bearing fruit and without prejudice to its essence differs from both exploitation and disposal. In other words, one may use a thing but not necessarily put it to multiplication or profit. This is not just semantics. In essence, there is an element of the definition that allows usage but precludes commercial exploitation within the same rights granted by "title."

For instance, if the subject matter is a house, one may live in it by virtue of one's title, but this would preclude leasing it out to a third party which, under the Kuwaiti Civil Code, would constitute exploitation. If we consider the subject of leasing, for example, the authorities of title are distributed between the owner and other parties. Thus, a leaseholder has the rights of usage and exploitation but the rights of disposition remain with the owner, as is the case for usufruct(81).

The beneficiary as the owner of the exploitation authority, is entitled to the right to obtain the fruits of the matter only. As for the products, in this case, sub-leasing and disposition, these remain the full right of the owner. A leaseholder may not dispose of a property as his rights are restricted to enjoyment for the period of the lease(82).

What is clear here is the divergence between the two jurisdictions as regards title. At common law, as mentioned, if not expressly forbidden by contract or the law, one may sublet a property thus, earning a profit.

Yet, the Kuwaiti jurisprudence does provide a convergence down the line. Its definition of title is a holistic one that is not restricted to land but is enunciated to embrace other situations that may have nothing to do with land but everything to do with title.

Historically, the now obsolete common law doctrine of *subfineudation*(83) allowed not only the enjoyment of title but, the creation of titles allowing for exploitation in the sense that one could lease out property thus creating

(81) The right to use and benefit from a property, while the ownership of which belongs to another person. See https://www.law.cornell.edu/wex/usufruct.

(82) This obtains under Term of Years Tenancy or Periodic Tenancy. See: https://www.law.cornell.edu/wex/landlord-tenant_law

(83) The practice by which tenants, holding land under the king or other superior lord, carved out new and distinct tenures in their turn by sub-letting or alienating a part of their lands. See Sir William Searle (2002). *An historical introduction to the land law page 105 to 107*. ISBN 9781584772620.

subtitles. This was outlawed for good reason. It created ambiguities in title. The current system allows a lease based on a freehold ownership and not the creation of new titles(84).

Under exploitation, the Kuwaiti code permits the undertaking of necessary acts to obtain fruits generated from the matter. In other words, rights of both use and exploitation may co-exist in time to the same title holder. The rationale for this is that since fruit is the proceeds by the thing which is the subject of the title, it has the feature of periodicity and thus, obtaining it does not prejudice the essence of the matter or its origin(85).

The fruit is, by definition, an expansive concept. Although the Kuwaiti Civil Code appears pedantic in form, in spirit, it embraces the same principles of title as the common law. The ambit of the rights of *exploitation* recognizes the holistic nature of the term to include natural, industrial and civil fruits – each of which connotes an entirety of rights conferred on the title holder.

Finally, the Civil Code deals with the authority of disposition thus: The owner has the authority of disposition in the matter owned by him – materially and legally. The allusion to "*materially*" refers to the owner undertaking all the material acts leading to the consumption, impairment or change of a matter, such as the demolition of a house, disassembling a car or transformation into bread. The material disposition authority in this manner is considered an element of the title distinguishing it from other rights in kind. The person engaging in such activity must act within his rights as an owner.

Legal disposition refers to the owner's rights and authority to undertake the legal actions which may lead to the elimination of his right over the matter completely or restricting it. The owner can conclude legal transaction which lead to transferring his right completely to another person such as selling or donation. Further, he may – according to the legal disposition also – restrict his authority over the matter by establishing the right of benefit, *usufruct*(86) or *mortgage*(87) over it to a third party.

(84) Law of Property Act 1925 CHAPTER 20 15 and 16 Geo 5.

(85) Article 811 of the Kuwaiti Civil Code: the title of a matter includes its parts, fruits, products and attachments unless there is a legal provision or action to the contrary.

(86) In the civil law. The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. Civ. Code La. art. 533. See, also, Mulford v. Le Franc, 26 Cal. 102; Cartwright v. Cart- wright, 18 Tex. 62S; Strausse v. Sheriff, 43 La. Ann. 501, 9 South. 102. See https://thelawdictionary.org/usufruct/

(87) A legal agreement by which a bank, building society, etc. lends money at interest in exchange for

3.1.2 Leaseholds

At feudal law, a leasehold was not considered an estate but was treated as a contractual right binding only on the parties involved. By the end of the 15th century, the doctrine of '*ejectment'* operated to extend the right of estate to leaseholders. A leasehold, unlike freehold, was never regarded, in the strict sense, as "real property" but was classified as "*chattels real*." English law, today(88), recognizes leasehold estates without limitations to duration(89). However, whereas a freeholder held his property in perpetuity, a leaseholder's ownership rights exist for a limited time(90).

Thus, as a matter of research, under a leasehold, financial institutions are reluctant to grant mortgages if the remaining lease is under 70 years. Lenders tend to prefer, at least, about 30 years left on a leasehold property beyond the end of a mortgage. It can thus be quite the challenge to sell a leasehold property with diminishing period unless the time is extended(91). Some of the characteristics of a leasehold property include the fact that it does not grant any rights of ownership especially if it is a house(92).

Under Kuwait Civil Code, a leasehold could be no longer than 25 years and must be registered to avoid being challenged. If less than 10 years, it need not be registered.

taking title of the debtor›s property, with the condition that the conveyance of title becomes void upon the payment of the debt. https://en.oxforddictionaries.com/definition/mortgage.

(88) Martin George & Antonia Layard, Thompson's Modern Land Law, 7th ed., Oxford University Press, UK, 2019, p. 12.

(89) Leasehold or 'term of years absolute, is governed by the Law of Property Act 1925 section 205(1)(xxvii). This law also imposes some statutory protection on tenants against the freeholder or landlord.S.11 of the Landlord and Tenant Act 1985 imposes an obligation for the landlord to repair properties› structures, water and heating facilities for short leases. This is seen as a significant departure from the provisions of the erstwhile Rent Act 1977 and Landlord and Tenant Act 1954which provided substantial protection to leaseholders.

(90) It could be for any period or as long as 999 years in some cases but, eventually, the leasehold property would revert to the freeholder's estate that granted the leasehold.

(91) As long as the leaseholder has owned the property for two years, he has the right to extend the lease by 90 years, as a qualifying tenant. A qualifying tenant is one whose original lease was for more than 21 years. There is a cost associated with such an extension at the discretion of the freeholder and the type of property. A mechanism exists within the law to lodge an appeal to the Leasehold Valuation Tribunal.

(92) In essence, a leaseholder is not responsible for maintaining and it falls to the landlord or freeholder to do this at his expense. However, the leaseholders share the costs of this by paying a service charge to the landlord. You might also be asked to pay into a sinking fund, to help cover any unexpected maintenance work needed in the future. Other charges may be levied including the maintenance of common areas, ground rent, administration charges and building insurance.

Again, the comparison is stark. A leasehold is, to all intents and purposes, a mere contractual relationship. It cannot exceed 25 years under Kuwaiti law and grants no flexibility of commerce. Given its restrictions, there is very little commercial incentive in leasehold beyond a temporary residential situation or short-term office rental. This, it is argued, restricts commerce. As observed earlier, a leaseholder's right and interest in real property is restricted to usage and limited exploitation. He has no rights of disposition(93).

Under English law, however, the leaseholder can use, exploit and dispose of his lease. His rights are limited to the terms of his lease and the ultimate right of disposition of the freeholder have denied him since only the freeholder has and can exercise this right. Under Kuwaiti law, the property must revert to the freeholder after twenty-five years. A leaseholder cannot exploit the property by subleasing.

3.1.3 Land Transfer

At common law, an estate can be transferred by conveyancing(94). S.2 of the Law of Property Act 1925states that a deed(95) must be used to convey a legal estate in land. The main objective of the reforms Acts of 1922-25 was to simplify land transfer. From then, the only legal estates recognized in land are the fee-simple-absolute-in-possession and the term-of-years-absolute(96).

All other estates must now exist in *equity* and are referred to as equitable interests. For instance, suppose that Aslan wished to give a life interest in his land to Fatima and then to pass the fee simple to Ahmed. Neither Aslan's life interest nor Ahmed's fee simple in remainder can (since 1925) exist as legal estates. Aslan will therefore have to put his fee simple on trust(97) for Fatima for life with remainder to Ahmed in fee simple. Fatima will have an equitable life interest and Ahmed will have an equitable fee simple in remainder.

3.1.4 Registration of title to land under English Law

Land registration, over time, in England, however, has become compulsory. Nonetheless, much unregistered land remains since the law only requires

(93) Articles (810-817) – Kuwaiti Civil Code.

(94) A transaction between living persons or by will. The Wills Act 1837 governs the making of a valid will.

(95) Deeds are governed by the Law of Property (Miscellaneous Provisions) Act 1989 s.1

(96) Sandra Clarke & Sarah Greer, Land Law Directions, 7th ed., Oxford University Press, UK, 2020.

(97) Until the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) came into force on 1st January 1997, the type of trust required was usually a Trust for Sale. This avoided the complexities of the Settled Land Act 1925. Since TOLATA came into force, a «Trust of Land» has to be used).

registration when there is a dealing with the land - e.g. a sale or transfer by sale(98). The ultimate aim is that all title will be registered(99). Nevertheless, the legal estates in land remain central to the registration scheme. When a freehold title is registered for the first time, it will be registered as absolute title, qualified title or possessory title. Similarly, when a leasehold is registered for the first time, it will be either absolute title, good leasehold title, qualified title or possessory title.

3.1.5 Co-ownership of land

English common law may have shed the vestige of disparity between the genders in its modern version, however, a historical search shows a preceding unequal status. Kuwaiti law, by comparison, retains, in some sense, some of that inequality. Both owe their positions to the prevailing cultural dispensations. Even in its quest for equality, English law does not stray too far from a subjective evaluation of societal pressures. In fact, this may be the essence of its development – that it evolved piecemeal in response to societal changes.

Normative or positive in application, neither the English system nor the Kuwaiti Civil Code exemplifies the utilitarian values conclusively. Both seek to deliver fairness as embraced by society from their vantage positions of law making. Both succeed and fail because an ideological purity does not exist nor can it. The result, as we see, is an amalgam of ideas hoisted upon a citizenry in both jurisdictions and which awaits the passage of time for relative evolution.

Here, we will attempt a comparative analysis of the position of women with regards to land ownership in both jurisdictions.

At common law, the positions of husband and wife were quite different from one another about land ownership(100). The law provided that a widow (but

(98) See Land Registration Act 2002 s.4. Currently, the following Acts remain active on the statute books: Land Registration Acts of 1925, 1936, 1986, 1988, 1997 and 2002

(99) The idea is to then, abolish the old conveyancing methods for unregistered land - involving inspection of title deeds and wills etc. in order to obtain a good root of title.

(100) Statute of Distributions, 22 & 23 Car. 2, c. 10 (1670See Halsbury's Statutes of England. The Actdealt with the administration of intestate estates. It was made perpetual by Administration of Intestates› Estate Act 1685 (1 Ja. 2 c. 17). With regards to deaths that occurred post the Administration of Estates Act of 1925, which came into force on 1 January 1926, the Act was repealed by section 56 of, and Part I of Schedule 2 to, the Administration of Estates Act 1925. The situation was considerably more flexible in equity), a wife gave up all right to management and control of her property while the marriage lasted, but she received a forced share of one-third of all her husband's lands for life (dower) and a fee interest in all of the land which she and her husband had held jointly (tenancy by the entirety), if she survived him.

not a widower) would inherit one-third or one-half (depending upon whether there were surviving descendants) of her husband's *personalty*or moveable property in intestacy. A deceased husband's *Will* could provide a greater share of the realty in *lieu* of *dower* and could give the widow more or less than her intestate share of *personalty*(101).

However, under s. 37 of the Law of Property Act 1925, "husband and wife shall, for the purposes of acquisition of any interest in property, be treated as two persons"(102) Nonetheless, English law distinguishes between legal and equitable ownership through the use of trust(103). This allows for the operation of an equitable interest even in the absence of a legal interest. A legal ownership has overriding control over disposition. However, an equitable interest may seriously impact or, in some cases, undermine those powers.

3.1.6 The Effect of Divorce on Real Property

Thus, under current English law, there is no matrimonial property regime or community of property. Marriage, therefore, does not have a proprietary effect on land ownership. Nonetheless, when divorce arises, the courts exercise wide discretionary powers over ancillary relief(104). The welfare of the children of the family is usually of paramount importance. The House of Lords(105) recently identified three limbs of fairness, namely needs (of the parties and their children), compensation (of relationship-generated disadvantages)(106) and sharing (of assets).

In contrast, under Kuwaiti law, Article (198) of Act No. 51 of 1984 on personal status, gives the divorced wife the right to live in the matrimonial home if she has custody of the children but, with separate quarters. Furthermore, Article (26) of Decree No (31) of 2016 deals with the Regulation of Residential

(101) This is a marked departure from Continental Europe. English common law did not provide for any other forced share. After the Statute of Wills, an English testator could disinherit his sons and daughters completely, and the law would do nothing about it.

(102) A spouse has no rights of consultation or veto with regards to a family home owned by the other spouse. National Provincial Bank Ltd. v Ainsworth [1965] AC 1175 and Barclays Bank v O'Brien [1994] 1 AC 1980.

(103) Warren Barr, John Stevens and Robert Peace, The Law of Trusts and Equitable Obligations, 5th ed, Oxford University Press, UK, 2010, p. 25.

(104) Such relief may include the sale of property, creation of trust for assets, periodic payments, lump sum payments and orders regarding pensions. (Sections 21, Matrimonial Causes Act 1973). The objective is to achieve a fair outcome.

(105) Miller v. Miller; McFarlane v. McFarlane, UKHL, (2006), 24

(106) Such may include the fact that the wife gives up her career in order to take are of the children and become a home maker.

Care. In essence, for as long as the wife has custody of the matrimonial children, the husband has a legal obligation to provide her and the children with accommodation in the matrimonial home. Perhaps, the nature of home building, extended family system and the land mass of Kuwait may have informed this law.

By contrast, the cultural mindset, adversarial nature of divorce and the size of homes, in England for the most part, would militate against the sharing of a dwelling place except, perhaps, in a leasehold apartment housing unit.It seems quite clear that while the two jurisdictions have the common interest of the children in mind, each approaches the subject from a different perspective(107).

3.1.7 Land Ownership

Under English law, the same property may be owned by up to four people at the same time under a beneficial interest as tenants(108). However, the legal ownership is limited to four persons and where a conveyance seeks to invest legal title to more than four persons, the first four named are considered the legal owners(109), thus, giving rise to the doctrine of joint tenancy(110). Where land is conveyed to more one person, co-ownership of legal title will arise. Co-ownership of legal title can only be through a joint tenancy(111). Severance of a legal estate is not permissible(112). The joint tenants of the legal title are the trustees and hold the property on trust for the beneficial owners.

Where there are just two legal owners, they hold the property either under joint tenancy or tenancy in common. Typically, the co-owners may be a married couple, couple in an unmarried relationship or a civil partnership, people who do or wish to live together or just friends who are out to invest their resources(113).

3.1.8 Joint tenancy and tenancy in common

At common law, there is a default presumption of joint tenancies, subject to

(107) It would be quite the conundrum if English judges imposed the ruling upon divorcing couples to live under the same roof in close proximity. One of the points of divorce may, in effect, be negated or frustrated.

(108) Law of Property Act 1925.

(109) S.34 Trustee Act 1925.

(110) This is the holding of an estate or property jointly by two or more parties, the share of each passing to the other or others on death.

(111) (s. 1(6) Law of Property Act 1925.

(112) (s.36(2) Law of Property Act 1925.

(113) The property in question may be freehold or leasehold, with or without a mortgage.

certain criteria, whenever more than one person purchases a property. The relevant criteria for the creation of a joint tenancy embraces the doctrines of the four unities - possession, time, title and interests. The importance of this is the requirement that joint tenants be treated as one.

The idea of possession requires that each joint tenant possess an undivided interest in the whole property. That is to say that they must be in physical possession of the property in issue. The joint tenants must have acquired, at the same time, by the same instrument, an equal share in the same interest (legal or equitable, fee simple or leasehold, present or future, etc.). The element of time, title and interest requirement means that a joint tenancy cannot be created should any of these be absent from the arrangement. If any is absent, the interest of the breaking tenant is considered to have been severed(114).

When a married couple purchases a property together, they are said to own the entire property as joint tenants and equal partners regardless of who actually pays the mortgage or forked out the purchase price. To illustrate, a joint tenancy is presumed to exist when a husband and wife both own the property together. Under this arrangement, the doctrine of *jus accreciendi*(115) operates. It is not for everyone. Certainly, it does not work well with non-married people living together(116).

Thus, severance can occur when certain criteria(117) are met. In that case, joint tenancy can be converted to tenancy-in-common under which there is no right of survivorship but, each tenant-in-common can *will* his equitable interest to whomsoever he wishes(118). However, since a legal(119) ownership cannot be held under tenancy-in-common, it will always remain under joint tenancy

(114) Nonetheless, the conveyance to the joint use of, or a devise of a joint interest to, a class subject to open does not violate the unity of time and that new members of the class take as joint tenants as they become identified.

(115) This is simply a right of survivorship whereby the co-owners can inherit the rights of each upon death of either

(116) It is prudent to agree on the type of ownership at the outset of a purchase in order to avoid problems developing. A deed of trust may be useful to set out respective shares in the property.

(117) Severance, in real property law, occurs when a co-owner no longer wishes to be subject to right of survivorship in a joint-tenancy arrangement. If he takes the prescribed action necessary, ownership to the property will be converted to a joint-tenancy in common.

(118) Per S. 36(2) of the Law of Property Act 1925. Under the Trusts of Land and Appointment of Trustees Act 1996, severance can be achieved by the giving of a written notice to the other joint tenant(s), mutual agreement (*Williams v Hensman (1861) 70 E.R. 862),* bankruptcy and selling or charging the beneficial interest.

(119) The "legal owner(s)" of the property are the person(s) in whose name(s) the property is registered at the Land Registry. A maximum of four people may be registered as legal owners.

even when severance occurs. It is, thus, possible that, in some cases, the legal owners will also be the same as the "beneficial owners".

It also happens that sometimes, the beneficial owners are quite different and may even include others especially where the purchase funds are provided by others, but title is conveyed to one person and they agree to joint ownership of the property or where more than four people jointly own the property. Henceforth no joint tenant may ever say they own a certain part of the land which is restricted to other co-owners(120).

On the other hand, tenancy in common is the co-ownership arrangement in which the four (title, interest, possession and time) unities are absent with the exception of possession. The interest of a tenant in common passes to his heirs or *devisees*(121) upon his death. The doctrine of *jus accresciendi* does not apply to tenants-in-common.

Under Kuwaiti law, there is no equivalence of the joint tenancy principle. Its treatment of partition is even more troublesome. It is, however, silent on severance as an alternative.

Instead, property held under the common hold system is held at the discretion of the majority. Article (820) of the Civil Code deals with the management and disposal of common property. It specifically holds that "management and disposal shall be the right of the partners together unless otherwise provided." Further, under Article 819, each partner shall have the right to use and exploit his share, taking into consideration, respect to the right of others(122).

This may appear somewhat startling. However, on a closer reading, it is not as it appears. In essence, it is not clear if each partner or common holder has the right to manage and dispose of the property as an individual or together as a group of beneficiaries. Given that the code specifically invests the majority with the right to deal with the property as they see fit, in contra distinction to Article 819, including disposition, it is submitted that no individual has a right to act unilaterally except to marshal support from the other co-owners to form a majority. In that sense, each partner enjoys the same rights as the others in pursuing his best interests. Only the majority may act against the minority. This issue compels further study and analysis.

(120) See Meyer v Riddick (1990) 60 P. & C.R. 50.

(121) One who receives a gift of some interest in real property from a decedent's will. See https://www.law.cornell.edu/wex/devisee.

(122) No. 408/2003 Commercial hearing 27/3/2004.

To mortgage the property either to the value of his ownership or the whole property, a title owner must seek out and build a coalition with a majority of those with strong concerns. Even so, they must follow a prescribed process. To do so unilaterally, the individual is said to assault the ownership of the others. This is allowed but is subject to action by the remaining common holders. Indeed, the Civil Code recognises that whenever the majority acts against the interests of the minority by engaging in actions designed to impact the ownership, it has committed an assault on the interests of those concerned(123).

We find the language of the Article quite explicit. "Partners who own, at least, three quarters of the common property, shall decide to dispose of it if they rely on strong reasons and the division is detrimental to the interests of the partners, they shall notify the other companies of their decision in writing. Those who object among them shall submit to the Court their objection within 60 days from the time of notification, and the Court, depending on the circumstances, may authorize or refuse the disposition(124).

This is a real point of departure. There appears to be no similitude of the ownership doctrines of joint tenancy and tenancy in common inherent in common law.

Under English law, partition operates to allow the physical division of land. This, however, is only possible with physical land and the action must be effected by deed of trust. On partition, each joint owner is absolutely entitled to a separate piece of the land(125) and his rights are not extinguished.

The challenge, at this stage, is the position of the Kuwaiti Civil Code. Under this, a co-owner can be put in jeopardy of his interest in land should the majority of the holders choose to do so. Presumably, the proviso that the majority have a serious concern is sufficient to force a separation. Indeed, the law appears to accept that while the action has the effect of assaulting the interest of the remaining partners, it is allowed but will be subject to some form of due process as yet, undefined.

What is less clear, however, is the issue of mortgage and its operation.
Under Article 980:

(123) Ibid.

(124) Article 827 of the Civil Code

(125) S.7 of the Trusts of Land and Appointment of Trustees Act 1996, empowers the trustees of land who may, where beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money. Subsection (1) is subject to sections 21 (part-unit: interests) and 22 (part-unit: charging) of the Commonhold and Leasehold Reform Act 2002.]

1. "if a partner mortgaged all or part of his common share in property, the mortgage would be burdened after division with what is in the share of the mortgagee or part of his share equivalent to the value of the mortgaged share. This part shall be identified by an order in a petition
2. This mortgage shall retain its rank if it is subject to a new entry within sixty days after the time in which any interested party notifies the mortgagor of registering the division. The mortgage's retention of its rank in this respect shall not affect a mortgage issued by all the partners or the privilege of the division parties.

The language of the Article raises some points. It appears to suggest a number of issues.

1. That he may mortgage his part of the ownership regardless of the wishes of the other co-owners. Presumably, this is to be read in the context of the majority action against the minority.
2. That he may, as well, mortgage the whole property ignoring the wishes of the other members.
3. That the mortgage will be burdened, after division, with the share or its equivalent of the value of the mortgage
4. That the mortgage shall take precedence over any interests filed against the property within a stipulated time.

What may require further analysis is the fact that the law allows for a partitioning of the property without forcing a sale, as obtains at common law, to redress the aggrieved parties.

To better understand this phenomenon, let us examine the issue of mortgages under English law.

4. Mortgages and co-ownership

A mortgage is, crucially, a contract between a borrower and a lender, of money for the purchase a property and for which repayment over time is the main contractual term. Contract law governs the transaction with regards to its terms and formation. However, there is a point of departure in that the lender acquires the rights of a *chargee* over assets of the borrower. In addition, a mortgage has the effect of creating a proprietary interest in the mortgaged property. This arises from the fact that the lender acquires the necessary rights of possession of the property should the borrower default in repayment of the loan. The lender may also sell the repossessed property to repay the loan.

Under S. 85 of the Law of Property Act (LPA) 1925, the mortgagee acquires both rights of possession at common law and rights of sale under statute. Thus, S. 85 of the LPA 1925: (1) A mortgage of an estate in fee simple shall only be capable of being effected at law either by a demise for a term of years absolute, subject to a provision for *cesser*(126) on redemption or by a charge by deed expressed to be by way of legal mortgage.

The English courts have been astute to ensure that there is equity between parties to a relationship where one party takes out a mortgage without the knowledge or informed consent of the other party. Such a situation will constitute a severance of the joint tenancy with the result that the lender's rights will obtain only against the person who took out the mortgage(127) The matter does not end there. Under this ruling, the very act of applying for the mortgage loan was sufficient to sever the joint tenancy.

As we see at common law, the nature of a co-ownership may be affected by the actions of the parties. A person may take action, at his discretion, to sever his interest in the land includingby alienation(128). In this instance, he may, at his discretion, sell and transfer his interest in the property to a third party. This will sever the joint tenancy since it destroys the unity of title. The new purchaser must then be a tenant in common as the unities of time and title are destroyed.

This is the closest we come to the Kuwaiti position although the former speaks of severance as opposed to partition and joint-tenancy as opposed to tenants-in-common. 'As a general rule, severance by selling or transferring a joint tenant's interest to a third party does not require the consent or notification of the remaining joint tenant(s).

Upon transfer, the transferee and the remaining joint tenant will hold equal shares as tenants in common.' This sort of severance is possible via mortgage, bankruptcy and any act shown by the co-owner. At English law(129), a co-owner of real property within a tenancy in common can sell or transfer his title to a third party.

(126) Termination or cessation, especially of a period of tenure or legal liability. See https://www.lexico.com/en/definition/cesser.

(127) First National Security v Hegerty [1985] QB 850.

(128) This is the process of a property owner voluntarily giving or selling the title of their property to another party. When property is considered alienable, that means the property is able to be sold or transferred to another party without restriction. See https://www.law.cornell.edu/wex/alienation.

(129) S. 14 of the Trust of Land and Appointment of Trustees (TLATA) Act 1996.

This may include a mortgage. The matter, however, relates to his share of the property.

According to article 830 and 831 of the Kuwaiti Civil code, each co-owner can request physical partition of a property provided he is not restricted by the law or legal action to stay(130). The physical partition can be by agreement of all the partners or by the court(131).

Thus, they can maintain common ownership if the purpose cannot be achieved unless the property, land or money must stay in common. They can also stay in common by legal action if the contract is done by them or will say that and not exceeding five years. It can be renewed for one or more for five years.

The Kuwaiti Civil Code, it appears, allows a partition of a common-hold property provided no other law prohibits the act. What is not clear is whether this partition is possible when the property cannot be divided in kind, or the partition is in equity. In other words, how does the Kuwaiti law prevent a rogue co-owner from mortgaging a common-hold property in total against the wishes or knowledge of the other co-owners? There appears to be no answer to the vexed question and in the absence of case law, the matter may be left to speculation.

4.1 Mortgage of common ownership property

Article (818) of the Civil Code provides that "property shall be common if the owners of the in-kind right have an undivided share of each other. In other words, they are common partners. Thus, when two persons own a property equally, ownership is common, so that each partner owns each part of the common property. Due to the large number of owners in the common property, the Kuwaiti legislature regulates all matters relating to the management of common property and its disposal by partners. articles (818 to 846) of the Civil Code(132). Under the code, two types of mortgages exist:

First, is the mortgage issued to the legal majority. Second, is the mortgage issued by a partner who does not have the legal majority?

4.2 The mortgage by the legal majority

The management and disposal of common property shall be the right of the partners together unless otherwise provided(133). Equally, partners who own,

(130) See Article (847).

(131) See Articles (831, 832 and 833).

(132) See Articles (818 to 846) of the Civil Code.

(133) Article (820) of the Civil Code.

at least three quarters of the common property, shall decide to dispose of it if they rely on strong reasons and if the division is detrimental to the interests of the partners, they shall notify the other companies of their decision in writing. Those who object among them shall submit to the Court their objection within 60 days from the time of notification, and the Court, depending on the circumstances, may authorize or refuse the disposition(134).

Therefore, as observed, the right to mortgage a common property devolves as much to the legal majority ownership as it does to a global community of owners or partners of the same property this mortgage is valid against everyone.

Per the Kuwaiti civil code, there is no effect of the division on the mortgage created by the partners' agreement or according to the legal majority. Furthermore, a person shall be deemed to be the sole proprietor of the classified share which is allocated to him in the division, and his ownership shall be exclusive of any right of other partners unless the right has been decided unanimously by the partners or by a majority of them in accordance with the law(135).

Based on the above, the sale of a mortgaged property in public will lead to the foreclosure of the mortgage and then the mortgagee's right will be transferred to the price at which the auction was awarded. If the mortgaged property is divided by a division in kind., the classified part shall be transferred to the partner after division while being charged with the mortgage.

Article 979 of the Civil Code states that "the mortgage issued by all landlords on a common property shall remain effective, whatever the result of the division of the property or its sale because it cannot be divided." In effect, this is consistent with English law which holds that except in partitioned leasehold communal properties, a mortgage on a single property binds all partners.

4.3 Mortgage issued by a partner

Practically, a partner may pledge a common share of common property. He may mortgage a portion or all the common property. How this can be achieved in practice remains a moot point.

4.3.1 Mortgage of the common share of the common property:

Under Article 819 of the Civil Code, "each partner shall have the right to use the common matter and exploit it to the extent of his share and to take into account the rights of his partners. He may dispose with his common share. A common partner has a full ownership stake in which he may act in return for

(134) Article (827) of the Civil Code.

(135) Article (838) of the Civil Code.

or without payment provided that he does not exceed the limits of his share. Any action issued by the partner within the limits of his share is true and productive of its effects and invoked by all.

Analysis

The legislature was keen to state the provision of the mortgage issued by one of the partners in article 980, which stipulates that "(1) if a partner mortgaged all or part of his common share in property, the mortgage would be burdened after division with what is in the share of the mortgagee or part of his share equivalent to the value of the mortgaged share. This part shall be identified by an order in a petition 2. This mortgage shall retain its rank if it is subject to a new entry within sixty days after the time in which any interested party notifies the mortgagor of registering the division. The mortgage's retention of its rank in this respect shall not affect a mortgage issued by all the partners or the privilege of the division parties.

In fact, there is no difficulty when the term of the debt secured by the mortgage expires before division of the mortgaged property, as the mortgagor with his traceability and advance authority may undertake the procedures of selling the property in public auction to settle his dues from the price for which the auction was awarded.

On the contrary, the difficulty is raised when the mortgaged property is divided before the expiry of the term of the debt secured by the mortgage. Here, the matter is pending on the classified part transferred to the mortgagee according to the division. The matter in this case is one of the following two cases:

The first case:

in which the mortgagee partner has a portion of the mortgaged property that is equal to the common share of the encumbered asset. The mortgage is transferred to this part by division. The same provision applies if the mortgagee partner, after dividing by an apportionment the value of which exceeds the value of the mortgaged share. However, the mortgage encumbers only part of the apportioned share the value of which equals the common mortgaged share and not all the share transferred to the mortgage after the division.

For example, if a common partner owns a quarter of the property and then mortgaged the entire share (quarter) and then an apportioned share is transferred to him after the division equivalent to one fourth of the property (common property), the mortgage transfers to all this part.

If the partner is a common owner of half of the property and then mortgaged half of his share, i.e. a mortgage equivalent to a quarter of the property (common money) and then an apportioned part is transferred to him after the division equivalent to half the common property, then the mortgage created by him encumbers the equivalent of one fourth of the property transferred to him by the division only.

If the mortgaged property consists of several properties (house- cultivated land- chalet) owned by two persons under common ownership equally, then one of them mortgaged one fourth of his common share, then after the division the ownership of the house and chalet is transferred to him, in this case the mortgage created by one fourth of this share shall be encumbered. Here, if it has not been agreed on the apportioned part to which the mortgage shall be transferred, the court shall identify the same in an order in a petition.

Second case:

when an apportioned part is transferred by division to the mortgagee in another property other than the mortgaged property. The mortgage is transferred by its rank to this apportioned part transferred to the mortgagee after the division according to the subrogation in kind. Subrogation in kind is the property's substitution of another property in the encumbrance of the right in kind with which the first property was enforced.

According to article (980) of the Civil Code, the mortgage retains its previous rank by way of an exemption, if the mortgagee registers it after the division. The rule is that the rank of the mortgage is determined from the date of its registration. However, the legislator has come of out this rule, whereby it made the mortgage on the common property retains is previous rank after the apportionment, provided the mortgage is registered within 60 days.

For example, if Ahmad mortgages his common share in part of the common property, then after the division of the apportioned property other than the house is transferred to the mortgagee, then, the mortgage created by Ahmad on the house shall be transferred, encumbered with the mortgage, and shall retain the former rank if registered within sixty days.

However, keeping the mortgage with its previous rank after the new registration does not affect the mortgage issued by all partners neither on the privilege of the sharing partner. This means that the mortgage issued by all the partners and the privilege right of the sharing partner are in advance of the mortgage issued by one of the partners even if its registration date precedes the date of

registration of the mortgage issued by all partners or the date of registration of the privilege of the sharing partner on the property.

This provision is clearly stipulated by article (980) of the Civil Code which holds that this mortgage retains its rank if it is subject to a new registration within sixty days of the date in which any concerned party notifies the mortgagor of registering the division. The mortgage's keeping of its rank in this manner does not affect the mortgage issued by all partners.

4.3.2 Mortgaging the apportioned part or mortgaging the entire property

The partner may mortgage the entire common property (real estate) without seeking permission from the remaining partners. Thus, he has assaulted the rights of the remaining partners, as a the legislator laid down a special system for the administration and disposition of the common property. As we have seen, article (820) of the Civil Code stipulates that (the administration of the common property and disposition thereof is the right of the partners together unless it is stipulated otherwise).

Furthermore, article (827) of the Civil Code states that the partners who hold at least three fourths of the common property may decide to dispose with the same if they rely on strong reasons in this respect, and the division is damaging to the interests of the partners. They shall notify the remaining partners of their decision in writing. Those of them who object shall refer to the court with their objection within sixty days of the notification.

According to the circumstances, the court may decide to permit the disposition or reject it. Hence, the partner alone is not entitled to mortgage the property owned under common ownership. Further, if the partner mortgages an apportioned part of the common property, the mortgage assaults the rights of the remaining partners because they own with him each part of the common property.

Mortgaging the property by one partner without approval of the remaining partners or mortgaging an apportioned part thereof is considered a mortgage of third party's property. Therefore, it is valid but to identify its effects we must distinguish between two cases:

First case: before the division

In connection with the mortgagee's relation with the mortgagor, the mortgaged property remains retaining the common ownership status. Therefore,

the mortgage is then valid upon its parties the mortgagee and mortgagor. It produces its personal effects upon establishing it, i.e. every party shall execute his obligations derived from the mortgage contract. For example, the mortgagee shall establish the mortgage, for example. As for its effects in kind, they shall be postponed pending the division.

As for the effect of this mortgage against the remaining partners, it takes the form of mortgaging third party's property, i.e. it is valid but ineffective against them and they may completely disregard it.

Second case: after the division

Here, we are faced with two assumptions.

First assumption: in which the apportioned part is transferred to the mortgagee after the division. Hence the in-kind effect is effected upon this, and the mortgage right is established for the interest of the mortgagor and the apportioned part transferred to the mortgagee after the division is encumbered.

Second assumption: in which an apportioned part other than the part mortgaged is transferred to the mortgagee after the division. If the mortgagee is able to obtain approval of the remaining partners on the mortgage created by him, or owns the mortgaged property afterwards, then he has satisfied his commitment in the mortgage contract and is the one creating the effect in kind represented in establishing the right of mortgage on the mortgaged property.

But if he fails to do so, he shall be considered as breaching his contractual obligation for the creation of the mortgage right in favour of the mortgagor, and thus the latter is entitled to revoke the mortgage contract with compensation, if required.

5. Conclusion

There are glaring differences between the treatment of common property in English and Kuwaiti laws. While the English position is clear and unambiguous with regards to who may do what with common property both under joint tenancy and tenancy in common, the position of the Kuwaiti Civil Code is decidedly unclear. In fact, it may be submitted that the latter ferments chaos and may prove, ultimately, impractical with the passage of time and as more commercial transactions are undertaken in property transfer. Given the proposed legal thinking with regards to opening up the Kuwaiti property market, more work may be required to avoid confusion in common ownership of land.

In the case of divorce and marital property, Kuwait allows or requires the husband to maintain legal ownership of the marital property but accommodate the ex-wife and the marital children within the same property. Presumably, this has its roots in the religious law and embraces considerations for fairness and provision for children. A critical evaluation of this approach may conclude that this is a recipe for disaster should it be encouraged under English law. Of course, there may be practical reasons for this.

The Kuwaiti society is one steeped in familial traditions and unity. In addition, Kuwaiti homes are typically built for extended family situations and thus, may, indeed, provide for many family members without jeopardizing their privacy.

Such an arrangement, however, owing to the nature of English homes and the lack of homogeneity of family traditions, would cause more problems than it could ever hope to eradicate. In addition, western social mobility likely creates equality of earnings than may obtain in Kuwait thus necessitating this and therefore, put the English wife in a better position to seek severance. It is also observed that the question of real property in matrimonial homes is dealt with, at common law, by the laws governing divorce under which the doctrine of alimony operates to provide for the ex-wife and the minor children without the necessity for common residence.

In the case of tenancy in common and partition of property, it is observed that this is only possible where the property in issue is physical land. Where a tenant in common seeks a mortgage for his equitable share of the property, the banks, exercising their own due diligence, will have to decide if this is feasible given the nature of the legal title and thus, a profitable venture. Should a tenant in common take out a mortgage on the whole property, this has the effect of imposing an encumbrance on the other tenants. In the event of a dispute, the mortgagee may force a sale to recover its money and the proceeds, if any remains, shared amongst the tenants according to their equitable share of the property.

While English land law has developed piecemeal on litigation, Kuwaiti law is, largely, yet to be tested to the same breadth. It remains to be seen what the outcome of such a test would be. It is, nonetheless, observed that there are sympathies for the Kuwaiti position on marital properties although this should be placed in the right context of its religion and culture.

Finally, as mentioned above, because property ownership is related to the sovereignty and security of States, the Kuwaiti legislator has prohibited, as a gen-

eral principle, non-Kuwaiti ownership of real estate in Kuwait, and authorized them in exceptional cases(136).

The fact that Kuwait restricts ownership of real estate to a prescribed set of communities should not be regarded as anachronistic given its size and the need to manage both its population and its market. More importantly, for the official reason given. The British Channel Islands do the same for the same reasons. On a wider perspective, we see the operation of both dogma and commercial efficacy, both, instruments of social liberalism with conservative underpinnings.

That we should use legislation to eviscerate market forces to preserve our way of life is an attempt to look in two directions at once and pays homage to the realities of self-preservation. This, it is argued, is a departure from the free-market forces that characterized English land law development. Yet, such actions and sentiments are clearly active in the Channel Islands for the same reasons but couched in more subtle language.

In the end, land law reform in Kuwait may be dictated by market forces and the realities of welcoming the stranger with all that attends it. This was recognized by the common law. In a global market-driven economy which is the aspiration of all jurisdictions, the march may be unstoppable and be the only viable antidote to stagnation. Economic realities may trump cultural protectionism. The certainty of the Kuwaiti Civil code, notwithstanding allusions to stagnation may provide more certainty where English law has been found wanting(137).

(136) Decree Law No. 74 of 1979.

(137) Lord Bingham quoting Lord Mansfield, who in Vallejo v Wheeler (1774) 1 Cowp 143, 153 said that "in all mercantile transactions the great object should be certainty, and therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon".

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