Free Speech and Defamation in Kuwait and U.S. Law:
Historical Dimension of Jurisdictions and Law in a Social Context

by

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DEDICATION

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ABSTRACT

This legal comparative study aims to explore how the U.S. and Kuwaiti legal formants, such as legislators and judges, achieve balance with individuals' reputational rights and freedom of speech and the press. It also examines the factors contributing to their differing views about defamation and free speech limitations. The law-in-context method and the Theory of Legal Formants were applied to achieve the study objectives. Traditional, religious, and historical factors have made significant impacts on Kuwaiti laws. The results show some contradiction between the laws as written, as interpreted, and as applied in the country. The first step in reforming these laws is to remove the vagueness and breadth in some articles that provide unnecessary governmental control over speech. To survive the 21st century and cope with a world of publication without borders, Kuwait and the governments of the Gulf Cooperation Council (GCC) must reform their defamation laws to allow more freedom of speech and of the press.

There are several benefits to this study. First, it helps international media organizations and journalists to improve their work methods by providing them with the necessary information about the limitations of their free speech rights in Kuwait and the United States. Second, the study contributes to the process of constructing a common legal understanding that better supports information and media exchange among societies. Third, it could serve as a reference for journalists, publishers, and media
organizations that are planning to produce or publish media content in the U.S. or Kuwait.
INTRODUCTION

In 1948, the United Nations General Assembly (UN) in Paris proclaimed the Universal Declaration of Human Rights (UDHR), which is regarded as "a milestone document" in the history of human rights. Drafted by representatives from different legal and cultural backgrounds from all regions of the world, the declaration establishes the fundamental human rights to be universally protected (Universal Declaration, 1948).

Article 19 of the UDHR states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" (Universal Declaration, 1948). At the same time, Article 19-3 of the International Covenant on Civil and Political Rights, adopted by the UN in 1966 and signed by Kuwait and the U.S., states that opinion may be subjected to certain restrictions to protect "the rights or reputations of others" and for "the protection of national security or of public order, or of public health or morals" (International Covenant on Civil and Political Rights, 1976).

There is always a thin line between one person's right to freedom of speech and another person's right to protect his/her reputation and good name. Defamation laws are considered one of the most complex areas of law because there must be a balance between two fundamental liberties: free speech and protection of reputation. Providing more protection for free speech might expose individuals to social harm, such as
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tempt, hatred or disgrace; or financial harm, like job loss or damage to businesses. On
the other hand, providing more protection to individuals’ reputations might lead to a
“chilling effect,” which occurs when individuals are deterred from engaging in activity
protected by law due to governmental regulation not specifically directed at that protected
activity (Youn, 2013).

The current era of Internet and information technology makes it easier for almost
anyone to produce and share any type of content he/she desires. A lack of basic reporting
skills, such as verifying resources, and basic knowledge of media laws and free speech
limitations, has led to many individuals being subjected to defamation charges both
inside and outside of their countries. At the same time, these advanced technologies have
resulted in powerful surveillance tools for governments and institutions to track anything
people say or write, which threatens individuals’ rights to privacy and freedom of
expression (Richard, 2014).

Some scholars argue that the current U.S. libel law might get many Americans
into trouble when traveling outside their country because of the heavy burden it places on
any attempt to restrict speech (Socha, 2004). In his study on the limits of the First
Amendment, Jean-Marie Kamatali (2016) of Ohio Northern University points out that the
new information technology allows access by other countries to speech made by
American citizens in the U.S., “exposing the speaker to consequences for violating the
free speech limitations set in international law or the domestic laws of other countries.”

In February 2015, Ryan Pate, a citizen of Florida, was arrested upon his arrival in
the United Arab Emirates (UAE) on defamation charges. Pate, who works at Abu Dhabi-
based Global Aerospace Logistics, criticized his employer on Facebook while on
vacation in the U.S. following a dispute over sick leave. A prosecutor told him that he could face a fine, possible prison time, and deportation if convicted. However, after spending 10 days in jail, Pate was released after reaching a legal truce with the company and apologizing publicly. When interviewed afterward, Pate said, “I just couldn't register it in my head because as an American growing up in the United States, the First Amendment right is just ingrained in my brain” (Said & Hanna, 2015). He later stated, “I never even entertained the fact that I would wind up in prison out here for something I put on Facebook in the United States” (American arrested in UAE, 2015).

Since the 2016 presidential election, there have been many discussions in the United States about the country’s libel laws. In January 2018, President Donald Trump pledged to change the United States’ libel laws to make it easier for people to sue news organizations and publishers for defamation. He said during a cabinet meeting in the White House, “We are going to take a strong look at our country’s libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts.” Trump argued that you “can’t say things that are false, knowingly false, and be able to smile as money pours into your bank account,” describing the current laws as “a sham and a disgrace and do not represent American values or American fairness” (Grynbaum, 2018).

Several First Amendment lawyers pointed out that the president has “little power to modify those laws” as he will need a Supreme Court appeal or constitutional amendment to succeed. Moreover, libel laws are determined at the state level, where the president has no direct power (Grynbaum, 2018; Wilkie, 2018). “President Trump’s threat to revise our country’s libel laws is, frankly, not credible,” according to the
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American Civil Liberties Union, pointing out that the First Amendment provides strong protections against libel liability, especially when the statement is about a public figure or a matter of public concern (ACLU, 2018).

Bill O’Reilly, a renowned newsman and commentator who has been the target of controversial reporting surrounding his dismissal from Fox News, complained that anyone can say anything about you in the U.S., but you can’t do anything about it. O’Reilly blamed it on the way the law is structured in this country, saying that people’s lives are “being blown up” because of it. He argued that the U.S. needs “tougher libel laws, such as the laws in the United Kingdom” (Hoffmann, 2018). British law does not distinguish between public figures and private figures in defamation lawsuits. It also puts the burden of proof on the defendant instead of the plaintiff (Johnson, 2016).

While the argument of whether or not to amend libel laws is ongoing in the U.S., the number of countries that limit speech that would likely be protected under the U.S. Constitution’s First Amendment has increased recently (Kamatali, 2016). In the Middle East, many countries have already approved new media laws in response to the increased use of electronic media, which reshaped the way news is being produced and circulated among society and the way governments views journalists and the media (Duffy, 2013). Kuwait is one of these countries. In 2006, the country applied its new Press and Publication Law, and by 2010, nearly 600 people were sued in courts on allegations of infringements under this law (Kuwait Defamation Law, n.d.). Following the Arab Spring, the country passed three laws in quick succession: The Mass Communications and Information Technology Law of 2014, the Cyber-Crime Law of 2015, and the Electronic Media Law of 2016. The government’s justification for passing these laws is the
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protection of national security, public order, public health, morals, and serious harm to others (Kuwait, 2014). In 2015, a new law was passed in Kuwait which allows citizens to challenge the constitutionality of laws directly in the Constitutional Court, opening a new path for reforming the law in the country.

Despite these laws that limit freedom of speech and the press in the country, the Freedom House Organization ranks Kuwait among the best four countries in the Middle East and the Arab world in its recognition of freedom of the press (Abramowitz, 2017). Compared to other countries in the region, Kuwait’s media is considered more critical and outspoken, and its press enjoys relatively better protection (Duffy, n.d.). Therefore, many international media organizations prefer to base their news editors and translators in Kuwait. For example, the American weekly magazine, Newsweek, chose Kuwait as its Arabic base. International news reporting is edited in New York and then translated into Arabic by translators and editors based in both Washington and Kuwait (A Newsweek in Arabic, 2000).

Due to the present political crisis in the region between Saudi Arabia, UAE, Bahrain, and Qatar, many American and international journalists might have to report news from Kuwait. Although the right of free speech and free press are mentioned explicitly in both the U.S. and the Kuwaiti constitutions, each country has different views about how these rights should be practiced and their limitations. Therefore, understanding the similarities and differences between the Kuwaiti and the U.S. media laws is important, not only for journalists in the practice of their professions in these two countries, but also to shield journalists from possible legal charges.
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Comparative legal studies are significant and useful to better understand one’s own legal system, as well as the one to which it is being compared. Although some researchers question the benefit of these studies, they have become increasingly significant in recent years and almost compulsory in doctrinal legal research due to several factors, such as globalization, international trade, and information technology (Clark, 2012; Hoecke, 2015). The complexity of decision-making increased the level of importance for understanding how other jurisdictions have dealt with similar problems. Both international and domestic courts around the world are making use of comparative law to an unprecedented extent (Monateri, 2012).

There are several benefits to this study. First, it can help international media organizations and journalists in both countries improve their work practices by providing them with the necessary information about the limitations of their free speech and protecting them from being subjected to possible criminal charges. Second, the study contributes to the process of constructing a common legal understanding that better supports the exchange of information and media among different societies. Third, it could serve as a reference for journalists, publishers, and media organizations planning to produce or publish media content in the U.S. or Kuwait.

Research Objectives

This legal comparative study aims to explore 1) how the U.S. and Kuwaiti legal formants, such as legislators and judges, are balancing individuals’ reputation rights with freedom of speech and the press; 2) what factors contributed to the different views about
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defamation and free speech limitations; and to 3) propose suggestions to reform U.S. and Kuwaiti law.

Literature Review

The legal system of Kuwait is a blend of British common law, French civil law, Islamic legal principles, and Egyptian law (State of Kuwait, 2004). Duffy (2014) says, "GCC countries to varying degrees rely upon [British] common law systems." Reviewing academic studies on the similarities and differences between the British and the American defamation laws is useful for building a foundation for similar comparison between Kuwaiti and the U.S. laws.

In his study "Comparative Defamation Law: England and the United States," Vincent Johnson (2016) found that the English and American libel laws have different paths, despite their common history. The two laws are similar in their elements of defamation. For example, both laws consider "truth" as a complete defense against a libelous action, and both laws require that a defamatory statement be published to a third person other than the plaintiff and the defendant. On the other hand, there are stark differences. In the U.S., the burden of proof lies with the plaintiff, while in Britain, the burden of proof lies with the defendant. Also, English law does not distinguish between public and private figures. In England, the falsity of a defamatory statement is presumed, while in the U.S. there is no presumption that a defamatory statement is false. Johnson considers English law to be pro-reputation and pro-plaintiff and the American law as pro-speech and pro-defendant. He asserts that the American defamation law is "far more
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protective of free speech and free press than English law," calling on U.S. courts to continue to refuse the enforcement of English libel judgments.

Michael Mcfall (2012) claims in his study, "American and English Libel Law - Which Approach is Best?," that the current American libel law “has struck the best balance possible” between free speech and reputation protection and “avoided the ridiculous situation of libel tourism, which England is now confronted with.” Libel Tourism is defined as “the act of bringing a defamation suit in a country with plaintiff-friendly libel laws, even though the parties might have had relatively few contacts with the chosen jurisdiction prior to the suit” (Barbour, 2010).

In his study, "Double Standard: A Comparison of British and American Defamation Law," Michael Socha (2004) agrees that defamation laws of the U.S. are more defendant-friendly and protective of speech when compared with British defamation law. Yet, he warns that the differences between the two laws can pose many problems to the American speaker in the United Kingdom. He notes that in the past these differences had little consequence as information was not globalized to the level it is today. However, the World Wide Web allowed information, news, and other forms of communication to reach vast global audiences. This communications revolution has caused a clash between the U.S. and British defamation laws as some speech that is protected in the U.S. is considered defamatory in Britain. “Journalists and media outlets who share their publications online are now parties in defamation lawsuits in Britain,” says Socha. He believes that “the fear of violating British law may cause journalists to edit the content of their stories to avoid defamation lawsuits in Britain,” which will cause a profound chilling effect on speech in the U.S.
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According to Kamatali (2016), American free speech exceptionalism is facing two main challenges today. The first is the increased number of international and domestic laws around the world that limit speech that would likely be protected under the U.S. First Amendment. The second is new information technology, which makes speech made in the U.S. by an American citizen globally accessible.

In *Grant v. Toronto Star Newspapers Ltd.*, the Supreme Court of Canada considered the U.S. defamation law as “an extreme among the laws of western countries, and envisioned Canada’s path as avoiding that extreme by pursuing a middle road” (Drucker, 2013). In his study “A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics,” Jason Zenor (2016) argues that the U.S. Supreme Court’s heavy handedness on any attempt to restrict speech gave a “broad protection to intentional lies” by ignoring many precedents recognizing that “the First Amendment does not protect false factual statements that cause harm and serve no legitimate interest.” Attorney Gary Zerman (2006) asserts that as a result of the existing defamation law “there is almost no longer such a thing as truth” and that “lying has become the currency of the realm, and reputation means nothing.” David Anderson (1991) describes the current law of libel as a failure since “it denies most defamation victims any remedy, and at the same time chills speech by encouraging high litigation costs and occasional large judgments.” In his book *Power, Publicity, and the Abuse of Libel Law*, Donald Gillmor (1992) claims that American libel law does not favor plaintiffs nor defendants, but rather serves only as a profitable process for lawyers.

On the other hand, there is a lack of legal comparative studies on defamation laws in the Middle East and Arab countries specifically. In their study “Arab Defamation
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Laws: A Comparative Analysis of Libel and Slander in the Middle East, Communication Law and Policy,” Duffy and Alkazemi (2017) analyze the defamation laws of six Arab countries including Egypt, Jordan, Kuwait, Lebanon, Libya and UAE, and compared them with international norms. They identified three major characteristics of defamation laws in countries with strong press protections. First, defamation cases in these countries are handled through civil lawsuits rather than criminal charges. Second, public officials and public figures withstand greater scrutiny than private individuals. Third, truth is an absolute defense against defamation charges. The writers found that defamation laws in the six aforementioned Arab countries are “not in alignment with international norms.” The authors assert that journalists in these countries will not be able to practice their reporting duties effectively as long as they fear that such reporting may lead to imprisonment or unfair verdicts.

According to Reporters Without Borders, Kuwait enjoys the highest level of press freedom among the GCC countries, which is comprised of six countries: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and UAE (World Press Freedom Index, 2017). Nevertheless, a report by the Doha Center for Media Freedom points out that Kuwait’s penal code and press law “specify many instances in which freedom of the press can be infringed.” According to the report, many observers consider these legal provisions as tools to “stifle legitimate expression, particularly expression perceived as relating to religion, morality, or heads of government.” The report also mentions some flaws in the law, including vagueness and overreaching breadth in some of its articles, which “provides a generous opportunity for the harassment of journalists” (Duffy, n.d.).
Mohammad Almoqatei, a professor of constitutional law at Kuwait University, asserts that the current Kuwaiti laws that regulate the press and media contradict what the Kuwait Constitution guarantees with regard to free speech and the press, especially in their requirements that the media obtain an operating license from the government (Sarmad Network Plus, 2016). In his comment about Kuwait’s Mass Communications and Information Technology Law, Eric Goldstein, deputy director of Middle East and North Africa Human Rights Watch, said that these laws appear to be designed “to give prosecuting authorities even wider legal authorization for violating Kuwaitis’ right to free speech” (Kuwait, 2014).

To date, there is no agreement among countries regarding a unified international defamation law, or the elements of defamation it should include. However, defamation legal standards developed by international human rights bodies, such as the UN Human Rights Committee, the European Court of Human Rights, and the African Commission on Human and Peoples’ Rights, agree on several principles including: 1) governments must abolish, or consider abolishing, criminal defamation; 2) public officials must be more, not less, tolerant of criticism and scrutiny; 3) heads of state should subject to the principles as public officials; 4) no belief system, however strongly held, should be protected from criticism; 5) awarded sanctions must be equivalent to the harm done; and 6) the burden of proof and legal costs should not present unreasonable barriers to justice (International Standards, n.d.).

In his study on defamation in social media, Alex Mills (2015) asserts that the cross-border distribution of material, which is easier to do and harder to control, justifies a special choice of law. Mills points out that European Union (EU) rules on jurisdiction
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under the Brussels I Regulation might offer some solutions. Under this regulation, a
defamation case can be brought against an EU-domiciled defendant in either the place
that the wrongful act took place or the place of direct damage. If the case was brought in
the place of the wrongful act, the plaintiff can recover for all damages to their reputation.
But, if the plaintiff sued in a place other than the publisher’s domicile, he/she will receive
cover “only in respect of the damage suffered in that place.” To deal with online
defamation, EU jurisdiction allows the plaintiff to fully recover from all damages to their
reputation if the case was brought to the courts in the place where the plaintiff has his
“center of interests.” However, Mills argues that the concept of “center of interest”
remains vague, which “increase[s] jurisdictional risk for publishers of online material”
argues that reaching an agreement on a unified international defamation law is not likely
to happen due to issues raised by internet publication.

Methodology

A comparative legal analysis is defined as the method used by scholars or other
legal experts in conducting a comparison of different legal systems in the world (Calboli,
2017). Before conducting a comparative legal study, it is critical to have an
understanding of the common methods of comparative law and when each method is
identifies five major methods used in comparative legal analysis: the functional method,
the analytical method, the structural method, the historical method, and the law-in­
context method.
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The functional method looks at a certain social event or a problem and how it was solved in different legal systems. For example, studying a train accident and how different jurisdictions compensate victims for damages based on liability tort.

The analytical method looks for similarities and differences between jurisdictions in complex legal concepts and rules, such as ownership. It then ranks these legal concepts, rules, and institutions, on a scale based on how closely they resemble the characteristics of an “ideal type.” For example, in the case of ownership, providing a total protection of possession and an absolute freedom of disposal would be an ideal type.

The structural method focuses on the framework of the law using an analytical approach. It looks for the collection of elements that form a system and then characterizes or classifies them into “legal families,” such as the Anglo-Saxon or the Romano-Germanic legal families.

The historical method cannot be avoided in any legal comparative study. It is a necessary part of all methods and is used to reveal similarities and differences at a deeper level through an understanding of the history of law in the countries under study.

The law-in-context method studies the historical dimension of jurisdictions with a focus on law in a social context, such as culture, economy, psychology, religion, etc., depending upon the focus of the research. This method provides a “much broader context when compared to the functional or analytical method” (Van Hoecke, 2015). It looks for elements that influence the way law is interpreted and handled in different societies.

To compare U.S. and Kuwaiti law, the Theory of Legal Formants will be applied, which is considered one of the law-in-context theories and known as the dynamic approach to comparative law. It was introduced in 1991 by Rodolfo Sacco, a renowned...
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Italian legal scholar and one of the most well-known comparative lawyers in Europe. The theory looks at law as a social activity in which formants of the law, such as judges, lawyers, groups, communities, and institutions, participate in shaping the legal system of a certain society (Farran, Gallen, Hendry & Rautenbach, 2016). It can be defined as the study of “all the elements that constitute the ‘living law’ of a country” (Frohlich, 2014).

In his book *Methods of Comparative Law*, Pier Monateri (2012) notes that the theory looks at the law as a combination of different models and clashing texts rather than a harmonious set of elements. It is designed to help researchers deal with the different fabrics of law, which are considered “a battleground of competing sources and professional elites.” This theory emphasizes the importance of deconstructing the law in order to reach its working level. This deconstructivism is critical for making meaningful economic analysis of the law. In his study, “Legal Formants: A Dynamic Approach to Comparative Law, Rodolfo Saco (1991) states:

> “We must consider contemporary history, and in particular, incongruities which exist at the same time within a given legal system and are due to the multiplicity of legal formants of that system. An example would be a lack of harmony between statute and the law as applied or between operational rules and the formulas which jurists have deemed to describe those operational rules” (p. 378).

When conducting a comparative legal analysis, attention must be paid to how law is perceived, interpreted, and being applied. Recognition of these factors enables an accurate comparison through understanding why law is set as it is in a particular society. Many historical events and political circumstances that shaped the U.S. and Kuwaiti Constitutions greatly impacted how each viewed free speech, free press, and defamation laws. To achieve the research objectives, the Legal Formants theory will be used to compare 1) the history and principles of law in both countries; 2) the defamation law
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itself, what it says and what it means; and, 3) how the law is being applied in courts and understood by jurists.

Some may argue that comparative legal studies are only relevant when the countries under study are at the same level of legal evolution. This might be true if the sole purpose of the study was to supplement judicial decision and support the harmonization of law in specific countries, such as EU countries. However, the purpose of legal comparative studies is much broader. Morgera (2015) affirms that comparative law serves a variety of functions, including legal education to encourage students to be more critical about the functions and purposes of the law, both inside and outside of their home country. It also helps in understanding the development and effectiveness of international law in different countries and supporting legal reforms. In his study “Aims and Methods of Comparative Law,” Imre (1974) emphasizes the importance of comparative studies for training lawyers and helping them with “looking out of the cave.” He affirms that lawyers must learn during training that the legal system within which they have been brought up is not the only one of its kind, “that the laws of different countries make provision for different solutions for such or such a conflict of interests, and that the solution adopted by [their] national legislature is not necessarily the best.” According to David and Brierley (1978), one of the major benefits of comparative law is introducing western researchers to societies where the western notion of law might be unknown or synonymous with force or religion. In Internationalizing Media Studies, Thussu (2009) argues that the globalization of communication and the growing number of those engaging in cross-border communication led to greater demand for a harmonized
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international legal system. According to Thussu, legal “harmonization can succeed only through the medium of comparative law.”

Hoecke (2015) asserts that legal comparative research is primarily about comparing national legal systems, even if they have entirely contrasting forms of jurisdiction. Sacco (1991) asserts that it is absolutely valid to compare legal systems of countries with different economic bases “because comparison itself has no fear of differences however large they may be.” He argues that “the very jurists who once denied that capitalist and socialist legal systems were comparable because they are fundamentally diverse were, without realizing it, themselves making a comparison.”

This paper will examine the political circumstances that shaped the Kuwaiti Constitution, the similarities and differences between the Kuwaiti and the U.S. Constitutions, the effect of religion on both, and the U.S. and the Kuwaiti judicial systems. A discussion on the freedom of press, defamation laws, and the legal rights regarding criticism of public figures in Kuwait and the U.S. will follow. Both primary and secondary sources will be used to conduct the analysis. Primary sources will include constitutions, penal codes, media laws, cybercrime legislation, and court decisions from both countries. Secondary sources will include newspapers, online media outlet reports, and reports from freedom of the press and human rights organizations.

In the U.S., defamation claims are primarily governed by state laws. The tort law is largely state law and differs relatively throughout the 50 states and the District of Columbia. Still, state laws are subject to the limitations imposed by the free speech and press provisions of the First Amendment of the U.S. Constitution, as interpreted and applied by the U.S. Supreme Court and other courts (Johnson, 2016). As it would be
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overly broad to discuss defamation laws of all 50 states, I will concentrate on the law in
the state of Florida, along with the U.S. Supreme Court decisions that impact Florida’s
defamation law.
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FINDINGS

As this paper is aimed at an American audience and discussing law in a social context, it is necessary to elaborate about Kuwait and discuss its society, history, and culture in some depth. This will be important to understand, later, why the U.S. and the Kuwaiti constitutions have contrasting views in certain areas of law, such as freedom of speech, self-governance, and press licensing. Without understanding the political circumstances and the historical events that shaped the Kuwaiti Constitution and laws, it would be difficult to understand why certain articles or laws exist as they are today. Hoecke (2015) asserts that “fully understanding the law as it functions today in some society, is only possible when one knows where it comes from and why it is as it is today.” Lee (2013) affirms that law “is definitely a historical product as well as an integral part of social institutions” and that legal concepts in any society are always built on its social and historical background. Thus, it will be a major mistake to judge Kuwait’s legal system and defamation laws without understanding the country’s cultural and social background.

The State of Kuwait

While focusing on Kuwait, it is important to have a general understanding about the country. The State of Kuwait is a constitutional, hereditary, Amirate located on the north end of the Arabian Peninsula. Kuwait City is its capital. Kuwait shares land borders
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with Iraq and Saudi Arabia, and sea borders with Iran. The country’s official language is Arabic, with English as a secondary language. It is a geographically small country with a wealthy economy. Kuwait measures 6,880 square miles, which is about the same size as the State of New Jersey.

Kuwait’s population in 2017 was estimated at 4,400,000, with immigrants accounting for more than 69.5% of the population. The country’s economy depends upon oil production as the main source of revenue, and the national GDP per capita is $69,700. (Kuwait, 2016; The World Factbook, n.d.). The majority population (76.7%) are Muslims, 17.3% are Christians, and the remaining 5.9% are of other religions (The World Factbook, n.d.). The adult literacy rate in Kuwait is 95.69% and the youth literacy rate is 99.4% (Kuwait, 2015).

The country has a democratically-elected parliament and voting is limited to civilians over the age of 21 (Kuwait, 2016). The Amir is the head of state and has the right to appoint the prime minister following the traditional consultations. Ministers are appointed by the prime minister and approved by the Amir. The entire number of ministers shall not exceed one-third of the number of the members of the National Assembly. Laws are promulgated through passage by the National Assembly and sanctioning by the Amir. The Amir has the authority to dissolve the National Assembly but must subsequently call for new elections within 60 days. The Constitutional Court can invalidate the Amir's decree to dissolve the parliament (Kuwait Constitution, 1962).

Political parties are not permitted in Kuwait. However, there are active informal political groups, such as the Kuwaiti Democratic Forum (KDF) and the Islamic Constitutional Movement (ICM) (Ghanim, 2000).
U.S.-Kuwaiti bilateral relations

During World War I, the U.S. had no formal policy with regard to the Persian Gulf region, which, to the Americans, had no strategic or political significance. The Kuwaiti economy, before oil, relied on pearl diving, sea faring, and shipbuilding using woods imported from India (Kuwait, 2017). These bases of economy were not of interest to the U.S. government or its citizens. The first contact between the two countries was through private American citizens on humanitarian and philanthropic missions, not through the U.S. government (Panaspomprasit, 2005).

It is not certain when the first American missions arrived in Kuwait. However, evidence points to between 1909 and 1912, when the ruler of Kuwait, Shaikh Mubarak Alsabah, convinced the Reformed Church of America in Basra, Iraq, to settle in Kuwait in order to provide its citizens with modern medical care (History of Kuwait-U.S. Relations, n.d.). Besides humanitarian and health care causes, the American missionaries also sought to spread Christianity among Kuwaitis. However, according to Chookiat Panaspomprasit (2005), they faced deep-rooted belief in Islam and failed in their efforts to convert Kuwaitis to Christianity. Another reason might be the fact that Kuwaiti Muslims found no conflict with believing in Jesus, who is praised in several verses of the Quran, and in keeping their faith.

Nonetheless, a relationship between Kuwaiti society and the American mission members was cemented. The missionary doctors and nurses were quickly accepted into society and considered the same as Kuwaiti citizens. They were also given Kuwaiti nicknames out of respect and appreciation. In 1914, the missionaries completed the
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construction of the first hospital in Kuwait. It was known as the Americani Hospital and was the first concrete building in the country and the region. To this day, Kuwaitis use the word “sister” when referring to a nurse (American Hospital, n.d.).

The first official relations between the U.S. and the Kuwaiti governments started soon after Kuwait declared its independence in 1961. The relationship fluctuated throughout the years, especially during the 1973 Arab-Israeli war. However, the strategic relationship between the two countries increased dramatically during and after the Iraqi invasion of Kuwait in 1991. The U.S. guided the multinational military operations of Desert Shield and Desert Storm, which led eventually to Kuwait’s liberation from Saddam Hussein’s regime. Today, the U.S. continues to provide military and defensive technical assistance to Kuwait. The U.S. also considers Kuwait, which provides it assistance in military, diplomatic, intelligence fields, and cutting off financial resources of terrorist groups, an important ally in the war against international terrorism (U.S. Relations with Kuwait, 2014; Panaspomprasit, 2005).

The U.S. and Kuwaiti judicial systems

The U.S. and Kuwait have vastly different judicial systems due to several factors, such as their geographical areas, populations, and political system. The U.S. system is made up of the federal and state governments. The state court system consists of trial courts, appellate courts, and state supreme courts. The federal courts system includes U.S. district courts, U.S. courts of appeals (or circuit courts), and the U.S. Supreme Court, which is the highest court in the country. Federal court judges are nominated by the president and confirmed by the Senate. State court judges are elected and/or appointed.
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The U.S. Supreme Court has complete authority over the federal courts. Its rulings affect many cases in the lower courts and its decisions are final. The Supreme Court's responsibilities include cases dealing with the constitutionality of a law, disputes between two or more states, U.S. laws and treaties, cases involving ambassadors and public ministers, maritime law, bankruptcy, and habeas corpus issues (Office of the U.S. Courts, 2016).

In Kuwait, all judges are appointed by the Amir upon recommendation of the Supreme Judicial Council, a consultative body comprised of Kuwaiti judges and Ministry of Justice officials (The World Factbook, n.d.). Kuwait's court system is divided into two parts: basic courts and special courts. The basic courts preside over civil, commercial, criminal, and administrative cases and are structured in three levels: Court of First Instances, High Court of Appeals, and Court of Cassation, which is the third and final stage of litigation. It is divided into commercial, civil, and criminal boards (Hassan, 2016). The special courts include the Supreme Constitutional Court, which is considered the highest level of the Kuwaiti judiciary. The court interprets the constitution and deals with disputes related to the constitutionality of laws and statutes. Its judgments are binding on all lower courts (Hassan, 2016).

In the past, the Constitutional Court could only accept challenges filed by the government or the National Assembly. However, the National Assembly passed a law in 2015 that allows citizens to directly challenge the constitutionality of laws in the Constitutional Court. This development dramatically increased the importance of this Court and it now functions much like the U.S. Supreme Court. In November 2016, a Kuwaiti lawyer filed the first case by a citizen questioning the constitutionality of the
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DNA law, which allows the government to collect and maintain DNA data from Kuwaiti citizens, residents, and even visitors (Al-Enezi, 2016). In October 2017, the court ruled the DNA law to be unconstitutional on the grounds that it violates articles 30 and 31 of Kuwait’s constitution, which protects the right to personal liberty and privacy (Kuwait Court Strike Down Draconian DNA Law, 2017).

**Historical Context of the Kuwaiti Constitution**

Kuwait was founded by immigrants who came from the heart of Arabia two centuries ago and settled in the area (Ghanim, 2001). They were in need of a strong and moral leader to secure protection and to manage their daily life affairs. Eventually, they chose Sabah the First, founder of the present ruling family, on the conditions that he would consult them on major issues. In return, they would support him financially. This agreement created a joint governance between the ruler and the ruled, which offered a system of checks and balances between Alsabah (the ruling family), the merchants (the financiers), and the people (the workers) (Ghanim, 2000). This mutual understanding guaranteed a stable political system and ensured economic growth and prosperity for Kuwait.

In 1898, Kuwait became a spot of international conflict between the world’s superpowers. The Russians were negotiating with the Ottomans to construct a railroad running from Syria to Kuwait. The German government requested permission from the Ottomans to establish a station for the Baghdad-Berlin Railroad on the northern end of Kuwait, which threatened British interests in the Middle East. (Alshayeji, 1988). In 1899, Kuwait signed the Anglo-Kuwaiti agreement and it became a British protectorate with a
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self-governing system. The treaty was crucial to both Britain and Kuwait. It secured Britain’s interests in the Gulf and guaranteed Kuwait’s existence and protection against regional threats, including the threats of the Ottomans and the Wahhabi movement (Alshayeji, 1988). Based on the treaty, Britain provided naval protection for Kuwait, and in return, Kuwait allowed London to control its foreign affairs (Kuwait profile, 2017).

After the discovery of oil in 1938, Kuwait’s political balances and the traditional joint governing system collapsed. The ruling family became the sole owners of the oil industry and their leverage increased. The merchants’ role shifted from checking the ruling family, to seeking their satisfaction in order to win governmental contracts. The rest of society became vulnerable to governmental suppression, resulting in corruption and dissatisfaction (Ghanim, 2000).

In 1958, the Kuwaiti government faced new threats. The Iraqi monarchy was overthrown and the new leader, Abdul Kareem Qasim, claimed sovereignty over Kuwait. Moreover, a new generation of politically-minded and well-educated Kuwaitis emerged onto the scene demanding more participation in the decision-making process (Ghanim, 2000). Realizing the dangers of the situation, some members of the ruling family started pushing for a new governing system that would allow for more participation by the people in the decision-making and to secure the position of Alsabah as the head of state.

Abdullah Alsabah, who was known for his liberal ideas, fairness, and support of democracy, became the ruler of Kuwait, ended the Anglo-Kuwaiti agreement in 1961, and declared Kuwait an independent country. In 1962, the Constitution of Kuwait was presented to the Amir, which he signed without requiring any amendments as a show of respect for the people’s choice (Alshayeji, 1988). The constitution proclaimed Kuwait a
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hereditary Amirate and recognized the political system of the country as "democratic, under which sovereignty resides in the people, the source of all powers." Alsabah was greatly admired in Kuwait and is known as the father of the constitution, much as George Washington is often known by Americans as the father of their country.

Similarities and differences

In his study of similarities and differences in comparative law, Gerhard Danneman (2006) points out that some comparative lawyers generally put emphasis on differences, while others focus on similarities, especially when studying problems and their results. A third group prefers a balance between observing and analyzing similarities and differences. Danneman argues that the decision to look for similarities, differences, or a balance between both, depends upon the purpose of the comparative enquiry. For the purpose of this study, the focus will be on differences between the two laws, while pointing out similarities when relevant.

The U.S. Constitution, as a document, tends to be brief and to the point when compared to the Constitution of Kuwait. It is comprised of three parts: 1) the Preamble, which explains the purpose of the document; 2) seven articles, which explain the structure of the government; and, 3) the amendments or the changes made to the Constitution, the first 10 of which are called the Bill of Rights. On the other hand, the Kuwaiti Constitution is an exhaustive document, consisting of 183 articles and divided into five parts: 1) the state and the system of government; 2) fundamental constituents of Kuwaiti society; 3) public rights and duties; 4) powers; and, 5) general and transitional provisions.
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The Kuwaiti Constitution was influenced by the Egyptian Constitution of 1923, which was influenced by the French, American, and even the Russian constitutions (Alshayeji, 1988). Therefore, it is not surprising to find some similarities in the U.S. and the Kuwaiti constitutions. For example, both establish a separation of power system, known in history as *Trias Politica*, which divides the government powers into three branches, i.e. legislative, executive, and judicial.

Like the First Amendment in the U.S. Constitution, the Kuwaiti Constitution protects the rights of free belief, opinion, and press. However, these rights are subject to the conditions and stipulations prescribed by law. Article 38 of the Kuwaiti Constitution asserts that "The home is inviolable; therefore, save in the cases determined by Law and in the manner stipulated therein, no person may enter any home without the dweller's permission." This is similar to the 4th Amendment of the U.S. Constitution. Also, physical or moral injury to any person accused of a crime is prohibited in the Kuwaiti Constitution and the right to defense and a fair trial is guaranteed. These rights are parallel to those contained within the 5th and 6th Amendments of the U.S. Constitution (Alshayeji, 1988).

Despite these similarities, there are huge differences between the two constitutions, which begin in the very first sentences of each. The Constitution of Kuwaiti starts: "We, Abdallah Al Salem Al Sabah, Amir of the State of Kuwait, Desirous of fulfilling all of the exigencies of democratic rule in our beloved homeland; Confident in the role this Nation can play in the wake of Arab nationalism ... sanction and promulgate this Constitution." While the U.S. Constitution begins: "We the People of the United States, in order to form a more perfect union, establish justice, insure domestic
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tranquility, provide for the common defense ... do ordain and establish this Constitution for the United States of America.”

The U.S. Constitution emphasizes that the people are self-governing, and the source of any power given to the government. Kuwait’s constitution emphasizes that Al Sabah is part of the initiative to adopt a democratic participatory system in ruling the country. It is a lasting reminder to the people of the contract between the ruler and the ruled that shall not be forgotten and shall not be used against the ruling family.

In *Race, Law, and American Society*, Browne-Marshall (2007) points out that the word “people” in the U.S. Constitution had a different meaning in the 18th century when the document was written; it was exclusive to white male landowners only. “When the constitution was ratified in 1789, the Framers refused to abolish the institution of slavery or accept that enslaved persons were, in fact, people,” said Browne-Marshall. However, in *United States v. Verdugo-Urquidez*, the U.S. Supreme Court identified “the people” as “persons who are part of a national community,” or who have “developed sufficient connection with this country to be considered part of that community” (*United States v. Verdugo-Urquidez*, 1990).

The framers of the Kuwaiti Constitution did not intend to create a completely new governing system like those of the U.S. Constitution did. Instead, the primary purpose was simply to create more room for participation by the people in the decision-making process and in the governing system without changing the traditional structure of powers. In fact, Kuwaitis still look at their constitution as a contract between the ruler (the Amir) and the ruled (the people). Al Sabah needed legitimacy to stand up against regional and internal threats, and the people needed more participation in the power and wealth. The
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bargain was that Alsabah agreed to accept a participatory system and, in turn, the people agreed to maintain Alsabah's position in society as the ruling family and the head of the government (Alshayeji, 1988). The history of Kuwait's National Assembly clearly shows that any attempts to force more authority over the government will be directly dissolved by the Amir. For example, the parliament was dissolved in 1999 on the grounds of “abuses of parliamentary tools and the selection of tension and confrontations over positive dialogues,” which is a totally absurd reason for dissolving a parliament elected by the people. The Kuwait Assembly was actually dissolved nine times in its 54 year history, six times in the last 10 years, which indicates a continuously growing tension between the legislative and executive branches of the government (Toumi, 2016). As a result, the judicial branch is facing an unprecedented number of lawsuits brought by government officials, politicians, journalists, and citizens that will determine the future of free speech in Kuwait and the role of the government to regulate it.

Religious influence

The U.S. and Kuwaiti constitutions also have different perspectives about the role of religion in government. Historical evidence asserts that religion played an important role during the American Revolution. In November 1783, Gen. George Washington wrote, "the establishment of civil and religious liberty was the motive which induced me to the Field [of battle]" (Dreisbach, 2012, p. 441). The framers of the Constitution were keen to separate the church from the government, as is reflected in the First Amendment: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” The early American legislatures wanted to build a wall of
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separation between “the garden of the church and the wilderness of the world” (Green, 2015). Article Six of the U.S. Constitution also states that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

On the other hand, the Kuwaiti legislatures wanted to recognize and protect the importance of religion in society. Article Two of the Kuwaiti Constitution states, “The religion of the State is Islam and Islamic Law shall be a main source of legislation.” Moreover, Article Four requires the heir apparent to be “a legitimate son of Muslim parents.” Article Nine states, “The family is the foundation of society; its mainstays are religion, morals and the love of country.”

In his study “Legislatures in the Gulf Area: The Experience of Kuwait,” Abdo Baaklini (1982) suggests another reason for including Islamic law as main source of Kuwait’s legislations. He believes it was intended to create a feeling of comfort in Kuwaiti society that their Constitution and its practices reflected Islamic origins and was “not a mere importation of Western practices” (p. 364).

**Freedom of the press**

The U.S. Constitution’s First Amendment protects freedom of speech and press rights stating, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.” The Kuwaiti Constitution also protects freedom of expression and press rights in two articles. Article 36 states, “Freedom of opinion and scientific research shall be guaranteed” and “Every person shall have the right to express and propagate his opinion verbally, in writing or otherwise…” Article 37 also confirms that “freedom of the press
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and of publication is guaranteed." Yet, both articles close by stating that these rights are
"subject to the conditions and stipulations prescribed by law." At first glance, this
sentence appears reasonable. However, digging deep into those conditions and
stipulations reveals the complicated nature of the Kuwaiti system and its contradictions.

First, while the Kuwaiti Constitution asserts the freedom of press in two articles,
the Press and Publication Law requires all publishers to obtain a license from the
Ministry of Information (MOI) in order to practice this constitutional right. The MOI
must issue the license or explain its reason for refusal within 90 days of application, and
refusals can be appealed in court. In the U.S., a major objective of the First Amendment
is to prevent the government from prohibiting written expressions until the publisher
obtains a license from the government, as was required under British rule. In We’re All
Journalists Now, Scott Gant (2007) says, “Although the idea that a license would be
required to publish is hard to imagine now, the practice was prevalent in England and
carried across the ocean to some of the British colonies.” He also asserts that the
prevention of this restraint “was a leading purpose in the adoption of the press clause”
(p.53).

While Americans saw the licensing of publication a hindrance to their freedom of
speech and derived from British rule, Kuwaitis saw it as an advanced system adopted
from countries like the U.K. and Egypt. This demonstrates the role of historical events in
shaping the variance in views about certain areas of law and regulations. However, it is
now evident that placing press licensing under government control leads to many
negative consequences on the freedom of speech and the press worldwide.
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Second, Article 54 of the Kuwaiti Constitution states that "The Amir is the Head of the State. His person is safeguarded and inviolable." Consequently, the Kuwaiti Press and Publication Law of Article 20 prohibits any challenge to the person of the Amir through criticism and prohibits attributing a statement to him without written permission. The law also prohibits publishing anything that may defame or mock God, the Holy Quran, the prophets (including Jesus, Moses, Abraham, etc.), prophet Mohammad companions, wives, or family. Moreover, it prohibits publishing disparaging comments regarding the Constitution, jurists, public morals, or the value of the national currency. It also prohibits anything that may cause harm to the relationships between Kuwait and other Arab or friendly countries (Kuwait Press and Publication Law, 2006).

All these prohibitions verify the influence of religion and traditional beliefs on the Kuwaiti Constitution. They also confirm that the main purpose of the Kuwaiti Constitution is not to create more freedom of speech or press, but rather to offer citizens and the press more participation in decision-making while maintaining the traditional power structure in society. Unfortunately, although the constitutions of many Arabic countries state that their people are the source of sovereignty, it appears they read more like pieces of literature than active national policies. What some articles preserve as rights completely differ from how the rights are regulated and practiced.

This is certainly different from the purpose of the Bill of Rights in the U.S. Constitution. The American view of freedom of the press is much broader than the Kuwaiti view, especially with regard to criticizing the head of the executive branch. Evidence shows that President George Washington was criticized harshly by the press.
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Such attacks were considered normal practice under freedom of speech and press as stipulated by the U.S. Constitution (Burns, 2006).

Defamation in the U.S. and Kuwaiti Laws

Before discussing defamation in the U.S. and Kuwait, it is essential to recognize how the two systems treat opinion. This is important in understanding their differing views about free speech limitations.

Opinion and elements of defamation in U.S. law

Although the First Amendment of the U.S. Constitution restricts the government’s ability to constrain the speech of citizens, the prohibition on abridgment of the freedom of speech is not absolute. There are some types of speech that can be entirely prohibited, such as obscenity, child pornography, or speech that constitutes fighting words. Also, there are other types of speech that can be less protected than others, such as commercial speech, defamation, speech that may be harmful to children, speech broadcast on radio and television, and public employees’ speech (Ruane, 2014).

Moreover, a less strict protection for speech is applied against content-neutral legislation, such as time, place, and manner of speech. The Supreme Court also held that the government may prohibit some speech that may cause a breach of the peace or cause violence (Kohler et al., 2014).

There is an ongoing controversy regarding what the U.S. framers actually meant by the free speech and the free press clauses. Many scholars claim that the framers left us with less-than-clear language that justifies the present debate. They argue that “no one
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will ever know exactly what the framers intended.” Zechariah Chafee, who is described as the most important First Amendment scholar of the first half of the 20th century, says, “the truth is, I think, that the framers had no very clear idea what they meant.” (Kohler, Levine, Ardia Dale & Papandrea, 2014).

However, historical evidence shows that the framers believed in a free marketplace of ideas in which all ideas are tolerated and left to compete until the true and sound survive. In his first Inaugural address, President Thomas Jefferson said: “If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it” (Gertz, 1974).

Note in *Gertz v. Robert Welch, Inc.* (1974) that the U.S. Supreme Court states there is no such thing as a false idea or opinion under the First Amendment, no matter how erroneous they may seem. “We depend for its correction not on the conscience of judges and juries, but on the competition of other ideas,” said Justice Lewis Franklin Powell Jr., representing the majority opinion. (Gertz, 1974). Accordingly, in the U.S., all types of speech are generally protected, even that which some may see as hate speech. In *Matal v. Tam* (2017), the U.S. Supreme Court affirms that “the Government has an interest in preventing speech expressing ideas that offend.” However, the court asserts that “idea strikes at the heart of the First Amendment.” Therefore, even speech that “demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground” or that seems hateful is still protected. The court mentioned two justifications for extending the First Amendment’s protection to hate speech: 1) to “protect the freedom to express the thought that we hate,” which might be accurate or has
some accuracy in it; and 2) to protect minority and dissenting views against dominant views. "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all," said Justice Anthony Kennedy. However, the court specified very narrow and precise categories in which the government may regulate speech, which include fraud, defamation, and incitement (Matal, 2017). Consequently, in the U.S., speech is generally protected, which indeed includes the right to criticize others. The U.S. law mentions few instances in which speech can be regulated, which are known as speech limitations.

According to this notion, the Code of Laws of the United States of America (2006) defines defamation as any act or other proceeding for defamation, whether libel (spoken), slander (written), "or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person" (p. 628). The U.S. defamation law is mentioned under tort law and categorized as either slander (spoken) or libel (written).

In order to win a defamation case in the U.S., a plaintiff must prove four elements: 1) a false statement claimed to be fact; 2) a false statement was published or communicated to a third party; 3) negligence on the part of the publisher; and, 4) a statement caused damage or harm to the plaintiff. In 1964, the Supreme Court held in New York Times v. Sullivan that when the plaintiff is a public figure, he/she must prove an additional element, which is that the false statement was made with actual malice, i.e. with knowledge of or reckless disregard for the truth (Bhagwat, 2014; New York Times, 1964). Beyond these federal standards, each state also has its own slander and libel laws.
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In *Kirk v. Wolfson*, the Supreme Court of Florida defined defamation as "the unprivileged publication of false statements which naturally and proximately result in injury to another" (Kirk, 1973). The elements of a Florida defamation claim are 1) publicity; 2) falsity; 3) the plaintiff must prove that the defendant acted with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; 4) actual damages; and, 5) the statement must be defamatory (Eng, Fitzgerald, & Weiss, 2016).

**Opinion and elements of defamation in the Kuwaiti law**

The Kuwaiti Constitution guarantees freedom of opinion and the press in two articles: Article 36 protects freedom of opinion, expression, and scientific research, Article 37 protects freedom of the press and of publication. Yet, unlike the U.S. legal formants, Kuwaiti formants believed that speech and opinion should not be left completely free because complete freedom of speech might lead to chaos, threaten national security, or spread hostile ideas among society and youth. Article 10 of the Constitution points out that "the State shall watch over the youth and shall protect it from exploitation and from moral, corporal and spiritual negligence," which makes the government, with its different branches, responsible for protecting the society in general and youth in specific, from corrupting ideas (Kuwait Constitution, 1962).

Accordingly, hate speech and expressions of opinions that might degrade some portion of society is not protected speech under the Kuwaiti Constitution as these opinions may lead to outrage and threaten the stability of society. Based on this notion, some ideas and opinions are considered poisonous and should not be allowed to enter
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society’s marketplace of ideas. Therefore, Kuwaiti legislators gave the government the power to regulate speech by subjecting Articles 36 and 37 to “the conditions and stipulations prescribed by law” (Kuwait Constitution, 1962).

In its interpretation of Articles 36 and 37 of the Constitution, the Kuwait Court of Cassation says “the rule is that freedom of expressing thoughts and opinions, including the right of criticizing others, and freedom of the press and of the publication, are fundamental constitutional rights. Any limitations on these rights is the exception to the rule” (Alkandari & Ghannam, 2015). However, examining how these constitutional guarantees in Kuwait are translated into laws and how these laws are applied reveals a completely different understanding than what the court says.

In its interpretation of the right to criticize others, the Egyptian Court of Cassation defines permitted criticism as “expressing opinion about an issue, a work, or a behavior without prejudice to the individual conducting it, for the purpose of defaming or degrading his dignity.” According to Alkandari & Ghannam (2015), the Egyptian notion of permitted criticism is the same notion accepted by Kuwaiti Courts when deciding defamation cases. This demonstrate a clear contradiction in how the law is interpreted and how the law is applied in Kuwait.

First of all, by accepting the Egyptian notion of permitted criticism, the Kuwaiti Court of Cassation contradicts its interpretation of Articles 36 and 37 of the constitution. The Kuwaiti court’s interpretation asserts that the right to criticize others is a fundamental constitutional right. At the same time, it applies the Egyptian notion, which establishes that criticizing others is generally a prohibited act, and only permitted in narrow situations specified by law, but not a fundamental constitutional right. Second, the
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Egyptian Court defines the right of criticizing others as merely expressing opinion about an issue. It also presumes ill will behind any mention of the person conducting the issue under criticism. This is not only an unjustified assumption but is also inconsistent with the Kuwaiti Court understanding of Articles 36 and 37 of the constitution. However, accepting this notion shifted the criticizing of public figures in Kuwait from being a right, to being a privilege given to the press and society at large.

Section Three of the Kuwait Press and Publication Law of 2006 specifies the matters prohibited from publication in any printed media outlets and the associated penalties. This section divides defamation charges into three different categories, represented by three different articles, according to the subject being defamed. Each category has a different correlating penalty or punishment, which is specified under Article 27 of the law (Kuwait Press and Publication Law, 2006).

The first and most extreme category is blasphemy. Sacrilegious speech about God, the Quran, the prophets, prophet Mohammad companions, or his wives and family calls for the perpetrator to be imprisoned for a period not exceeding one year and levies a fine ranging from KWD 5,000 to 20,000 dinars ($16,570 to $66,280), or one of these two penalties. The second category is challenging or criticizing the head of the state, the Amir, or attributing a statement to him without special written permission from the Amiri Diwan, which is the Amir’s administrative office. Violations under this category subject the perpetrator to the same penalty as that for blasphemy but excludes imprisonment. The third category prohibits nine matters from publication. For the purpose of this study, only two will be discussed:
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1) Article 21-7, which prohibits the infringement on the dignity of the persons, their lives, or their religious beliefs. It also prohibits “instigating hatred or disdain of any of the society’s strata” or revealing a secret “which would harm their reputation” (Kuwait Press and Publication Law, 2006).

2) Article 21-8, which prohibits the “Encroachment into the private life of an employee or a person who is charged in a public service, or attributing statements or acts not true to him which would cause harm or insult to his person” (Kuwait Press and Publication Law, 2006).

Violations under this category subject the perpetrator to a fine of not less than KWD 3,000 ($9,990) and not more than KWD 10,000 ($33,280). However, in the same section the law states that these punishments are “without prejudice to any severer penalty which is stipulated in another law.” This not only exposes journalists to other fines set by other laws, but also expose them to imprisonment for defamation under the Kuwait Panel Code of 1960.

Article 209 of the Panel Code defines defamation as “attributing to another an event punishable by law or causes harm to his reputation, in a public place, within earshot or sight of a person other than the victim.” The law punishes defamation with incarceration for a period not exceeding two years or a fine of 2000 Rupees, or both. A rupee is Indian currency equivalent to one pound sterling that was replaced with the Kuwaiti dinar (KWD) in 1963. Note that Kuwaiti defamation law does not recognize truth or actual harm as an element of defamation.
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Public figures:

In *New York Times v. Sullivan*, the U.S. Supreme Court confirmed that "the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials." The court set an exception for statements made with actual malice, which requires public figures to prove that the defendant knew of the falsity of the statement or acted in reckless disregard of the truth. The court reasoned its rule to American society's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (*New York Times Co. v. Sullivan*, n.d.).

In the U.S., a public figure is any person who arouses public interest, voluntarily or involuntarily. Public figures may include government officials, politicians, media celebrities, business leaders, or sports heroes. These figures typically submit their lives to public scrutiny to benefit politically, socially, or financially. Limited purpose public figures may be anyone who becomes the center of public attention without effort or intent on his or her part. These are people who thrust themselves into "the forefront of particular public controversies in order to influence the resolution of the issues involved." The court determines whether the plaintiff is a public figure on a case-by-case basis (*Gertz v. Robert Welch, Inc.*, 1974).

In *Hatfield v. New York Times Co.*, Dr. Steven J. Hatfield sued the *New York Times* and its reporter, Nicholas Kristof, for defamation and intentional infliction of emotional distress. Kristoff implicitly accused Hatfield of being the anthrax mailer of 2001. Despite these baseless accusations and after several appeals, the U.S. Supreme Court rejected the
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case on the basis that Hatfill was a limited purpose public figure and had not proven actual malice on the part of The New York Times (Stout, 2008).

The right to criticize public figures in Kuwait is a privilege given to the press and society in general. However, the concept of public figures and their privacy is completely different than in the U.S. Kuwaiti law prohibits the publication of any material that may harm an individual’s reputation, dignity, or social status. Nevertheless, there are exceptions for public figures. Public figures in Kuwait are any persons who occupy a public service job or public interest position, such as ministers, government officials, members of public services committees, and members of the National Assembly.

Kuwaiti defamation law requires the defendant to show that his or her statement 1) is true or believed to be true; 2) serves the public interest; 3) demonstrates objectivity in presenting the information; and, 4) uses appropriate words and refrains from speaking ill for the purpose of revenge (Alkandari & Ghannam, 2015). These requirements are plaintiff-friendly and make it very easy to win a defamation case in Kuwait. The law is derived from a profound Sharia law principle, which states that the “onus of proof lies with the claimant and he who denies must take the oath” (Islamic Jurisdiction, n.d.). In other words, if a journalist claims the wrongdoing of someone, he must prove it in front of the court.

By law, public figures are expected to receive and tolerate harsh criticism about their official conduct (Alkandari & Ghannam, 2015). The Kuwaiti legal perspective on this is that the public and the press have a strong interest in evaluating public services and fighting corruption, which outweighs protecting the reputations, social status, or emotional welfare of public figures. In Kuwaiti law, accepting a government position
means accepting intense evaluation by constituents. Others in Kuwaiti society such as actors, artists, celebrities, and sports figures are also considered public figures and expect to receive criticism about the work they present to the public. However, these figures enjoy greater protection of such criticism and for their private life under the law of free speech than do politicians and government officials (Alkandari & Ghannam, 2015).

In a case brought to the Kuwaiti Courts, a manager employed at Kuwait Airways sued a local newspaper editor claiming that he was mocked and defamed in a published article. The High Court of Appeals upheld the decision by the Court of First Instance that the Kuwait Airways manager is considered a public official and should expect and tolerate such criticism. The court also stated that the writer focused his severe criticism on the manager’s public conduct and did not place any attack on him personally, which is considered legal and a privilege of the press and the public at large (Alkandari & Ghannam, 2015).

Truth as a defense

The U.S. defamation law could be considered defendant-friendly because it requires the plaintiff to prove the falsity of the statement. Truth is considered an absolute defense to a defamation action. Article 1, Section 4 of the Florida Constitution also states that “If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated” (Constitution of the State of Florida, 1968).

Kuwaiti law does not consider truth to be an absolute defense against defamation charges, but one of its elements. Therefore, even if the published information was true
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but concerning a private matter of the defendant that has no effect on the public interest, the plaintiff would still be facing possible charges of defamation and invasion of privacy.

The strong protection of individuals’ privacy by Kuwaiti laws is also rooted in Sharia law. Verse 11 of the Quran states, “do not find faults in yourselves,” which means Muslims should not search for faults and mistakes in others. The Prophet Muhammad teaches that whoever conceals [the faults of] a Muslim, Allah will conceal [his faults] in this life and the hereafter (Relieving, 2016). He also gave instructions to not backbite Muslims or search into their private matters (Hadith 36, 2011). These teachings represent the Al-Setir (the cover) principle of Sharia law, which means to keep one another’s faults covered and not publicize them.

These principles can be seen clearly in how adultery cases are dealt with in Sharia law. While it only takes one Muslim to keep his mouth shut to conceal adultery, he or she is required to bring at least four male witnesses in front of a judge to prove adultery against someone. Without this proof, the statement would be considered false and the plaintiff would be flogged for slander. However, Sharia law provides exceptions if the matter involves blood or money, meaning that Muslims are not allowed to cover another Muslim’s crimes of murder or theft.

Private life of public figures

Kuwaiti law is different from U.S. law when it comes to the private lives of public figures. Article 21 of the Press and Publication Law of 2006 prohibits the “encroachment into the private life of an employee or a person who is charged in a public service, or attributing statements or acts not true to him, which would cause harm or insult to his
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person.” Accordingly, the private lives of public figures are treated the same as those of other individuals. This article represents another influence of Sharia law and the traditional beliefs on the notion of a free press.

However, in rare instances the law would allow the infringement into the private life of public figures if their private life matters have a direct negative effect on their public service job. For example, if a government official gave special benefits to one of his employees in exchange for a private personal interest.

**Personal attacks on public figures**

Kuwaiti law also differs from U.S. law by prohibiting personal verbal attacks on individuals and public figures. For example, describing a public official as an apostate would be illegal because it is considered a personal attack on his/her beliefs, which could instigate hatred or disdain towards him/her, and not a criticism of his/her official conduct. However, describing a public figure as ignorant, pathetic, or cowardly in standing against corruption would be considered legal.

In a 2007 case brought to the Kuwaiti Court of Cassation, a public figure sued the writer of the weekly “Question Mark” column, the editor and chief of the newspaper, and the owner of the newspaper. The public figure wanted to recover personal damages for libel and for being described as an apostate. The court pointed out that speech and the press freedoms, along with the right to criticize public figures, are fundamental constitutional rights. However, legal publications should be free from breaching the dignity of any person, their lives or religious believes, even if there was no ill will. The
court held that describing the defendant as an apostate is defamatory and awarded the plaintiff compensation for damages and attorney fees.

In another case brought before the Kuwaiti Court of Cassation, a daily newspaper published a caricature depicting the face of the prime minister on the body of a half-naked belly dancer in an inappropriate position. The court held that this caricature exceeds the limits of freedom of expression allowed by law and embodied personal attack on the prime minister, not on his official conduct (Alkandari & Ghannam, 2015). The Kuwaiti Court of Cassation ruling in this case contradicts the U.S. Supreme Court ruling in *Hustler Magazine, Inc. v. Falwell*.

In 1983, Jerry Falwell, a televangelist and conservative activist, sued *Hustler Magazine* for publishing an advertisement parody that portrayed him in a drunken sexual relationship with his mother in an outhouse. Falwell wanted to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. At first, Falwell won a jury verdict on the emotional distress claim and was awarded $150,000 in damages. However, when *Hustler Magazine* appealed, the U.S. Supreme Court, in a unanimous opinion, held that public figures cannot recover damages for intentional infliction of emotional distress, if the emotional distress was caused by a caricature, parody, or satire of the public figure that a reasonable person would not have interpreted as factual. The court added that this decision is not a "blind application" of the *New York Times* standard, but reflects the Court's belief that this standard is necessary to give enough "breathing space" to the freedoms protected by the First Amendment (Hustler, 1988).
Kuwait defamation law during election period

During an election period, an unusual change happens to the Kuwaiti defamation law. Article 44 of the National Assembly Election Law does not provide any punishment for defamation or spreading fake news about candidates' conduct, unless they can prove the falsity of a statement, and that the defendant lied deliberately for the purpose of affecting the election's outcome (Alkandari & Ghannam, 2015). During this particular time, the law shifts from being plaintiff-friendly to being defendant-friendly by considering truth as an absolute defense against defamation charges, placing the burden of proof on the defendant, and requiring the defendant to prove that the false statement was intended to affect the election results.

Kuwait's High Court of Appeals justified this change to the law by stating that “during the election period, the political competition reaches its peak which rise the intensity of the public debate. This special period of our nation's life requires special legal consideration.” In a similar case brought before the court, a candidate sued a newspaper writer for defaming him during the election period. The court stated: “criticizing political candidates is at the core of any democratic system, it is a unique chance for the entire society to debate about public issues. During this period, the society plays the role of a grand court that decides the competence and fitness of the candidate to represent the nation.” Although the defendant was able to prove that the statement was false, the court held that the writer was not guilty since the defendant failed to prove that the writer lied on purpose and also failed to prove how his false statement affected the election outcome (Alkandari & Ghannam, 2015).
DISCUSSION

As mentioned before, the main purpose of comparative legal studies is not to compare a set of articles and rules, but to contribute to reforming laws and constructing a common legal understanding that supports the formation of a harmonized international legal system. Accordingly, this part of the study will focus on providing suggestions for the reformation of defamation laws of Kuwait and the U.S., in a way that supports the formation of an international defamation law. To bridge the differences between a legal system that builds its values based on a Western perspective, as in the United states, and a legal system that builds its values based on traditional and religious beliefs, as in Kuwait, two major questions must be addressed: 1) How can defamation laws of traditional Monarchy systems survive in an era of democratization and growing demand for free speech? and 2) What is the value we want to place on reputation in a globalized communication world?

Monarchical Legal Systems and Free Speech

In Kuwait, and all GCC countries, panel codes, media laws, and cybercrime laws are used to restrict speech and freedom of the press (Duffy, 2014). The law still requires media to obtain a license from the government. Defamation laws are used to “silence public criticism and stifle robust debate and good journalism” (Duffy & Alkazemi, 2017). Information technology has experienced unprecedented growth over the last few years in
the region, which has increased the demand for more freedom of speech and more participation in political decision making (Internet usage, 2018). Kuwait and the GCC governments are now faced with two critical choices. The first is to keep pace with the new changes happening worldwide by reforming their legal systems and allowing more “breathing space” for freedom of speech. The second is to continue to pass new laws that suffocate speech, such as the Cybercrimes Law. These laws might shield some of these governments against criticism for a period of time. However, they will gradually shift these governments from Constitutional Monarchies to authoritarian systems and lead to unpredictable consequences. To survive the twenty-first century, Kuwait and the GCC governments should reform their legal systems and seek public legitimacy instead of traditional authority.

The first step to reform the legal and the governing system of Kuwait is to revisit the laws that provide unnecessary governmental control over speech. Many articles in Kuwaiti law are either overly vague or overly broad. For example, Article 21 of the Press and Media Law prohibits the press from publishing anything that would insult “the public morals” without stating in the Explanatory Note what does “public morals” means or how they might get insulted. Alkandari & Ghannam (2015) affirm not only the vagueness of this term, but also its contradiction with Article 32 of the Constitution which requires the text of incrimination to be clear and specific. Another example is Article 21 of the same law which prohibits the press from publishing “what would lead to worries about the economic status.” Here the text is very broad and in contradiction with the Constitution which guarantees freedom of speech and the press. Although Kuwait’s government usually does not prevent the press from discussing economic issues, such as the global
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financial crisis of 2007 and its effect on Kuwait, or the consequences of dropping oil prices on Kuwait, this law remains a dangerous weapon in the government’s hands that could be used against the press whenever needed. Removing the vagueness and broadness of these laws would be a good start in achieving greater freedom of speech and the press in the country.

Value of Reputation

When discussing reputation from a global perspective, scholars must take into consideration the different cultures of the world. Evaluating defamation laws of Arab countries without understanding the value of reputation in their society, might lead to inaccurate conclusions. In “Democracy and Defamation,” David Riesman (1942) asserts that reputation is an essentially pre-capitalist value more suited to Europe than America. He says, “where tradition is capitalistic rather than feudalistic, reputation is only an asset, "good will," not an attribute to be sought after for its intrinsic value. And in the United States these business attitudes have colored social relations. The law of libel is consequently unimportant.” In his study on libel law reformation, Anderson (1991) points out that Riesman’s argument “may or may not have been true 50 years ago, but it is certainly a fair description of the law’s treatment of reputation today.”

This cannot be said about Arab culture where reputation is considered one of the most highly-valued forms of respect. Family honor is of utmost importance in Arab society (Nydell, 2006). In Understanding the Arab Culture, Alomari (2008) describes Arab culture as a collectivist one where “the need to save face is helped by complex sophisticated communication systems which are on the whole more implicit than
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"Explicit." To an Arab, dignity, honor, and reputation are primary and to be protected at all costs. Honor, or shame, is collective, affecting the entire family or group. Most Arabs feel that the indiscriminate imitation of Western culture and laws will have a corrupting influence on their traditional family ties, social principles, and religious values (Arabs, n.d.).

In Western cultures, harming or insulting a person's reputation would properly harm only that person. However, in an Arab culture, such as Kuwait's, a bad reputation could harm not only the person him/herself, but also the entire family, including his/her spouse, children, parents, brothers, sisters, and even cousins and other close relatives. In some circumstances, a shameful act by one, or a few individuals, could harm the reputation of an entire family or tribe for generations.

Kuwaiti legal formants had to consider all these cultural norms while crafting the defamation laws of the country. They had to find balance among free speech, the protection of individuals' reputations, and the protection of the reputation of the social group that the individuals belong to. The result was strict libel laws that do not consider truth as an absolute defense against defamation charges and treat the reputation of private and public figures similarly.

Unfortunately, many of the libel laws in Kuwait are being abused by politicians and public officials in order to avoid public scrutiny or to cover up corruption. Therefore, it is necessary to pass new laws that reduce the protections given to politicians and government officials. A suitable solution would be to apply the laws of defamation during the election period on both government officials and politicians for as long as they remain in their position.
The current defamation laws in Kuwait prohibit the media from the encroachment into the private life of public figures. However, in recent years, many celebrities in Kuwait started exposing their private life matters voluntarily to the public, through social media outlets. For example, many celebrities now post about their marriages, divorces, family conflicts, legal disputes, and even their health conditions. Some of them actually do it to gain more popularity and to attract more fans. This places a new challenge to the Kuwaiti defamation laws and requires special legal consideration for this new social phenomenon. It would be unreasonable to punish the media for encroachment into the private life of public figures if they deliberately presented these private matters to the public. These public figures should expect getting both positive and negative feedback about what they present to the public. They themselves should be responsible for their actions and should anticipate consequences, not the media nor the public.

Any future attempt to reform defamation laws in Kuwait and the GCC countries should not be isolated from cultural and historical context. To reach the appropriate degree of integration between Arab and Western libel laws, international formants must discuss the value that needs to be placed on reputation and free speech in the modern world, where anything can be said by anyone on the Internet and where defamatory statements can be archived forever and retrieved at any time. There must be an ongoing legal and ethical discussion with the aim of forwarding our global mutual understanding of what is necessary to advance human progress.

It is obvious that U.S. law provides greater freedoms of speech and press than does Kuwaiti law by not prohibiting criticism directed to the head of the executive branch and by protecting the ability to freely assert individual ideas. Although the Kuwaiti
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Constitution asserts a free press and freedom of speech in two of its articles, legal conditions and stipulations prevent the actual practice of these rights. The traditional system of society has a significant influence on both.

Nevertheless, Kuwaiti defamation law provides more privacy and reputation protection for individuals, while American defamation law seems too broad in terms of the private lives and reputations of private figures. For example, in *Hatfill v. New York Times Co.*, Hatfill’s reputation was severely harmed by baseless statements, yet he lost his defamation suit because the court decided he was a limited-purpose public figure. In *Rosenbloom v. Metromedia*, the U.S. Supreme Court asserts that the First Amendment protections extends even to defamatory falsehoods relating to private persons, if the statement concerned is a matter of general or public interest (Rosenbloom, 1970).

A great quote attributed to Daniel Patrick Moynihan is “everyone is entitled to his own opinion, but not his own facts.” Holding people accountable for causing harm to others by making a false statement is more reasonable than justifying the negligence of seeking the truth in the name of protecting speech. It also can be argued that there is substantial governmental interest in promoting the pursuit of truth instead of blindly sharing whatever we hear.

**Conclusion**

Traditional and historical factors have made significant impacts on both the Kuwaiti and the U.S. constitutions, which in turn has led to different perspectives about freedom of the press and defamation laws. The Kuwaiti Constitution was established to create more participation by the people in the decision-making process and governing
system while maintaining the traditional structure of power in society. The U.S. Constitution was established to protect citizen self-governance, personal liberties, and to provide more control over the government's powers. The U.S. legal formants want to separate religion from the government, while the Kuwaiti legal formants want to protect religion and assert its importance by stating that Islam is a main source of Kuwaiti legislation.

To survive the twenty-first century, Kuwait and the GCC governments must reform their defamation laws to allow for more breathing space for freedom of speech. Kuwait law suffers from contradictions in how the law is written, is interpreted, and is applied in the country. The first step to reforming these laws is to remove the vagueness and breadth in some articles that provide unnecessary governmental control over speech. To stop politicians and public officials from abusing Kuwait libel laws, this study suggests applying the laws of defamation on government officials and politicians during the election period for as long as they remain in service. Any international efforts to urge legal reform in the GCC countries must take into consideration the cultural and historical context of their laws.

Collecting data about lawsuits in Kuwait is a significant limitation to this study. First, the country does not have a law like the U.S. Freedom of Information Act. Therefore, many institutions can refuse to provide researchers with basic information without offering a reason. Second, due to privacy issues, not all legislation documents related to the press are made public, and the names of the plaintiff, the defendant, and the newspaper are removed from most of the published and archived lawsuits, which causes confusion to the reader. Kuwaiti law gives the court the sole right to decide which
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proceedings will be published. Third, Kuwait lacks a legal archival system and sufficient legal online search engines. Many of those that exist are created by small businesses and suffer from technical problems, such as broken links and missing documents. Another major problem is that most court rulings tend to be short and summarized, and therefore lack details about the judicial analysis or the judges’ understanding of opinion and free speech.

In “Methodology of Comparative Legal Research,” Hoecke (2015) points out that comparing official state law in some African countries with local customary law reveals several tensions between these countries. For example, tension between traditions and modernity and tension between Western law only followed by elites and African law followed by the majority of the population. A suggested future study would be to examine the tension between Sharia law and Western law in the Kuwait legal system and how these tensions are perceived by the majority of the population and treated by Kuwait’s legal formants.
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