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# Kuwait's political impasse and rent-seeking behaviour: A call for institutional reform

Fahad Al-Zumai



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A Call for Institutional Reform**

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*Fahad Al-Zumai*  
*Assistant Professor*  
*Gulf University for Science & Technology*  
*Visiting Lecturer*  
*Westminster University Law School*  
*AlZumai.F@gust.edu.kw*

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# **Kuwait's Political Impasse and Rent-Seeking Behaviour: A Call for Institutional Reform**

FAHAD AL-ZUMAI

## **Abstract**

This paper introduces an analysis of the impact of rent-seeking on Kuwait's historical political impasse and the stagnation of its democratic institutional development. The main questions that the paper aims to answer are how rent-seeking is influencing the development of Kuwait's political system and whether it is possible to minimize the spread of rent-seeking in the Kuwaiti polity. The paper evaluates the 'institutional settings' of the Kuwaiti polity by applying rent-seeking theory, and concludes that a constitutional reform introducing a stakeholder-based definition of ownership of natural resources is a fundamental safeguard to protect the interests of future generations and to minimize the spread of rent-seeking. Finally, the paper advocates reforming available safeguards in the Kuwaiti polity such as the Constitutional Court, the introduction of political parties and, finally, empowering civil society as additional means to reduce the spread of rent-seeking.

## **Keywords**

Kuwaiti politics; National Assembly; political reform and stagnation; rentier state theory; rent-seeking

## **1. INTRODUCTION**

This paper deals with Kuwait's current political paralysis and the stagnation of its democratic institutional development. In order to do so, the paper evaluates the 'institutional settings' of the Kuwaiti polity by specifically assessing the impact of rent-seeking on its evolution. The paper therefore examines the spread of rent-seeking behaviour as a factor that is eroding the existing political institutions and is affecting their development.<sup>1</sup> Rent-seeking behaviour is exacerbated by the fact that Kuwait is a 'rentier state'. Rentier states derive most of the revenue that they generate from the rent of their natural resources (Al-Zumai 2007: 16–18).

A rentier state is generally seen in political theory as a state short of certain key factors and reasons to develop a democratic political system and institutions (Al-Khoury 2009).<sup>2</sup> Although rentier state theory has evolved since the 1970s, the basic tenets of its original

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<sup>1</sup> The paper adopts Douglass North's definition of institutions as 'the humanly devised constraints on repeated human interaction, that is, the rules of the game – both formal and informal norms of behavior and the way they are enforced' (North 1988: 15).

<sup>2</sup> Many studies have argued that rentierism affects democracy negatively (Anderson 1987; Crystal 1995; Luciani 1990; Herb 1999; Lowi 2009).

political findings are still valid.<sup>3</sup> Rentier states tend to overlook local demands for reform because of the political autonomy they derive from the external rents they receive (Brumberg and Ahram 2007: 5). It is often said that in effect, therefore, states with natural resources, and oil in particular, tend to be cursed with the ‘paradox of plenty’, which entails corruption, authoritarianism and economic decline (Basedau and Lacher 2006: 5). All of this results in what is known as the ‘rentier special contract’, according to Wiktorowicz (1999: 608).

Indeed, Kuwait obtains a substantial portion of its national revenue from the rent of its oil reserves. In the proposed budget for the years 2010–11, the total estimated revenue was KWD9.72 billion; around 82 per cent of this revenue was generated from oil exports (Al-Shall 2010a). While at first glance the political system of Kuwait seems to defy the typical descriptions of rentier states, it is deeply affected by rent-seeking attitudes.<sup>4</sup> Two features illustrate this point. First, it has been contended that the level of political freedom in Kuwait is higher than that of its Arab neighbours: the Press Freedom Index of 2011 classified Kuwait as one of the four Arab countries that were partly free.<sup>5</sup> However, more recent reports from Freedom House indicate that freedom of the press in Kuwait is declining as a result of all the legal actions directed towards a number of activists (Amnesty 2013).

The second feature relates to the division of powers in Kuwait. Kuwait’s parliament, the National Assembly, plays an active and substantive role in governance, both in legislating and in monitoring the government. The contribution of the National Assembly of Kuwait is particularly strong in comparison to other emirates or regional constitutional monarchies, such as Jordan.<sup>6</sup> Arguably, the institutional framework that was introduced by the 1962 Kuwaiti Constitution, regardless of its shortcomings, has partially saved the country from the ‘paradox of plenty’ by introducing checks and balances on political power and corruption.<sup>7</sup> This can be

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<sup>3</sup> For more discussions on the evolution of rentier state theory, see Gray (2011).

<sup>4</sup> See Luciani (1990). In addition, a number of scholars have extended the remit of the classical rentier state theory to offer a theoretical foundation for the current status of rentier states and in particular Gulf States (Gray 2010).

<sup>5</sup> See [http://www.freedomhouse.org/images/File/fiw/FIW\\_2011\\_Booklet.pdf](http://www.freedomhouse.org/images/File/fiw/FIW_2011_Booklet.pdf). For a critique of the Freedom House methodology, especially in considering Middle Eastern countries, see Harik (2006).

<sup>6</sup> For more details on the electoral environment in Jordan, see Lust-Okar (2009).

<sup>7</sup> Some studies link democratic governance with the avoidance of the resources curse; see e.g. Alexander and Gilbert (2010: 10). The so-called economic success stories in the region, such as Dubai, have validated the authoritarian model of government in the Gulf Cooperation Council (GCC). People in Kuwait were so impressed by Dubai’s economic success and its apparent connection to Dubai’s authoritarian model of government that they began to ask whether the democratic system of Kuwait, adopted with the 1962 Constitution, was an obstacle to attaining the economic success that Dubai had achieved. The daily newspaper *Alseyassah* openly advocates following Dubai’s direction. Also, it is irrational to expect the reforms proposed in this paper to lead Kuwait to a ‘political utopia’. Arrow’s impossibility theorem has proved that there is no perfect system of voting and that it is

demonstrated by comparing the recording of oil and gas revenues in Gulf Cooperation Council (GCC) countries. According to a study conducted by Dr Al-Kuwari, oil and gas revenues, especially if they are substantial amounts, are not recorded properly as a state revenue in the GCC. Table 1 illustrates this and shows that Kuwait is a true exception to the phenomenon in the GCC. It can be argued that this is due to the institutional settings introduced by the Constitution (Al-Kuwari 2009: 82). The positive surplus in the case of Kuwait is due to local consumption and sales.

On the other hand, especially in the last few years, Kuwait has experienced a notable political impasse. For example, over the period 2006–12, eleven governments were formed, and five National Assemblies were constitutionally dissolved.<sup>8</sup> The year 2006 represented a milestone in the history of Kuwait's polity as the National Assembly voted to remove the ailing Amir Sheikh Sa'ed Al-Abdulah Al-Sabah and appoint Amir Sheikh Sabah Al-Ahmad Al-Sabah. This event empowered the parliament in an indirect way, and subsequent events such as the interpellation of the prime minister show the evolution of the polity in Kuwait. Rent-seeking is becoming a contest to tilt the balance of power between the parliament and the ruling family.

Scholars have attributed this political impasse to a number of reasons. Al-Najjar, for instance, links it to structural challenges in the Kuwaiti polity, such as the non-partisan nature

**Table 1.** *Difference between oil and gas production revenue and recorded public budget revenue, 2007 (US\$ billion)*

	Saudi Arabia	United Arab Emirates	Kuwait	Qatar
Total value of oil and gas revenue	206.4	84.4	60.1	40.7
Public budget recorded revenue from oil and gas	149.9	69.8	65.2	20.2
Difference	56.5	14.6	(5.1)	20.5
%	27.4%	17.30%	(8.5%)	50.4%

*Source:* Al-Kuwari (2009).

unrealistic to expect rational and egalitarian social decisions in every political setting. For more discussion on this topic, see Parisi (1998: 746).

<sup>8</sup> See Herb's (2013) database on Kuwaiti politics. Two governments were formed in 2006. The same thing took place in 2007. In 2008 there was only one government change, and since 2009 each year the country has had two governments introduced, with the exception of 2010. The changes tend to vary from minor amendments to the government's composition to a major reform.

of the parliament, and to political challenges, such as an imbalance in power (Al-Najjar 2000). It has also been argued by Power (2012) that weak parliamentary performance in Kuwait, and in Bahrain and Oman, can be traced to the weakness and underdevelopment of political parties in these countries. In addition, the failure to liberalize the economy in these countries is hindering the development of their parliaments (Power 2012: 43–4). Others, such as Herb, believe that the failure of the opposition to act in unity and press for a reform agenda is one of the main reasons why the Kuwaiti parliament is not pushing for more power. This is also associated with the hesitation of the Kuwaiti voter to transit to a full democracy (Herb 2009: 138). According to Herb, ‘there is no reason to think that oil, in itself, explains the absence of democracy in Kuwait’ (ibid.).

The literature on rent-seeking and democracy is well established, and historical findings suggest that democracies tend to reduce rent-seeking behaviour and contribute positively to the quality of a nation’s institutions (Calderon and Chong 2005: 5). Kuwait, as will be illustrated in this paper, seems to indicate the opposite to conventional theory when it comes to rent-seeking and democracy, as its democratic institutions, mainly the National Assembly, appear to tend to encourage and support rent-seeking behaviour.

This paper aims to provide an analysis of the impact of rent-seeking on Kuwait’s continuing political dilemmas and of the structural obstacles facing any political reform agenda. The paper will formulate recommendations on how to minimize the negative effects of rent-seeking behaviour, which is one of the main obstacles to the evolution of Kuwait’s political system. That is, the paper will advance the idea that in order to limit the spread of this behaviour, a constitutional amendment to the concept of ‘public ownership’ of natural resources should be implemented. The proposed amendment introduces a stakeholder-based property regime for natural resources to limit the rent-seeking behaviour which is eroding Kuwait’s democratic institutions. In particular, it is maintained that the fiduciary duty of the political bodies under the Kuwaiti Constitution should be extended to include sustainability and the interests of future generations, especially when it comes to the expropriation of natural resources, with special attention to the role of the Constitutional Court.

In fact, it will be shown that the current Kuwaiti legal framework concerning natural resources facilitates rent-seeking behaviour, as it reduces the costs of engaging in such behaviour substantially. The problem with the current legal definition of public property, and in particular of natural resources, is that it does not create a standing from which to challenge

any law or actions by the government on the basis that such a law or decision will have a long-term negative impact on future generations.

This paper is structured as follows: after this introduction, an historical overview is provided of developments in and setbacks to the Kuwaiti political environment since independence. The subsequent section presents the problem of rent-seeking behaviour and interest groups endemic in the Kuwaiti polity. Next, the paper analyses in depth the relation between constitutional design and rent-seeking behaviour. Special attention is paid to identifying the political forces that influenced the writing of the Kuwaiti Constitution, as well as to evaluating the current status of constitutional backup safeguards in Kuwait. Finally, the paper proposes suggestions for constitutional reform to tackle the problems of rent-seeking in Kuwait politics.

## **2. OVERVIEW OF KUWAIT'S POLITICAL ENVIRONMENT: DEVELOPMENTS AND SETBACKS**

This section aims to identify the historical background of the evolution of Kuwait's democratic institutions. Since its independence from the British Empire, which ended its protectorate relations in 1961, Kuwait has undergone a series of positive developments that contributed to the evolution of the political system and increased the scale of freedom, accountability and transparency. In 1962 a new Kuwaiti Constitution was created, which established a constitutional hereditary emirate and entrenched the division of powers in the country.<sup>9</sup> More recent developments include, for example, the granting of political rights for women in 2005;<sup>10</sup> the separation of the posts of crown prince and prime minister in 2003 (Democracy Reporting International and Kuwait Transparency Society 2008); the interpellation of the prime minister in 2009, 2010 and 2011 on corruption-related matters – a historical precedent which empowered the parliament (Kuwait National Assembly 2011: 56); the election of four female MPs to the parliament in 2009 (MEI 2009: 4–5); the liberalization of the media and press (Kuwaiti Law No. 3/2006); and other events that continue to contribute to the evolution and maturation of the Kuwaiti political system.

Countering this progress, Kuwait has witnessed a number of major setbacks during its short modern political history. The two main setbacks were the unconstitutional dissolutions of the National Assembly from 1976 to 1981 and from 1986 to 1992 (Kuwait National Assembly 2011: 56). The amir issued a decree in 1976 to dissolve the National Assembly, in violation of the Constitution – in essence, a coup. This created an implicit menace to the

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<sup>9</sup> The amir still appoints the head of the executive branch. See Article 56 of the Kuwaiti Constitution.

<sup>10</sup> For more details on Kuwaiti women's political rights, see Al-Mughni (2010).



National Assembly and activists.<sup>11</sup> The negative impact of these two incidents continues, as the possibility of an unconstitutional dissolution of the National Assembly still exists and threatens the Constitution and social contract of the state.<sup>12</sup>

The diversion of some of the political institutions from their constitutional functions, such as the National Assembly, also became a phenomenon in Kuwait, especially with the emergence of ‘services MPs’.<sup>13</sup> The political systems of other countries in the region, which have similarities to Kuwait, are instructive. Let us take the example of Jordan. According to Lust-Okar (2009), the parliamentary election in Jordan’s political system serves to reinforce *wasta* (favouritism).<sup>14</sup> In Kuwait, elections serve a similar purpose; however, for Kuwaiti voters, the chief purpose of elections is to support rent-seeking. The absence of full support for the rule of law has led to the importance of *wasta* as the sole mechanism to get what individuals desire.<sup>15</sup> This eventually altered the National Assembly’s function and extended it to become a ‘service-oriented institution’, contrary to its constitutional functions and in clear violation of the Kuwaiti Constitution’s principle of separation of powers.

The ongoing impasse in the relationship between the two main branches, namely the executive and the legislative, is becoming the theme of Kuwaiti political discussion. The Kuwaiti parliament has shown its strength over time and continues to clash with and confront the executive branch. Since 2004 the amir has dissolved parliament three times.<sup>16</sup> In addition, six governments have stepped down, and nine were formed in 2006–9 as a result of parliamentary confrontation (Shayji 2009). Since the introduction of the Kuwaiti Constitution, the parliament has interpellated more than forty ministers, including the prime minister, who comes from the royal family (ibid.). These interpellations were all related to cases of corruption, nepotism and failure to adhere to the rule of law.<sup>17</sup>

To date, a true and honest assessment of the root causes of this impasse has been absent from public discussions. Nonetheless, there has been a recent movement to aim at more institutional redesign to avoid the current impasse. A number of commentators and politicians

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<sup>11</sup> It became common knowledge that whenever the relationship between the parliament and the government became tense, the threat of an unconstitutional dissolution would be circulated in the media and among activists.

<sup>12</sup> The role of the Kuwaiti Constitutional Court in the self-enforcement of the constitution is examined below in section 4.

<sup>13</sup> For more details, see Power (2012).

<sup>14</sup> For more analysis of the concept of *wasta*, see Faisal (1990).

<sup>15</sup> For more details on the involvement of MPs in offering services *wasta* to voters, see Al-Zumai (2007).

<sup>16</sup> When the amir dissolves parliament, the Constitution requires that a new election be held within two months of the dissolution. Civil society, labour unions and professional associations organized an opposition coalition against the unconstitutional decisions to dissolve parliament in the 1970s and 1980s. See Lawson (1985).

<sup>17</sup> For more details on the history of these interpellations see Al-Saidi (2009).

have raised a variety of solutions, such as constitutional reform designed to reduce the powers of the National Assembly,<sup>18</sup> or the removal from office of certain individuals, such as the then prime minister Sheikh Nasser Al-Mohammed Al-Sabah, claimed to be a major contributor to the cause of the current impasse.<sup>19</sup> The level of government penetration of the National Assembly led a number of MPs to urge the amir to dissolve it constitutionally and call for elections, as they argued that the National Assembly had been hijacked by the government.<sup>20</sup> Time has shown that this analysis is not entirely accurate, as despite Sheikh Nasser Al-Mohammed Al-Sabah's 2011 resignation, political impasse continues to be the case.

Corruption cases related to suspicious payment to a number of MPs in the 2009 parliament were submitted to the public prosecutor's office. This case shocked Kuwaiti society, as it revealed the extent and magnitude of corruption claims. More worrying is the claim that the payment was institutionally orchestrated by the prime minister. The result was an unprecedented youth-led protest which lasted for months, demanding the dissolution of parliament and the removal of the prime minister. These efforts eventually led the amir to dissolve the Cabinet and call for early elections (Kinninmont 2012: 2). Other researchers have suggested that Kuwait is witnessing a political decay that is rooted in its social structure – in particular, in the emergence of tribes as an active player on the scene. Arguably these groups are the true impediment to social progress in Kuwait (Al-Fadalah 2011).

The absence of political parties in Kuwait has created a government that is in a 'privileged' position in terms of the associated transaction costs in the legislative process, as it requires less than one third of the National Assembly to pass any piece of legislation, and only a slightly larger number to block any bill.<sup>21</sup> This dominant position has been brought about by two factors. First, the government acts as one voting bloc; in accordance with the Constitution, according to Article 128 (Abdulmalek 2003: 246),<sup>22</sup> Cabinets need contain only one elected

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<sup>18</sup> For more details on these suggestions, see MP Ali Al-Rashed's proposed amendments to the Kuwaiti Constitution in 2010, <http://www.alraimedia.com/Alrai/Article.aspx?id=198526>.

<sup>19</sup> Mohammed Abdulqader Al-Jasem, an activist, launched a number of studies and articles aimed at exposing the prime minister. These activities resulted in the activist's prosecution. Moreover, a number of social groups were formed that aimed at the removal of the prime minister. One example is the 'Leave, we deserve better' movement.

<sup>20</sup> Five MPs in 2010 pleaded with the amir to dissolve the National Assembly and call for new elections. See <http://www.alsabahpress.com/spress/Default.aspx>.

<sup>21</sup> For more details on transaction costs, see Coase (1960).

<sup>22</sup> Article 128 of the Kuwaiti Constitution is as follows: 'Deliberations of the Council of Ministers are secret. Resolutions are passed only when the majority of its members are present and with the approval of the majority of those present. In case of an equal division of votes, that side prevails on which the prime minister has voted. Unless they resign, the minority has to abide by the opinion of the majority. Resolutions of the Council of Ministers are submitted to the amir for approval in cases where the issue of a decree is required.'

MP and the remaining ministers become *ex officio* MPs. Hence the transaction costs of making any decision in the legislative process in terms of liaising, bargaining costs and the dissemination of information are minimal if the government utilizes its position – the government enjoys an inbuilt organizational advantage compared with other political players in the game.

The failure to acknowledge political parties legally produces a decision-making process that is inefficient from an economic perspective. In contrast, in multi-party parliaments negotiations are conducted in such a way that internal political party approval and deliberations increase the cost of bargaining. Additionally, competition among MPs to support the government is a well-established market in the National Assembly. In economic terms, there is a semi-efficient market for a government coalition in the National Assembly, as the available options of allies for the government are much greater than if there were two or more political parties, which would serve to limit the available choices for the government. That is, the bargaining power of these parties would be greater than in the current situation; the absence of officially recognized political parties makes it easier from an economic perspective for the government to control and dominate the National Assembly, and undermines the effectiveness of the Assembly as an institution. On the other hand, the lack of political parties fosters the characterization of politics as the field of competing, particular, rent-seeking interests.

### **3. RENT-SEEKING BEHAVIOUR AND INTEREST GROUPS ENDEMIC IN THE KUWAITI POLITY**

This paper argues that rent-seeking is undermining the development of Kuwait's political institutions. This is exacerbated by the fact that Kuwait is a rentier state. Rentier states tend to develop a socio-economic-political system that rewards and encourages rent-seeking (Losman 2010: 443). This section explores the impact of rent-seeking on Kuwaiti political rules and the development of democratic institutions in an environment where politicians continuously engage in rent-seeking behaviour. Rent-seeking is 'a term used by economists to describe actions taken by individuals and groups to alter public policy in order to gain personal advantage at the expense of others' (Van den Hauwe 1999: 615). As a consequence, rent-seeking is 'designed to describe behaviour in institutional settings where individual efforts to maximize value generate social waste rather than social surplus' (Brooks and Heijdra 1988: 4). Thus, the process of expending resources in an attempt to influence public policy outcomes

is called rent-seeking. The resources spent create no social product and, as a result, are regarded as social waste.

The spread of rent-seeking behaviours is having an impact on the social norms of society as, according to Ikeda,

rent-seeking tends over time to encourage growing numbers of ordinary people to engage in it, trying to acquire political power either to gain advantages over the less powerful or as redress against the mounting advantages and political power of others. It thereby sets into motion a troubling dynamic that over time progressively erodes respect for the rule of law, limited government, and private property. (Ikeda 2003: 26)

This is exactly what is happening in Kuwait as rent-seeking is becoming the norm, and the notions of public interest and rule of law have eroded in society since the early 1980s.<sup>23</sup> For instance, public sector salaries and subsidies increased by 540 per cent from 2001 to 2011 (Al-Qabas 2011). This is also reflected in various studies conducted by the International Monetary Fund in relation to Kuwait's budget (Figure 1).

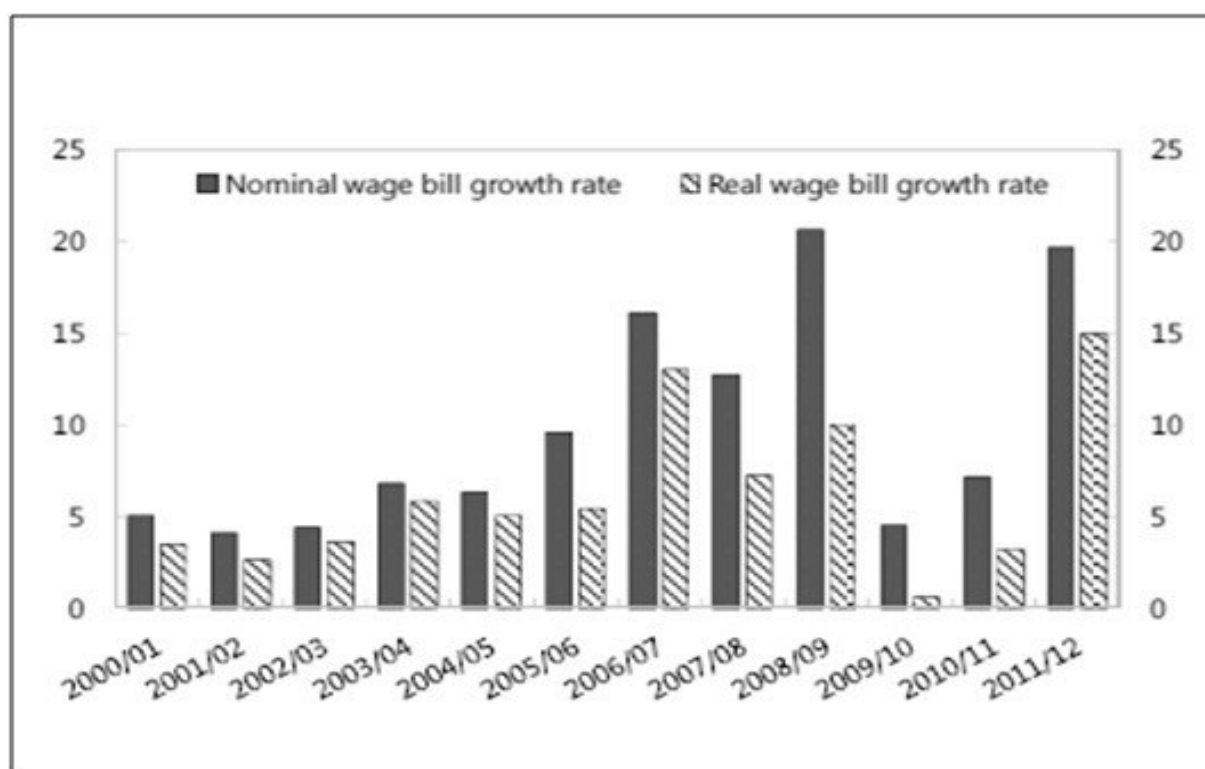
This rent-seeking trend can also be found in other Arab countries. For example, Lust-Okar maintains that in Jordan 'MPs can also call upon ministers and bureaucrats to allocate jobs to constituents, at times threatening state institutions or scandalizing them in parliament if they did not react positively to their requests' (Lust-Okar 2009: 10). The same practices are witnessed in the Kuwaiti parliament as MPs continue to rely heavily on advocating 'popular laws' in order to ensure re-election.<sup>24</sup> Figure 2 shows that the number of popular bills introduced by MPs in the thirteenth term (2009–12) amounted to 39 per cent of the total

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<sup>23</sup> Government public expenditure has increased sharply since the early 2000s. For instance, total government subsidies jumped from KWD817 m in 2005 to KWD3,372 m in 2010. Wages and salaries jumped from KWD2,125 m in 2005 to KWD4,047 m in 2010. For more details see IMF (2011). A number of arguments have been presented to explain the continuous decline of the functioning of the parliament. These include the impact of a new electoral law that was implemented in 1980 by an amiri decree introducing twenty-five districts instead of the existing ten. Some believe that this had a negative impact on the performance of parliament. In addition, the naturalization of Bedouin in the 1970s to act as a government voting bloc is associated with the decline of the role of parliament in the 1960s and 1970s. Finally, the government support of Islamists is also presented as an argument to explain the decline since the 1980s.

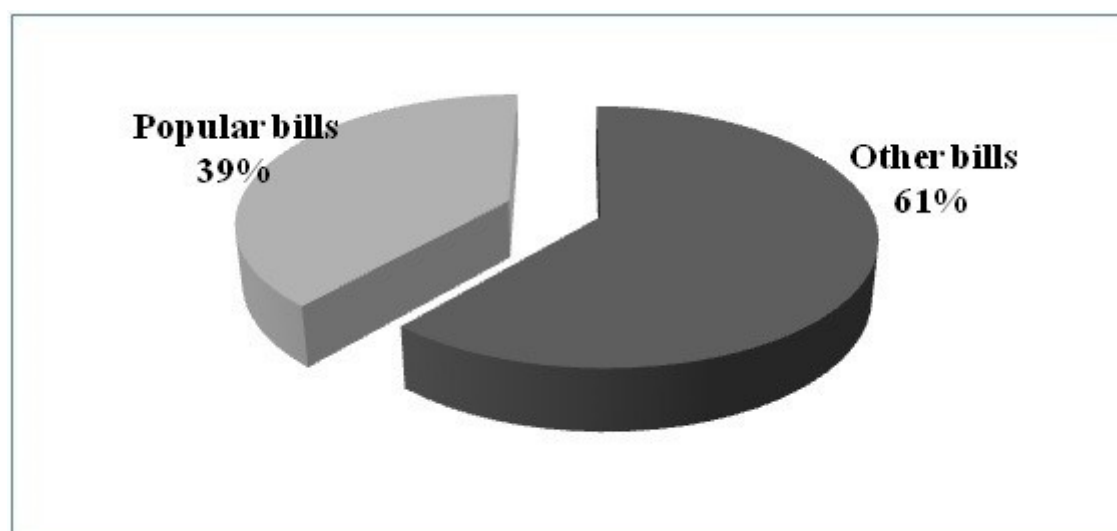
<sup>24</sup> Recently the minister of health was verbally abused by an MP for simply refusing to process a request for a *wasta* and was on the verge of physical assault. It is also interesting to see that during the drafting of the constitution, the legal expert appointed by the Council, Dr Othman Khalil Othman, raised the issue of *wasta* when Article 115 was being discussed, as this Article stipulates that '(1) The Assembly sets up, among its annual standing committees, a special committee to deal with petitions and complaints submitted to the Assembly by citizens. The committee seeks explanation thereon from the competent authorities and informs the person concerned of the result. (2) A member of the National Assembly may not interfere with the work of either the Judicial or the Executive Power.' Dr Othman gave as an example that he would not expect the MPs to discuss these matters by going to the ministers' offices, in order to ensure the purity of the relationship and avoid any influence that the government might exercise on the MPs. This is a good example of a case where the reality is the opposite of what the founders of the Constitution anticipated.

**Figure 1.** *Wage bill growth rate, 2000/1–2011/12 (percent)*



Source: Country authorities and IMF staff estimates.

**Figure 2.** *Bills proposed by MPs in the thirteenth term (percent)*



bills proposed by MPs. This indicates the extent of rent-seeking behaviour in the parliament, as such behaviour is the traditional mechanism for the great majority of MPs to ensure re-

election and hence avoid the need to advance structural reforms to the political system in Kuwait. This is also reflected in a survey conducted by the National Assembly statistical office regarding citizens' priorities in relation to expected legislative action: in the top five were the expectation that parliament would pass a law that compels the government to assume consumers' debt and increase salaries (Kuwait National Assembly 2012: 16).

Rent-seeking behaviour is not limited to the government; rather, it is endemic in the Kuwaiti polity. A good example is a law passed in 2009 by the National Assembly with a majority of thirty-five out of fifty-eight votes. This law mandates the dropping of interest payments on all consumer loans and mandates that the state will instead pay the interest on behalf of the citizens.<sup>25</sup> According to Al-Shall (2011), it is estimated that the cost of this law would be in the area of KWD1.5 billion. The demand for such a law was the theme of the election campaign of one of the MPs, Dr Thaif Allah Bo Ramia.<sup>26</sup> His absurd proposal and campaign initiated a new era of wealth distribution and rent-seeking behaviour in the Kuwaiti polity. Another example was the January 2011 announcement by the amir that each Kuwaiti should receive approximately US\$3,350 as a gift, at a total cost of around US\$5 billion (Al-Shall 2011). Liberal economists such as Hayek and Buchanan argue against state intervention to impose equalizing policies as they contend that such state policies diminish the concept of risk and kill incentives to work and invest. This is the case in Kuwait, as the distributional efforts of the legislature, government policies and the encouragement of rent-seeking behaviour are leading to moral hazard, and resulting in a competition between the government and the National Assembly to engage in rent-seeking and wealth distribution as part of a power struggle.

Interest groups, that is, 'any group between the individual and the state that seeks to influence public policy for its private gain' (Farber & O'Connell 2010: 262), play a major role in promoting rent-seeking behaviour in a rentier economy. Indeed, public choice theory states that 'groups that can organize for less than a dollar in order to obtain one dollar of benefits from legislation will be effective demanders of laws' (Mueller 1996: 521).<sup>27</sup> Interest groups are very active in Kuwait, especially when it comes to merchants, labour unions and social

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<sup>25</sup> This is an extreme example but a good illustration of the extent of 'public rent-seeking' in Kuwait. Fortunately the law was rejected by the amir but the National Assembly has a chance of passing it again in the next legislative term and overriding the amir's veto. For more details on this proposal see Al-Shall (2009a).

<sup>26</sup> Dr Thaif Allah Bo Ramia is a medical doctor, so any claim that he was not properly educated is not valid: he understood the implications of his proposal, for which he fought for more than four years.

<sup>27</sup> For a general introduction to public choice theory, see Shugart (2007).

networks.<sup>28</sup> In Kuwait, the majority of the population became an interest group and started to dip into future generations' welfare by exhausting current resources. This trend is of particular concern in a rentier state like Kuwait where the main source of revenue for the state is not the result of real economic activities that are taxed, but oil.

Some structural design to protect the interests of future generations was implemented in the 1970s as Law No. 106/1976, establishing a future generation fund in case oil depletes. This is funded by a deduction of no less than 10 per cent of total oil revenue per annum. The government decided in the 2012 budget to increase the deduction from 10 per cent to 25 per cent for that particular fiscal year only (Al-Shall 2012). It is hoped that such a percentage becomes permanent in order to strengthen this fund. According to local newspapers the value of the fund investment as of 2012 was estimated to be around US\$262 billion. This fund ensures an acceptable cushion for future generations, although prior practices in Kuwait undermine this severely. For example, in the 1980s and 1990s the government used to dip into this fund to cover its deficit in the form of loans, making it in reality a saving account for the government rather than for future generations (Al-Shall 2012).<sup>29</sup>

According to Tollison, 'those who "supply" wealth transfers are individuals who do not find it cost effective to resist having their wealth taken away' (Tollison 1988: 343). However, in Kuwait, those whose wealth is being stripped away are the future generations of Kuwaitis and not the 'tax payers'. Because future generations are voiceless, a state of apathy regarding them is created. In fact, such apathy is shifting towards the demand side, as wealth distribution is becoming the norm and demands are emerging from all sectors of society to exploit future generations' share of resources for the benefit of the current generation. In effect, a new institution has been introduced into the Kuwaiti polity: wealth redistribution. To escape this rentier state flaw, a new legal definition of the notion of public ownership of natural resources is needed. A new definition of public ownership that can reduce the current rent-seeking behaviour and help the nation escape the rentier state dilemma will be introduced below.

One of the consequences of being a rentier economy, according to Karl, is that 'instead of a capitalist class, nouveau riche – fabulously and ostentatiously rich and dependent – characterize oil states. But because this wealth is the result of a windfall as well as privileged

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<sup>28</sup> One reason behind their activism is the fact that the government cannot dissolve such a union without a court order. Recent strikes by a number of public sector agencies have shown how powerful they are, as the government accepted all of their demands.

<sup>29</sup> For more details, see the newspaper *Al-Qabas*, <http://www.alqabas.com.kw/node/112574>.

links to the state, and because it may be largely independent of merit-based efforts made by citizens, this pattern of wealth-creation encourages rent-seeking as well as a tendency to live beyond one's means' (Karl 2007: 14). This is evident from looking at consumers' borrowing behaviour; for example, by the end of 2008, the total amount of consumer credit was around KWD4,883 million, and the total government expenditure in that year was KWD17.7 billion (Al-Shall 2009a). Such expenditure trends are unsustainable, especially if we take into consideration that Kuwait has an established welfare system. Education is free, electricity is almost 80 per cent subsidized,<sup>30</sup> and interest-free loans are given to all citizens to build their residences to the amount of approximately US\$210,000.<sup>31</sup> This is a reflection of the corruption Thomas Jefferson warned of, 'when they [the heads of government] will purchase the voices of the people, and make them pay the price' (Jefferson 1782). This endemic rent-seeking phenomenon is acting as a major obstacle to democratic development, and delaying the maturing of the current political system by 'bribing' society and buying its silence (Abdulla 2010: 19–20). The executive branch is the catalyst of such a trend and historically has institutionalized such practices. The recent spread of legislation based on rent-seeking is a consequence of government policies rather than the cause of this phenomenon.

These shortcomings lead us to believe that more structural changes are needed to ensure that future generations' interests are preserved. Hence the second half of this paper will emphasise the need to incorporate a constitutional safeguard against rent-seeking and to introduce protection for future generations via a stakeholder-based definition of what constitutes public ownership.

#### **4. CONSTITUTIONAL DESIGN AND RENT-SEEKING BEHAVIOUR IN KUWAIT**

One of the objectives of constitutions is to avoid a Hobbesian state of nature and to design social cooperation (Farina 2005: 191–2). According to Hirschl, constitutional design 'suggests that desirable social and political outcomes may be accomplished through optimal institutional planning and implementation. It often engages in a quest to find the best or most suitable constitutional rule' (Hirschl 2009: 1339). In transitional societies such as that of Kuwait, the relationship between society and the state is complex. There is a struggle over state resources between tribes, religious groups, social classes and other interest groups (Ghabra 1997: 359).

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<sup>30</sup> Kuwait's consumption of electricity (with a population of 3.4 m) is greater than that of countries such as Ireland (population 4.5 m) and Denmark (population more than 5.5 m).

<sup>31</sup> For more details regarding the welfare system in Kuwait, see El-Katiri, Fattouh and Segal (2011).



This complex relationship is reflected in the Kuwaiti polity and the rent-seeking behaviour of the voters and interest groups as well as the royal family.

The formation of the Kuwaiti Constitution was the result of collective decision and negotiation processes that involved a number of interest groups. These took place via the Constitutional Council, elected and formed of twenty members. This body then drafted the Constitution in 1961 (Abdul Reda 1991). The ministers in the Council of Ministers were ex officio members of the Constitutional Council, and they participated in the deliberations. Yet they did not vote, as the amir instructed them to abstain from voting on the final draft to ensure that only elected members voted on the Constitution. The royal family was the main interest group that had the most influence on the formation of the Constitution as well as the greatest stake, along with other groups such as the capitalist elite and the political liberal reformists.<sup>32</sup>

According to Moe and Caldwell,

in all democracies, the formal structures of the government arise out of politics, just as public policies do. There is no practical way of separating the two, for all political actors know that structure is the means by which policies are carried out or subverted, and that different structures can have enormously different consequences. As a result, there is inevitably a 'politics of structural choice'. (Moe and Caldwell 1994: 173)

The reformist liberals and the royal family engaged in such behaviour during the drafting of the Kuwaiti Constitution, which led to the adoption of a hybrid political system.<sup>33</sup>

The wording of the Constitution reflects this negotiation process, whereby the interests of the royal family as a participating group in the formation of the Constitution were amply acknowledged. For example, instead of the term 'vote of no confidence in the prime minister' we see that the words 'difficulties of cooperation' are used (Baaklini 1982: 364–5). Also, instead of stating that the amir has the power to 'veto a law', the founders of the Constitution adopted the phrase 'to request the parliament to reconsider the proposed law' as a sign that legislative powers rest with the National Assembly (Kuwaiti Constitution, Art. 66). Others consider that the adoption of such wording shows the desire to link the Constitution with the country's Islamic heritage instead of merely reflecting Western doctrines (ibid.).<sup>34</sup> However,

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<sup>32</sup> Such as Dr Ahmed Al-Khatib; for more details of the social structure of the society at that time, see Ghabra (1997: 358–72).

<sup>33</sup> See the Constitution formation treaties, as the Kuwaiti Constitution blended the presidential and parliamentary system.

<sup>34</sup> This power is qualified, as the parliament can overcome the amir's veto if two thirds of the members vote for the same law.

this cannot be evidenced when one examines the minutes of the Constitutional Council deliberations, as there is no reference to such a thing. The amir's powers were qualified in the Constitution; for example, the National Assembly was to approve the appointment of the crown prince, the future amir of the country (Abdulmalek 2003: 311).

Mbaku believes that, 'after constitutional rules have been adopted and the apparatus of state established in a country, there exists an incentive for citizens to capture the government and use its redistributive powers to enrich themselves. Each political choice has a distributional effect, and participants in political markets have preferences about these effects and about public policy outcomes' (Mbaku 1998: 196–7). As mentioned in section 2, the Kuwaiti Constitution's failure explicitly to recognize political parties has led to an environment that has exacerbated rent-seeking behaviour. The recognition of political parties would reduce such behaviour, as political parties, through their organizational structure, increase the associated costs of engagement in this behaviour. For example, as a general rule, political parties tend to act as a unit; hence there is an internal negotiation and there are bargaining costs associated with any decision that needs to be adopted by the party. Also, the stakes of any political party are much higher than those of independent political agents. This eventually increases the costs of engaging in rent-seeking.

The abundance of resources has led to a growing percentage of the population that would like to see a continuation and exploitation of the welfare state model that Kuwait has adopted since its independence, and further wealth distribution. Notable is, for instance, the rent-seeking behaviour of civil servants, who push the executive to increase their salaries regardless of the long-term effect on the productivity of the workforce or the sustainability of such rent-seeking behaviour – especially if we take into account that more than 90 per cent of Kuwaitis work in the public sector and represent a substantial portion of the voters.<sup>35</sup> According to Mbaku it is commonly known that 'civil servants usually attempt to maximize their total compensation package through their influence on the political system' (Mbaku 1998: 195). In addition, when 'the effective law of the land makes it difficult to take the property of others or to force others to pay for projects favoured by you and your interest group, rent-seeking is unattractive' (Gwartney and Wagner 1988: 19). Rent-seeking costs for voters in Kuwait are almost zero because it is the property of future generations that is being exploited, and they are the ones that will pay for and suffer from such behaviour.

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<sup>35</sup> For more analysis of these proposals, see Al-Shall t (2008a, 2008b).

A crucial matter pertaining to the effectiveness of a constitution is the provision thereby of constitutional backup safeguards for the enforcement of the constitution itself. According to Ginsburg and Elkins, ‘actors engaged in constitutional design may seek to adopt rules that will advantage them in post-constitutional politics’ (Ginsburg and Elkins 2009: 6). Similar trends can be found in the deliberations in the Constitutional Council when Sheikh Saed Al-Abdullah Al-Sabah, son of the amir at that time, refused two of the amendments that Dr Ahmed Al-Khatib, one of the liberal reformists, had suggested, especially those that related to Article 80, which stipulates that ministers shall be considered to be ex officio members of the National Assembly. The rejection of Dr Al-Khatib’s proposal meant that the government can occupy up to one third of the National Assembly, with qualified authority especially in the case of interpellations, as the ministers are not entitled to vote in such situations. The insistence of the royal family on adding such an article to the Constitution was to ensure that they and the government would, in future, enjoy a major influence on the National Assembly and preserve some of their authority.

Ginsburg argues that

a constitution that focuses on the public interest may generate insufficient political support at the phase of ordinary politics to withstand interest group pressures for modification ... Thus constitutions require self-enforcement, and will endure so long as parties believe they are better off within the bargain than in risking new constitutional negotiations. The constitution becomes an equilibrium outcome. (Ginsburg 2010: 265)

This required self-enforcement is absent in Kuwait as the main interest group, namely the royal family, who are supposed to be the self-enforcers of the Constitution, do not believe fully in the Constitution; indeed, history shows that they have made various attempts to defuse it.<sup>36</sup>

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<sup>36</sup> In the early 1980s, a number of amendments to the Constitution were introduced to increase the powers of the royal family. For more details, see Lawson (1985), Al-Khatib (2009) and Yetiv (2002). The balance of power in Kuwait shifted in favour of the crown with the discovery of oil as the historically balanced relationship between the crown and the merchants (wealth holders) was distorted. The institutions that existed prior to the discovery of oil were mainly informal; no parliament or any other formal institutions existed in the year 1938. The discovery of oil empowered the crown, giving it absolute independence from Kuwaiti society. At the same time it eroded the independence of the merchants and the elite, as they became dependent on the crown. An interesting comparison can be drawn with the history of the monarchy in England, where the crown suffered from a number of setbacks such as the dethroning of Charles I and James II, which taught that the crown’s irrational behaviour would not necessarily be tolerated by the people. The fiscal deficit that the crown suffered from in the seventeenth century also contributed to a more balanced institutional relationship between crown and parliament. None of these or any similar events have occurred in post-independence Kuwait, with the exception of the Iraqi invasion of Kuwait in 1990, which showed the crown the importance of enforcing and following the Constitution.

According to Ginsburg and Elkins, constitutional self-enforcing results from having an

equilibrium [that] is enforced through groups in society policing transgressions. When a violation occurs, the subjects of the constitution face a severe coordination problem. They can take steps to uphold the terms of the constitution, but only if they can engage in collective action, which requires coordination among the individuals or groups that make up society. If they successfully resolve the coordination problem, the constitution is enforced, and it is possible that the ruler will refrain from transgression in anticipation of such enforcement. (Ginsburg and Elkins 2009: 10)

The absence of dynamic civil society and official parties in Kuwait acts as a major obstacle in the case of any coordination efforts.<sup>37</sup>

In any robust political system, informal safeguards against any hijacking of the official institutions – legislative and executive branches – exist.<sup>38</sup> To be efficient, to be self-sustaining and to deter any undemocratic behaviour, backups depend on political participants who comply voluntarily with the constitution; otherwise they would defy the purpose of such systems (Gardner 2005: 294). The Constitutional Court is an example of such a ‘backup system’ that was embraced by the Kuwaiti Constitution to serve as a safeguard; however, it has mostly failed as a functional backup. For example, the Constitutional Court failed to examine the constitutionality of electoral law prior to the granting of women’s political rights. The reason for its failure is Law No. 14/1973, which established the Constitutional Court and its operating rules, as it severely limited public access to the Court. Consequently, the scope and the function of the Court were restricted.<sup>39</sup> For comparison, historically in the USA the Pennsylvania Council of Censors that existed in the eighteenth century was a body in charge of reviewing every seven years to what extent the branches had followed the Constitution, and making recommendations accordingly. Having a similar institution on a formal basis is not something that is impossible; it can be formed but, to have more credibility and trustworthiness, it is preferable that such a function emerges from civil society rather than the state.

Reforming the Constitutional Court would be a viable option, as Kuwaitis trust the judiciary. A survey conducted by the United Nations Development Programme (UNDP) found

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<sup>37</sup> The Chadian experience in managing oil revenues is one that Kuwait can learn from. In Chad, civil society plays a major role in monitoring and supervising the use of these resources. This was brought about through the establishment in 1999 of a Monitoring Commission that overlooks the spending and impact of oil. See Alexander and Gilbert (2010: 38–40).

<sup>38</sup> For more details on self-sustaining constitutions and the role of democratic backup systems in the face of undemocratic behaviour, see Gardner (2005: 293).

<sup>39</sup> For more detailed analysis of the Constitutional Court in Kuwait, see Abdulmalek (1986).

that around 80 per cent of the respondents believed that they would have a fair trial in Kuwait (UNDP 2009: 60). More recently the Constitutional Court has begun to play a major role in safeguarding the Constitution, especially when it comes to unconstitutional laws. For instance, in 2007 the Constitutional Court ruled that some of the provisions of Law No. 65/1979 are unconstitutional, as they breach the doctrine of freedom of gatherings that the Constitution protects (Kuwaiti Constitutional Court Decision, 1 May 2006). This 1979 law introduced a number of restraints on gatherings, as it required their prior approval by officials; otherwise the gathering would be considered in violation of the law. The Constitutional Court decision nullifying substantially the major part of the law was a milestone in the history of freedom in Kuwait. In this context the Constitutional Court can operate in an efficient manner and act as a true safeguard of liberties and constitutional doctrines.

Civil societies play a pivotal role in Western states, as they monitor all formal institutions and, most importantly, counterbalance state power (Peerenboom 2003: 200). Despite the absence of a unified definition of civil society, an integral element of any 'true' civil society is its independence from the state. One of the main functions of civil societies is to act as informal gate-keeping 'watchdogs' over the state's activities. This informal institution can be considered as part of the 'backup systems' or the second line of defence against constitutional hijacking. However, the paradox is that these institutions function within guarantees offered by the state; that is, their functioning is within the institutional setting that the state introduces, and these institutional guarantees are considered to be vital for the existence of civil society (Tushnet 2000: 380). Hence, if they cross the line, civil societies are threatened with retaliation from the government. This is exactly what happened in Kuwait in the late 1970s when the government, as a punishment for its political resistance, closed the Independence Society.

Furthermore, parties that are not officially recognized hijack Kuwaiti civil society, and hence there is a major overlap between political societies and civil society activities (Fakhro 2005: 3). This overlap is natural, as civil society institutions are expected to influence policy-making in any given country. However, the separation is usually apparent between political parties and civil society institutions; that is, they are two different groups. In fact the situation in Kuwait is that political societies, due to the absence of a legal framework for their operations, ended up occupying civil society institutions and politicized their activities, as civil society acts as an operating platform for them. This resulted in an additional handicap on the operations and dynamism of Kuwaiti civil society. According to Fakhro, 'Gulf

Cooperation Council states have not yet fulfilled the basic requirements that constitute civil society ... [the] state has successes in transforming the civic society institutions to organizations performing as an extension to the state apparatus' (2005: 6).

The role of informal institutions such as customs, civil societies, social networks and religion cannot simply be excluded when one is assessing the institutional structure of any given country. According to Tocqueville, 'without active participation on the part of the citizens in egalitarian institutions and civil association, as well as in politically relevant organizations, there will be no way to maintain the democratic character of the political culture or of social and political institutions' (Tushnet 2000: 379). What Tocqueville is referring to are the informal institutions, 'safeguards', that are essential to complete the full picture of a democratic system that can function efficiently.

In effect, the *Diwanias* are the only true independent civil society institutions in Kuwait. They are informal social gatherings that do not require any formal permission or application. They are truly free, and this is why we see that the *Diwania* was the only institution that performed a patriotic role as a political opposition to the government's unconstitutional decision to dissolve the National Assembly in 1986 (Al-Mubarak 2008). To a large extent, the *Diwanias* are similar to Western coffee houses in the seventeenth century as institutions that first emerged in civil society, according to Habermas. The main reason for the survival of the *Diwanias* is simple: they are places within the private property of individuals, and hence they are outside the domain of the state. In Kuwait, civil society institutions are regulated by Law No. 24, issued in 1962.<sup>40</sup> According to this law, the Ministry of Social Affairs is responsible for monitoring and licensing these institutions and also for offering them state subsidies. So the government not only sets the institutional framework for civil society activities and operations, but offers subsidies and funding. Such an environment is simply undermining the role and independence of civil society institutions. This means that one of the main informal backup systems is barely functioning.<sup>41</sup>

Can civil society play the same role in Kuwait as it does in the West? In liberal democracies, the state is considered to be a necessary evil and hence civil society is one of the mechanisms to balance and limit state power. Thus in order to answer the previous question it is crucial to ask: is the state considered to be a necessary evil in the Kuwaiti polity? In fact this may not be the case, as the state is playing a more paternalistic role, especially with its welfare

<sup>40</sup> A 2007 study counted fifty-five societies with 40,000 members in Kuwait (Rishmawi and Morris 2007: 16).

<sup>41</sup> Some civil society institutions have been politically active against state intervention and excessive use of state powers, e.g. the Kuwait Lawyers Association.

system. The absence of the conceptual notion that civil society needs to limit and counter the power of the state undermines the effectiveness of civil society as a safeguard in Kuwait. This is also evident in the literature concerning other rentier states in the region, where rent-seeking politics is widespread. For example, the National Center for Studies in Bahrain states that civil society institutions in the GCC serve as ‘intermediaries working between official government bodies and the family unit’ (Al-Alekri, Janahi and Hafith 2010: 5). Thus, the next section will argue that constitutional reforms are crucial in order to tackle the negative effects of rent-seeking behaviours in Kuwait.

## **5. RECOMMENDED INSTITUTIONAL REFORMS**

As has been illustrated above, the ongoing political dilemmas and institutional failures in Kuwait are reflected in its constitutional shortcomings in relation to, inter alia, the fact that it is a rentier state. In addition, the imbalance of power that the government enjoys especially in the economic and political arena has played a crucial role in its dysfunctional polity.

To date, instead, reform efforts have always been targeted at changing individuals and influencing the behaviour of political agents.<sup>42</sup> However, these efforts continue to have their share of success and failure, with failure dominant. According to *Al-Shall Weekly Economic Report*, if Kuwait had a selection process that was transparent and based on qualifications and suitability, things would be solved for the decision makers and a brighter future would be guaranteed for the country (Al-Shall 2009c). However, this will never happen, and even if it did then it would only be temporary, as history proves.

This continuous failure is simply due to a systematic failure in the rules of the game, rather than the failure of individuals. It is rooted in the structural setting in Kuwait. Recall that Wicksell as early as 1896 ‘called attention to the significance of the rules within which choices are made by political agents, and he recognized that efforts at reform must be directed toward changes in the rules for making decisions rather than toward modifying expected results through influence on the behaviour of the actors’ (Van den Hauwe 1999: 611). This is exactly what Kuwait currently requires: raising the level of effort from requests to change certain individuals such as the current prime minister to changing the rules of the game. It is no longer optional; it is a matter that goes to the heart of the evolution of the current quasi-democratic system.

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<sup>42</sup> For example, in 2009 a campaign was implemented against the former prime minister Sheikh Nasser Al-Mohammed Al-Sabah. In the past there was a civil society campaign to separate the posts of crown prince and prime minister, as historically the same person used to occupy both positions.

Certainly, these structural changes face a number of obstacles, which, as illustrated in this paper, include the fact that Kuwait is a rentier state and the spread of rent-seeking behaviour. Not only will such reforms improve Kuwait's democracy and sustainable development; they are also backed by strong arguments relating to intergenerational equity and the legal concept of property. According to Coase, 'positive transaction costs may cause the bargaining performed by individuals in their social interactions to result in an inefficient outcome' (Farina 2005: 187). The situation in the Kuwaiti political environment now can only be one of 'high transaction costs', especially when it comes to any proposed reforms that need a constitutional amendment. In legal and economic terms, this means that the positive transaction costs, according to Coase's theorem, act as an obstacle to any constitutional reform.<sup>43</sup>

In other words, uncertainty over the actions of the other party, mainly the crown as a major player in the Kuwaiti political structure, makes it too costly to explore such an option due to all the uncertainties that can emerge from pursuing it. Hence, the great majority of the opposition and political activists refuse to explore constitutional reform as an available option despite the fact that they are convinced that it is needed (Al-Talea 2006). Nonetheless, the current political tension is pushing the opposition to demand explicitly constitutional checks and especially a popular government, but these have yet to happen.

A second obstacle that hinders any real reform proposals is the rentier nature of the Kuwaiti economy. According to Heckman, 'the political economy of the welfare state is rigged against reform because so many persons are its beneficiaries. Reforms that have occurred in most states have been quite modest ... there is little internal capacity for democratic societies to reform themselves without a crisis' (Heckman 2008: 99). Kuwait is no exception to this rule; as long as oil prices continue to rise, the hope for any structural reform is limited. According to Karl, 'Petroleum creates a world of illusion because some people become wealthy without effort' (Karl 2004: 665).

Day after day, the number of beneficiaries of the welfare state model based on rent-seeking increase, gradually killing the civic spirit of the society. The legislative and executive branches continue to feed this process. For example, the legislative branch recently passed Law No. 37/2010, which stipulated that no industry can be privatized unless the new private sector owner accepts all the employees that used to work in the public sector and ensures that none of their financial benefits are affected for five years. To an extent, this is understandable

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<sup>43</sup> Again, for more details on transaction costs, see Coase (1960).



in order to minimize the social impact of privatization. However, the law does not stop here; rather, it stipulates that after the five years have lapsed, any such employee whose job in the private sector is going to be terminated shall be guaranteed a job in the government with the same financial benefits (Kuwaiti Law No. 37/2010, Art. 20). Without the introduction of this clause, the law would not have passed through the National Assembly.

Furthermore, the absence of an established taxation system is an obstacle facing any reform initiative (Losman 2010: 429–30). Unlike tax-paying societies, where the citizenry funds initiatives through taxes, when the Kuwaiti political establishment makes a political decision that requires funding it simply pays for it with oil revenue, which results in eroding activism among citizen. In tax-paying societies, individuals can engage in collective efforts to change the decision-making regime through the ballot box. In other words, in a functioning democracy, society pays directly for political decisions through taxation, which is a kind of safeguard.<sup>44</sup> Voting democracies can also change the political establishment through their votes. In Kuwait, where the citizenry pays no taxes, only the National Assembly is elected by the people while the executive branch is appointed by the amir. Therefore, the society cannot simply choose another prime minister if it is not satisfied with the current one. This is why recently, and for the first time in Kuwait's modern history, demands for a popular government became very vocal and were at the top of the opposition agenda.

It is argued here that a major factor that can shield any country from the natural resources curse is the quality of its institutions, and constitutions play a major role in shaping this (Boschini, Pettersson and Roine 2003: 1). This will minimize, not eliminate, rent-seeking behaviour and encourage good governance. As was shown throughout this paper, Kuwait is affected by being a rentier state and by widespread rent-seeking behaviour. Recall that rent-seeking implies that actions taken by individuals and groups alter public policy in order to gain personal advantage at the expense of others. In fact, 'the expense of others' needs to be liberally interpreted to capture other stakeholders, mainly future generations, in a rentier economy, due to the nature of such an economy's resources. Society in a rentier economy should be considered as a trustee of natural resources and, hence, institutions should be established to govern the society's ability to use current resources.

This is a problematic situation as it clashes with mainstream notions of state sovereignty in political science and law, because it is not common to restrict a society's

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<sup>44</sup> In some cases the political establishment can affect future generations, especially if the decision relates to sovereign debts, as those debts will be paid by future generations and not current society.

capacity to decide its own destiny and make local choices. Such a restriction on society's freedom to do whatever it desires with its natural resources, even if it were done democratically, should be an integral part of the checks and balances on any rentier economy through its constitution. Germany, for instance, has 'pioneered constitutionally anchored "debt brakes" making it illegal for governments to pile up debts that burden future generations – though also limit the freedom of action of current policymakers' (Atkins 2011). This approach is what the Kuwaiti Constitution is really missing, and with the proposal set out in this paper it is hoped that a similar institution will be introduced in Kuwait.

One can apply to the political status quo in Kuwait the theory of contractual incompleteness, which states that contracts are imperfect as it is impossible to include all future contingencies in the drafting process.<sup>45</sup> After all, a constitution is the result of a bargaining process that is analogous to that involved in drafting contracts. The founders of the Kuwaiti Constitution introduced checks and balances over the amir's political powers as an attempt to establish a more balanced political system.<sup>46</sup> However, the current Kuwaiti Constitution is far from perfect, especially if we take into account the fact that Kuwait is a rentier state and hence requires special institutions and approaches that would not usually be found in other states. The rest of this section will aim to outline a number of reforms that would result in introducing the necessary institutions that are unique to the nature of the polity and economy in Kuwait, in order to limit the evils that emerge from its being a rentier state and from rent-seeking.

The role and responsibilities of states in a rentier economy need to be revisited and the state role needs to be reshaped due to its unique economic system. The notion of directors' fiduciary duty in UK company law offers an ideal structure for the role and responsibilities of governments in a rentier economy. The objective behind this exercise is to lay the ground for a new legal definition of public ownership of natural resources, as an attempt to establish an additional safeguard for the Kuwaiti government and to curb the current widespread of rent-seeking behaviour that is eroding democratic institutions. Under UK company law, directors owe their fiduciary duty to the company rather than to the shareholders (Ferran 1999: 154–5).

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<sup>45</sup> For more details, see Hart and Moore (1999).

<sup>46</sup> For example, if the National Assembly should be dissolved and no election called within two months, the dissolved National Assembly members regain their status and membership *de facto*, according to the Constitution. However, it seems that, in practice, this clause has proved to be ineffective and, hence, a new mechanism to induce cooperation between the amir as institution and a freely elected National Assembly makes the legitimacy of the former conditional on the presence of the latter. This constitutional reform can act as a self-enforcement mechanism for the Constitution and as a safeguard to its continuation from any transgression.

This is an interesting approach, as one can ask: why is it not to the shareholders? After all, they are the ones that have injected capital into the company and actually formed the company. And is there really a difference between the shareholders and the company that justifies such a distinction? These are all valid questions, which I shall explore in this section before drawing out the similarities and differences between a corporation and the political structure of a state.

The distinction that UK company law introduced between the interests of the shareholders and those of the company is insightful. In *Percival vs. Wright*, the House of Lords decided that directors owe their fiduciary duty to the company rather than to individual shareholders (UK High Court, *Percival vs. Wright* (1902) 2 Ch 421). In addition, the courts have decided that a company includes present as well as future shareholders. This is an interesting analysis of what constitutes a company. Such an approach can be applied to a rentier state setting by equating future generations with future shareholders.

I am proposing that the fiduciary duty of the political bodies under the Kuwaiti Constitution be extended to include sustainability and the interests of future generations, especially when it comes to the expropriation of natural resources. One might argue that this is already implicit in the notion of public interest. Moreover, one might argue that this proposal stands contrary to Article 6 of the Kuwaiti Constitution, which stipulates that ‘the System of Government in Kuwait shall be democratic, under which sovereignty resides in the people, the source of all powers. Sovereignty shall be exercised in the manner specified in this Constitution.’ By limiting the authority of both the National Assembly and the executive branch, it might be argued that we are undermining the will of the people. However, this is not true, for one clear reason: the Constitution is already full of provisions that aim at protecting fundamental rights such as those of free speech and academic freedom, and these rights supersede the legislative authority of the National Assembly and the executive power of the government (Kuwaiti Constitution, Arts. 30–49).

A further objective of this reform is that if such a restriction were introduced with the presence of an active and well-established Constitutional Court, then that might advance the longstanding plan to diversify the economy by limiting the use of natural resources as the major source of funding for the state, and create a positive environment for democratic evolution. This could force the state to engage in real economic and political reform activities. Introducing a new definition of ownership of natural resources to the political bodies in Kuwait would mean that many of the rent-seeking laws that both the government and the

National Assembly are championing could be challenged, on the basis that they are unconstitutional because they are against the interests of future generations and undermine the sustainability of the economic system. As a result of minimizing rent-seeking behaviour, the corrupting impact of these practices would be reduced and the quality of political institutions enhanced, by shifting their focus from continuous encouragement of rent-seeking behaviours to more productive activities that would contribute to the evolution of the political environment in Kuwait. In addition, society activism would increase, as currently rent-seeking behaviour is essentially discouraging a great portion of society from engaging in any proper evaluation of these political bodies.

According to Lehari, property rights, which are political institutions, have three main characteristics. First, they are the result of ‘conscious decisions by the state’ (Lehari 2008: 1993). Second, the state is not merely a private coordinating institution; rather, it plays a major role in creating and developing property rights regimes. Finally, since the state as an institution is not simply a private coordinator, its decisions need to be based on different grounds from those that are applicable in private markets (ibid.: 1994–5). Public reasoning in this case becomes integral to the process of creating property rights regimes. Adopting this approach means that there is no ‘single or formal’ structure of property regimes; rather, it is the structure that the state chooses to have in the light of public reasoning, adding in any values or goals that are desired (ibid.: 1998). In the words of Lehari, property is ‘understood as a jurisprudential framework the primary purpose of which is to delineate basic kinds of entitlements and obligations in regard to certain types of resources’ (ibid.: 2004). This means that the notion of property rights is something that can be reshaped according to economic, social, political and even ethical or philosophical interactions. All of this depends heavily on the environment that exists at the time that these rights are formed and/or redefined.

The property right in natural resources presents true economic, political and ethical dilemmas in rentier states. For instance, transforming it into public ownership ensures, to an extent, that any appropriation will be within the political system of the state, and if it is one that is democratic, or quasi-democratic like the one in Kuwait, this means that it will ensure that the great majority would benefit from it. Public ownership of natural resources is currently the trend globally as, according to Groves, ‘[it is a] nearly universal principle that oil ... [is] the property of the State and is to be managed by the State for the benefit of its citizens’ (Groves 2005: 83). For instance, can the current generation decide, even unanimously, to extract all the oil, sell it, and distribute the proceeds to the current citizens?

Under the current legal definition of public property, it is possible, but is it ethical, or, even more, does the current society have the right to do so?

The reason for proposing a new legal definition for public property ownership of natural resources is the fact that such ownership now lacks an important legal element, namely any consideration paid by the current generation to justify ownership. What was the consideration in legal terms that the current society paid in return for claiming absolute ownership over such a natural resource? The answer is: nothing. It was a mere stroke of luck that a given country ended up having such a reservoir of natural resources. Hence, rentier states' ownership of natural resources is akin to the position of a trustee rather than full legal ownership.

The proposed redefinition of a natural resources legal ownership framework, which introduces a stakeholder matrix as the model for such ownership, is not unusual or unheard of in constitutional law. For example, the US Constitution imposes certain limitations on the use of natural resources.<sup>47</sup> Also, this proposed alteration of the legal framework would be similar to the current development in the US courts in reference to the doctrine of standing, where the courts have expanded the definition of constitutional standing beyond economic injury to include environmental and other non-economic injuries (May 2009: 140). This proposed reform would add an additional safeguard on governments, provided that there is, to an extent, an independent judiciary. It would also force the government to deal with these resources reasonably and push for the real economic diversification that everyone is discussing, but about which so little has been done (Al-Shall 2010b).

In sum, the main advantage of the proposed alteration of the legal framework for natural resources is that it would allow individuals to challenge any act by the government and/or National Assembly that would violate the individuals' interests or those of future generations, on the grounds that the government and/or National Assembly are not entitled to utilize natural resources without taking into consideration the interests of all stakeholders, including those of future generations. This would be the case provided that the other proposed reforms in this paper were incorporated, mainly the introduction of political parties and reforming the Constitutional Court to give access to individuals to petition the court directly, as has been done by many countries, such as Switzerland and Spain.

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<sup>47</sup> The majority of these restrictions relate to commerce clauses etc. For more details on this topic, see May (2009).

## 6. CONCLUSION

The objective of this paper is to introduce an institutional analysis of the current political impasse in Kuwait. The spread of rent-seeking behaviour and the absence of a self-enforcement environment for the Kuwaiti Constitution are acting as two major obstacles to the evolution of the Kuwaiti polity. The transitional phase that Kuwait is in currently is being prolonged by a number of institutional shortcomings in the state structure. These include the absence of legally recognized political parties and the dominance of the executive branch over the National Assembly, as a result of the institutional framework that was introduced by the 1962 Constitution. A fair political structure and a true balance of power are missing in Kuwait. The Constitution is not operating in a politically sustainable environment. According to Hamilton, ‘Whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government’ (Hamilton 1788).

This paper identified how reforming and reinvigorating a dynamic set of ‘safeguards’ in the Kuwaiti polity, such as a constitutional court, and the introduction of a new public ownership legal definition, based on stakeholding in natural resources, could have a positive impact on the evolution of the political framework in Kuwait. The proposed legal ownership of natural resources would help in reducing existing rent-seeking behaviour by introducing new limits on the use of natural resources. Moreover, it would reduce the rentier impact of the current institutional setting by giving official legal recognition of future generations, along with extending the fiduciary duty of the legislative and executive branches to include the interests of future generations. Therefore, this would , inter alia, contribute to solving the current political impasse.

Finally, the paper identified a number of obstacles facing the reform agendas in Kuwait. These obstacles are exacerbated by the death of civil society as a catalyst of any real reform and by the spread of rent-seeking behaviour, which is sowing the seeds of self-destruction within the society. In other words, the spread of rentier ideology is mutilating political institutions in Kuwait.<sup>48</sup> After all, democracies are not the result of declarations or

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<sup>48</sup> I use Douglass North’s definition of ideology as ‘the subjective perceptions that people have about what the world is like and what it ought to be; ideology therefore affects people’s perceptions about the fairness or justice of the institutions of a political economic system’ (North 1988: 15).

constitutions only, as Judge Learned Hand stated:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. (Hand 1952: 99–100)

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Fahad Al-Zumai is Assistant Professor of Law and Vice President for Administration and Finance Affairs at Gulf University for Science and Technology. He is also an Associate Researcher at the Centre of Islamic Studies at SOAS, University of London and a Visiting Lecturer at Westminster University School of Law. Dr Al-Zumai has participated in a number of legislative drafting committees in the National Assembly in Kuwait and the Kuwaiti government legislative drafting committees.

Dr Al-Zumai holds his PhD in Law from SOAS, an LLM in International Business Law from the University of Manchester, Master of Law from the University of California-Berkeley, LLM Corporate Finance Law University of Manchester and MA International Business from London Metropolitan University. He has published in a number of journals on topics relating to capital markets regulations in the Middle East and Europe, Islamic finance and law and economics, in particular the impact of rentier state on economic regulations development.

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