Transplanting Class Actions: A Comparative Analysis of the Potential of Canadian Class Actions for the Kuwaiti Legal System

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ABSTRACT

The absence of a class action mechanism in a legal system hinders access to justice for individuals with similar claims, as it forces them to pursue costly and time-consuming litigation independently. This duplication of efforts burdens courts with repetitive adjudication of nearly identical issues, potentially leading to inconsistent judgments. To address these challenges and improve access to justice, this thesis explores the feasibility and potential benefits of introducing class actions into the Kuwaiti legal system, drawing on the Canadian class action model, particularly the frameworks in Quebec and Ontario. In doing so, the thesis addresses key questions such as whether class actions could be successfully transplanted into the Kuwaiti legal system, the challenges of transplantation, and how these challenges can be effectively addressed. Using a doctrinal comparative approach and drawing on the theory of legal transplants, this study explores how the procedural and cultural foundations of the Canadian legal system, including the mixed nature of Quebec's legal order, can inform the integration of class actions into Kuwait's procedural and cultural framework. The findings reveal significant procedural differences between Canada and Kuwait, with surprising similarities suggesting that the Kuwaiti legal system might be more receptive than resistant to class actions. The thesis finds that while class actions have traditionally developed in common law systems, their core principles can be adapted to Kuwait's legal framework, provided that certain procedural reforms are made. Accordingly, the thesis contributes to ongoing legal reform discussions in Kuwait by proposing a model for integrating class actions in the Kuwaiti legal system and jurisdictions with similar frameworks.

RÉSUMÉ

L'absence d'un mécanisme de recours collectif dans un système juridique entrave l'accès à la justice pour les individus ayant des revendications similaires, car elle les oblige à engager des litiges coûteux et chronophages de manière indépendante. Cette duplication des efforts surcharge les tribunaux avec des jugements répétés sur des questions presque identiques, ce qui peut entraîner des décisions contradictoires. Pour relever ces défis et améliorer l'accès à la justice, cette thèse examine la faisabilité et les avantages potentiels de l'introduction des recours collectifs dans le système juridique koweïtien, en s'inspirant du modèle canadien, notamment des cadres juridiques du Québec et de l'Ontario. Ce faisant, la thèse aborde des questions essentielles telles que la possibilité d'une transplantation réussie des recours collectifs dans le système juridique koweïtien, les défis associés à cette transplantation et les moyens d'y répondre efficacement. Adoptant une approche comparative doctrinale et s'appuyant sur la théorie des transplantations juridiques, cette étude examine comment les fondations procédurales et culturelles du système juridique canadien, y compris la nature mixte du système juridique québécois, peuvent guider l'intégration des recours collectifs dans le cadre procédural et culturel du Koweït. Les résultats révèlent des différences procédurales importantes entre le Canada et le Koweït, mais également des similitudes surprenantes qui suggèrent que le système juridique koweïtien pourrait être plus réceptif que résistant aux recours collectifs. La thèse conclut que, bien que les recours collectifs se soient développés principalement dans les systèmes de common law, leurs principes fondamentaux peuvent être adaptés au cadre juridique koweïtien, à condition que certaines réformes procédurales soient mises en œuvre. En conséquence, cette thèse contribue aux discussions en cours sur la réforme juridique au Koweït en proposant un modèle d'intégration des recours collectifs dans le système juridique koweïtien et dans d'autres juridictions ayant des cadres similaires.

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﴿وَإِن تَعُدُّواْ نِعۡمَةَ ٱللَّهِ لَا تُحۡصُوهَآۗ إِنَّ ٱللَّهَ لَغَفُورٞ رَّحِيمٞ (١٨)﴾

"If you tried to count God's blessings, you would never be able to number them: He is truly most forgiving and most merciful."

Qur'an, An-Nahl ("The Bee") 16:18

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﴿وَأَن لَّيْسَ لِلْإِنسَانِ إِلَّا مَا سَعَىٰ (٣٩) وَأَنَّ سَعْيَهُ سَوْفَ يُرَىٰ (٤٠)﴾

And that man shall have nothing but what he strives for (39) And that [the fruit of] his striving shall soon be seen (40)

Qur'an, al-Najm ("The Star") 53:39–40

INTRODUCTION

In 2010, several residents of the Umm Al-Hayman region in Kuwait filed lawsuits against the government, claiming damages and asking for plots of land to relocate their homes due to environmental pollutants and unpleasant odors emanating from nearby factories.[1] Over a span of 12 years, dozens of cases concerning the same events and issue were heard before the courts, resulting in repetitive litigation, judicial inefficiency, and wasted judicial resources.[2]

This is one of many cases in which a class proceeding would have been appropriate, if only that mechanism had been available. In today's modern industrialized society, the Kuwaiti legal system lacks a formal class proceedings mechanism for addressing mass disputes, and the existing procedural tools are insufficient to resolve them effectively. Recent statistics show that Kuwaiti courts registered 1,572,000 cases in 2023, 554,240 being civil cases, in a small country of only 1,520,000 citizens.[3] Courts are flooded with cases, many of which are duplicate cases involving individuals who suffered a common harm or wrong. This statistic suggests that there is a serious problem that could be resolved, in part, by considering the implementation of class actions. Such a mechanism holds significant potential for advancing access to justice, helping reduce court backlog, and promoting the consistency of judgments by aggregating similar claims. Given the Kuwaiti community's propensity for litigation,[4] along with the development of substantive rights and the variety of mass disputes that emerged, a class action mechanism is needed more than ever.

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[1] Mubarak Habib et al, "Umm Al-Hayman..a Pollution Hotspot By Court Judgment", *Alqabas* (18 July 2022), online: <alqabas.com/article/5889088>.
[2] *Ibid*.
[3] Mubarak Habib, "A Million Cases Annually", *Alqabas* (28 March 2023), online: <https://rb.gy/wsamcx>.
[4] The significant number of cases filed each month suggests that Kuwait is a highly litigious society. In September 2024, the Court of First Instance received 14,552 non-penal cases, amounting to approximately 130,000 cases annually. *See* Ministry of Justice (Kuwait), Statistics and Research Department, *Statistics: Civil Court – September 2024*, online: <moj.gov.kw/AR/Statistics/2024>; Ministry of Justice (Kuwait), Department Research and Statistics, Annual Statictical Book 2023 (Ministry of Justice 2023), online: <moj.gov.kw/Statistics/2023>.

Surprisingly, the adoption of a class action mechanism in Kuwait has never been considered before. No academic work has examined collective proceedings in the Kuwaiti context, whether to identify the absence of such proceedings, the negative implications of that absence, or possible solutions. While there have been some attempts in the literature to explore the reception of class actions in civil law jurisdictions,[5] little has been written in the Middle East context.[6] There is a noticeable lack of a structured methodological foundation in how studies approach the issue, making it difficult to establish a reliable framework for further research.

Because class actions have originated from and developed in the common law, their reception in civil law jurisdictions has been met with some concern and resistance. This hesitation stems in large part from the belief that the modern class action model clashes with long-standing codified procedural principles and inherent legal and cultural differences between common law and civil law systems. The reluctance of European civil law jurisdictions to adopt North American class proceedings has resulted in models that have shortcomings.[7] The European experience has shown how transplanting class actions can sometimes be challenging. Thus, a careful and informed approach to procedural transplants is essential to avoid these pitfalls.

Accordingly, this thesis explores the feasibility, potential benefits, and challenges of introducing class actions into the Kuwaiti legal system. It argues that class actions, as a form of collective proceedings, can be transplanted successfully into the Kuwaiti legal system. Moreover, the potential clash between class actions and long-established principles of civil procedure does not preclude a successful transplant, as the consistencies between class actions and civil law

[5] *See* e.g. Duncan Fairgrieve & Eva Lein, eds, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Oxford: Hart Publishing, 2012).
[6] *See* Nisreen Salama Mahasneh, "Class Action for Mass Tort in Comparative Law… Towards a Special Legal Regulation in Arab Laws: Qatari and Jordanian Laws as a Model" (2020) 8:1 Kuwait Intel L School J 199; Mohamed Nour Shehata, *Class Actions: An Analytical and Comparative Study of Their Necessity and Practice* (Cairo: Dar Al-Nahda Al-Arabiya, 1997).
[7] See Duncan Fairgrieve & Eva Lein, *supra* note 5.

systems outweigh the inconsistencies between them. By providing a methodology for a successful transplant, this thesis aims to encourage the adoption of class actions in civil law countries, particularly Kuwait.

While the success of such a transplant might depend on the support and guidance provided by robust empirical studies, it is first necessary to establish a theoretical foundation for these future studies. In that vein, this thesis seeks to answer several key questions regarding the feasibility and challenges of implementing class actions in Kuwait. The primary question guiding this study is whether class actions can be effectively transplanted into the Kuwaiti legal system. This involves examining the compatibility of class actions with the existing procedural framework in Kuwait and whether they are appropriate in the country's legal and cultural context. In addressing this question, the project explores related issues including identifying the key challenges that are likely to arise in transplanting class actions into the Kuwaiti legal system and how they may impact the transplant. Finally, the study considers the substantial adaptations to be made to successfully integrate class actions into Kuwait's legal system.

In answering these questions, this thesis hopes to contribute to Kuwait's ongoing legal reforms by offering a comprehensive analysis of the feasibility and potential impact of class actions, drawing comparisons with established systems like Canada. It offers a roadmap for legislators and policymakers to enhance judicial efficiency and access to justice. The findings are expected to serve as a reference for future legal reforms, fill a gap in the academic literature on Kuwaiti procedural law, and provide a methodology for successful procedural transplants. This research is significant not only in providing insights into how to successfully implement class actions in Kuwait but also in contributing to broader academic discussions on comparative law and procedural fairness in the Gulf region.

Through a doctrinal comparative approach, this thesis draws directly from the Canadian legal system to examine the nature and procedural features of class actions in comparison with individual proceedings. This includes an analysis of case law and statutory frameworks governing class actions in Canada, particularly Quebec and Ontario, in addition to drawing on the literature on both class actions and legal transplants. This method allows for a structured, informed legal transplant, providing insights into the adaptability of the class action mechanism in the Kuwaiti context. By aligning with the local legal context, this approach aims to enhance judicial efficiency and access to justice.

The structure of this thesis is designed to address the central research question systematically. Chapter One begins by framing the problem of the absence of collective proceedings in the Kuwaiti legal system – the recipient system. Chapter Two outlines the idea of legal transplants and the methods surrounding them, based on a review of the relevant literature. Chapter Three highlights the main features, advantages and challenges of the Canadian class action model in Quebec and Ontario – the donor system. Building on this analysis, Chapter Four addresses each challenge that class actions might encounter in Kuwait. Ultimately, the thesis ends by presenting a model for the Kuwaiti legal system and, potentially, other civil law jurisdictions.

Chapter One: The Absence of Class Proceedings in the Kuwaiti Legal System

As mass claims continue to emerge and increase in complexity, existing procedural tools in Kuwait remain insufficient to handle large-scale litigation efficiently. This gap raises concerns about judicial resources, access to justice, and inconsistent decisions in cases involving multiple plaintiffs with similar claims. In that vein, this chapter critically examines the absence of class proceedings in the Kuwaiti legal system. It analyzes the general provisions of the Kuwaiti Code of Civil Procedure alongside relevant sector-specific statutes to highlight the inadequacy of existing mechanisms in addressing mass claims effectively. The chapter begins by framing the problem (I) and offering a comprehensive definition of class actions (II). It then examines the procedural framework in Kuwait, identifying gaps and limitations in addressing mass disputes, both in the Code of Civil Procedure and sector-specific statutes (III).

I. The Problem in Context

The absence of a formal class action mechanism in Kuwait has significant legal and procedural implications. A prominent example illustrating these implications is the "Umm Al-Hayman" case, a mass environmental dispute that drew considerable public and media attention. Umm Al-Hayman, also known as Ali Sabah Al-Salem suburb, is a residential area located in southern Kuwait, with a population estimated at 47,302 people.[8] Several residents of Umm Al-Hayman region in Kuwait filed lawsuits against the government, claiming damages and asking for the replacement of their homes due to environmental pollutants and unpleasant odors emanating from the nearby factories.[9] Dozens of cases concerning the same issue were heard before the courts

[8] Turki Al-Mughmas, "Spotlight on Umm Al-Hayman" Alrai (18 July 2022), online: <alraimedia/article/1598916/>.
[9] Mubarak Habib et al, *supra* note 1.

over 12 years.[10] In 2022, the Kuwaiti Court of Cassation concluded in one of the cases that Umm Al-Hayman is uninhabitable due to pollution caused by factories and found that the government was at fault in designating it as a residential area.[11] The judgment ordered the government to grant the citizen residing in this area an alternative plot of land in another area. This precedent prompted many residents of Umm Al-Hayman to file identical lawsuits seeking the same remedy, as they could not benefit from the original judgment due to the res judicata doctrine. The effect of res judicata in civil matters is limited to the parties to the case and does not extend to third parties.[12]

Another significant case that did not receive media attention involved a limited liability corporation that signed investment contracts with numerous individuals in a residential tower in Makkah, Saudi Arabia.[13] These individuals were required to pay a sum of money depending on the number of units in exchange for promised returns over a period of two years, renewable for seven similar periods. However, the company failed to fulfill its obligations, leading the individuals to resort to the courts to vindicate their rights. The Kuwaiti courts dealt with over 60 individual cases involving the same facts and issues, yet reached significantly different outcomes.

In some cases, the court declared the contracts void and awarded compensation to the plaintiffs.[14] However, in several other cases, the plaintiffs sued the individual shareholders instead of the company, resulting in the claims being deemed inadmissible due to improper defendant status.[15] The plaintiffs argued the shareholders were personally liable, which the court rejected. In

[10] Hussein Al-Abdullah, "Cassation: Umm Al-Hayman is not suitable for habitation" *Aljarida* (19 July 2022), online: <aljarida/articles/1658159>
[11] Mahkamt al-Tamiez [Court of Cassation] 3 July 2022 No 494/2017/civil/2 (Kuwait); Mahkamat Al-Istinaf [Court of Appeal] 29 January 2017 No 2137/2011/civil/10 (Kuwait).
[12] Azmi Abdel-Fattah Attia & Musaed Saleh Al-Anzi, *Kuwaiti Civil and Commercial Procedure Law*, Book One, 4th ed (Kuwait: Dar Al-Kutub Foundation, 2017) at 221.
[13] Al-Mahkama Al-Kulliya [General Court of First Instance] 28 January 2024, No 5189/2023 (Kuwait).
[14] *Ibid*; Al-Mahkama Al-Kulliya [General Court of First Instance] 5 May 2024, No 4651/2023 (Kuwait).
[15] Al-Mahkama Al-Kulliya [General Court of First Instance] 4 July 2023, No 2469/2023 (Kuwait); Al-Mahkama Al-Kulliya [General Court of First Instance] 13 July 2023, No 4816/2023 (Kuwait).

another case, the court declined jurisdiction due to an arbitration clause in the contract, accepting the defendant's argument in that respect.[16] Notably, this argument was not brought forward in most of the cases.

These conflicting outcomes raise a significant access to justice issue. The plaintiffs had sought the assistance of various lawyers, some of whom developed incorrect arguments and were unsuccessful in pursuing the claims. Had the plaintiffs sued through a collective mechanism, raising the same cause of action, the outcome would likely have been more consistent and just. An important lesson from this case is that events where numerous individuals are affected by the same harm do not always receive the attention they deserve, making many harmed individuals miss the opportunity to vindicate their rights.

Another high-profile case in Kuwait's history was the T-MAS Real Estate Company case, one of the largest real estate fraud scandals in the country.[17] The company was involved in the sale of fake property units to investors, resulting in significant financial losses for numerous victims who had purchased non-existent properties. In addition to the criminal proceedings against T-MAS, the case led to multiple civil lawsuits filed by victims seeking to recover the funds they had paid for fraudulent investments and to obtain compensation for their financial losses. The court confirmed the company's criminal liability and imposed a fine of 107 million Kuwaiti dinars (approximately 497 million CAD) for its fraudulent activities, which included fabricating property ownership documents and misleading buyers about investment opportunities.[18]

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[16] Al-Mahkama Al-Kulliya [General Court of First Instance] 23 November 2023, No 5107/2023 (Kuwait).
[17] Mahkamt al-Tamiez Al-Da'ira Al-Jaza'iyya [Court of Cassation Criminal Chamber], 19 July 2020, No 412/2019 (Kuwait). For a civil judgment in this case *see* Al-Mahkama Al-Kulliya [General Court of First Instance], 23 February 2017, No 12679/2016 Commercial/18. *See* also "The Court of Cassation Closes One of the Largest Real Estate Fraud Cases Involving TMAS Company", *Al-Qabas* (23 December 2023), online: <alqabas.com/article/5787807>.
[18] *Ibid*; Mubarak Habib and Ibrahim Muhammad, "A Ray of Hope for Recovering the Funds of TMAS Victims*"*, *Al-Qabas* (24 December 2023), online: <alqabas.com/article/5788017->; "[Ministry of] Justice: 1.4 million dinars for those affected by 'TMAS' company"*Aljarida* (17 April 2024) online: <aljarida.com/article/59792>

These mass disputes are a few of many other cases that occur in Kuwait without a proper class proceeding mechanism. Mass disputes, for the purpose of this thesis, are situations in which a large number of individuals or entities are involved in a conflict over similar legal or factual issues arising from the same or related circumstances.[19] The term is utilized broadly to encompass both large-scale cases with thousands of parties and smaller yet significant disputes where the number of involved parties is still too large that joining all parties individually would be impractical. Such disputes arise in various contexts, such as consumer protection violations, environmental damage, securities misconduct, antitrust violations affecting those impacted by unfair competition, and investment fraud. To ensure efficiency and consistency, these disputes are often addressed through mechanisms like class actions such as those available in Canada[20] and the United States.[21] In Kuwait, such a procedure does not exist, leaving claimants to file individual lawsuits. The cases described above illustrate how such a procedural mechanism could enable litigants to address their shared issues more efficiently.

The absence of class proceedings in Kuwait poses significant access to justice issues. Multiple individual proceedings on the same issue can lead to judicial inefficiency, as judges repeatedly address the same facts and legal issues. This also increases the risk of inconsistent outcomes, with judges potentially reaching different conclusions even when the facts are similar, due to varying interpretations of the law. Moreover, many individuals lack knowledge of how the justice system works, are unaware of their rights, or lack access to legal representation, all of which further hinder their ability to seek redress.

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[19] Definition drawn from Howard M. Erichson, "The Dark Side of Consensus and Creativity: What Mediators of Mass Disputes Need to Know About Agency Risks" (2020) 88:6 Fordham L Rev 2155 at 2155–56.
[20] *See e.g. Class Proceedings Act*, RSBC 1996, c 50; *The Class Actions Act*, SS 2001, c C-12.01; *Class Proceedings Act*, SA 2003, c C-16.5; *Class Proceedings Act*, 1992, SO 1992, c 6; *Code of Civil Procedure*, CQLR c C-25.01 arts 571–604.
[21] *See* Federal Rules of Civil Procedure, r 23, 28 USC App.

One might question whether there is any procedural tool in the Kuwaiti legal system to aggregate these claims. This chapter critically examines the Kuwaiti procedural framework for addressing mass disputes, as the Kuwaiti literature lacks a comprehensive understanding of such procedures. Before delving into this analysis, it is essential to define what constitutes a class proceeding. As this thesis focuses on the absence of "class proceedings" in Kuwait, establishing a clear definition is a necessary starting point.

II. Definition of Class Actions[22] (Class Proceedings)

The purpose of defining class actions in this thesis is not mere conceptualism but multifaceted and crucial for legal transplanting. Firstly, the comparative literature on class actions reveals a misunderstanding of what constitutes a class action,[23] particularly among audiences from legal systems unfamiliar with the procedure. By presenting definitions, this section aims to address these misconceptions and identify the basic elements of the class action procedure. This will not only further clarify the nature of a class action but also differentiate it from other forms of collective litigation that are often conflated with it. Moreover, providing a clear definition identifies what the Kuwaiti legal system lacks specifically. This section will utilize two scholarly definitions[24] and one statutory definition for these purposes.

On one hand, Mulheron comprehensively defines a class action as:

> "[…] a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit.

[22] The terms "class action" and "class proceedings" are used interchangeably in this thesis, as they refer to the same legal mechanism. The choice of term varies across Canadian provinces; for example, Ontario uses "class proceedings," while Saskatchewan uses "class actions." Due to the predominant use of "class actions" in legal literature and practice, this term will be used in this section for definitional purposes.
[23] Antonio Gidi, "Class Actions in Brazil: A Model for Civil Law Countries" (2003) 51:2 Am J Comp L 311 at 334.
[24] The selected scholarly definitions were chosen for their thoroughness and clarity, as they are both comprehensive and easy to comprehend. This selection does not necessarily imply that other sources define class actions differently but reflects a focus on definitions that are particularly effective for the purposes of this thesis.

> In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation."[25]

This definition emphasizes the collective and representative nature of the lawsuit, where a representative plaintiff acts on behalf of absent members who share similar claims without their consent. It also underscores that, unlike the representative plaintiff, the class members are not identified as individual parties in the action and take no role in initiating the suit nor actively participate in the litigation process.

Similarly, from a civil law perspective, Gidi defines a class action as "the action brought by a representative plaintiff (collective standing), in protection of a right that belongs to a group of people (object of the suit), which judgment will bind the group as a whole (res judicata)."[26] This definition aligns with Mulheron's perspective by emphasizing the central role of the representative plaintiff and the collective nature of the class action. Gidi's definition focuses on the class action as a means of protecting a right belonging to "a number of persons," which aligns with Mulheron's concept of addressing claims that are similar or identical among class members. Interestingly, his definition does not explicitly emphasize the idea that the representative does not have a mandate from members of the class. This contrasts with the statutory definition provided in article 571, paragraph one of the Quebec *Code of Civil Procedure*,[27] which defines a class action as "[…] a

[25] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004) at 3.
[26] Antonio Gidi, *supra* note 23 at 334.
[27] *Code of Civil Procedure,* CQLR, c C-25.01 [CCP].

procedural means enabling a person who is a member of a class of persons to sue without a mandate, on behalf all of the members of the class and to represent the class."

From these definitions, we can identify four key elements of a class action procedure: consolidation of claims, common issues, collective standing, and extended res judicata effect. Firstly, consolidation of claims entails aggregating *multiple claims* into a single class action, reflecting the existence of a class due to the *numerosity of claims*. Secondly, common issues refer to the shared questions of law or fact among these claims, which justify their consolidation into one lawsuit to address these commonalities. These claims aggregated constitute protection of grouped individual rights, which is the *object* of the suit.[28] Thirdly, the class action gives *collective standing* to a representative plaintiff to initiate the lawsuit on behalf of the entire class without their explicit consent, which is not permissible in individual litigation. Fourthly, unlike an individual lawsuit where the judgment binds only the parties directly involved, the judgment in a class action has a binding effect on class members absent from the proceedings. Contrary to these elements, *who* has standing (individuals or organizations), the type of remedies (whether injunctive or compensatory), and the method of constituting the class (opt-in or opt-out), are not defining elements of a class proceeding. Notably, the aforementioned definitions mention neither the form of relief nor specific procedural technicalities like discovery, certification, or method of class formation.

Understanding these definitions opens the door to distinguishing between class actions and other procedural vehicles that are often conflated with them. These distinctions are essential to further understand the unique characteristics and procedural implications of class actions. First, a class action differs from an individual action in terms of the nature of the right being protected.[29]

[28] Antonio Gidi, *supra* note 23 at 334.
[29] *Ibid*.

In class actions, the lawsuit addresses multiple individual rights that belong to a group or multiple individuals with similar claims, whereas an individual action pertains solely to a personal right specific to the plaintiff. The two types of actions are also different in terms of representation. In an individual lawsuit, the plaintiff acts only for themselves, while in a class action, the representative plaintiff/s represent the interests of an identifiable group of individuals, which grants him/them "collective standing." Importantly, collective standing in the context of class actions should not be confused with the concept of having a mandate to sue on behalf of multiple parties. Here, the representative merely has "procedural capacity" to represent the parties in court, while "standing" remains with the represented parties.[30] Second, a class action differs from lawsuits involving multiple parties, whether the parties are included from the outset or joined later through procedural mechanisms like interventions. While these lawsuits may appear collective, they remain individual in nature, as each party must actively participate by filing a claim or intervening. Class actions, on the other hand, consolidate harmed individuals into a single entity referred to as "class members," shifting away from the traditional concept that the right to sue belongs solely to the aggrieved individual or their legal representative.[31]

The final and most important distinction lies between class actions and other mechanisms for addressing collective and public interests. Various procedural vehicles exist to address public interests or injuries arising from a single event or common cause, such as environmental or consumer issues. Such vehicles include collective private enforcement, regulatory enforcement, government enforcement, social compensation schemes, and other approaches.[32] These

[30] Azmi Abdel-Fattah Attia & Musaed Saleh Al-Anzi, *supra* note 12 at 566–570, 598–600 [translated by the author].
[31] Mauro Cappelletti, "Vindicating the Public Interest through the Courts: A Comparativist' s Contribution" (1976) 25:3 Buff L Rev 643 at 647-648.
[32] See e.g. Colin Crawford, "Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory" (2020) 27:1 Indiana J of Global L Stud Vol. 59; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harvard L Rev 1281; Marcello Gaboardi, "New Ways of Protecting Collective Interests: Italian Class New Ways of Protecting Collective Interests: Italian Class Litigation

mechanisms should not be equated with North American class actions. While they may share certain features, such as a judgment impacting many individuals, they differ significantly in structure, purpose, and procedural framework. For example, in a Kuwaiti constitutional proceeding, which allows any individual to file a lawsuit to the Constitutional Court demanding to repeal legislation on grounds of constitutional violations, judgment has *erga omnes* effect binding on all.[33] This framework is similar to a class action in the sense that the plaintiff in the constitutional proceeding plays a role akin to that of a representative plaintiff, and that the judgment has an extended res judicata effect beyond the parties of the proceeding. However, the two proceedings differ in their purposes, goals, and procedural structures.

While other mechanisms and class actions may sometimes overlap, the latter aims to facilitate the efficient resolution of many, often small, claims.[34] Class actions allow for the collective vindication of subjective rights[35] (*droit subjectif*).[36] In contrast, the other mechanisms for protecting collective or public interests involve rights that are not divisible among individuals in the group but are exercised by or on behalf of the group as a whole. The compensatory mechanisms employed in public interest litigation some jurisdictions usually do not allow for the

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and Arbitration Through a Comparative Analysis" (2020) 2020:1 J Disp Resol 61; J. A. Jolowicz, "Protection Of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law" (1983) 42:2 C.L.J 222; Thomas D. Rowe Jr., "Foreword: Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other" (2001) 11:157 Duke J Comp & Intel L 157; Estey, Wilfred. "Public Nuisance and Standing to Sue" (1972) 10:3 Osgoode Hall LJ 563.

[33] Constitution of Kuwait, art 173: "[…] In the event that the said [judicial] body decides that a law or a regulation is unconstitutional, it shall be null and void." [translated by author]. See also *Law No. 14 of 1973 Establishing the Constitutional Court (14/1973*), amended *by Law No. 109 of 2014*.

[34] Jasminka Kalajdzic, "Review Essay: The Universality of Class Action Dilemmas" (2023) 45:3 Sydney L Rev 423 at 424.

[35] Francisco Valdes, "Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective" (2008) 24:3 Georgia State U L Rev at 635, 649.

[36] "Droit subjectif," traditionally defined as the "individual prerogative recognized and enforced by objective law which allows its holder to do, to demand or to forbid something for its own interest or, sometimes, in the interest of someone else." *See* Gérard Cornu, ed, *Vocabulaire juridique*, 7th ed (Paris: Presses Universitaires de France 2005) sub verbo "droit": droit subjectif [translated by author].

collective enforcement of subjective rights.[37] Instead, these rights are addressed individually on a case-by-case basis.

In sum, the class action is a special procedural mechanism designed to efficiently address the grievances of a large group of individuals who have suffered similar harm through a single legal action pursued by a single person, rather than through numerous individual lawsuits. Class actions differ both in nature and in underlying principles from traditional bilateral litigation.[38] With a clear understanding of class actions and their purpose, the focus can shift to finding equivalent mechanisms and alternatives to class actions in Kuwait's procedural framework for the aggregation of claims.

III. Alternatives to Class Actions Within Kuwait's Procedural Framework

The Kuwaiti legal system is rooted in the French civil law tradition. Its procedural framework is primarily governed by the *Code of Civil and Commercial Procedures* (the "Kuwaiti Code of Civil Procedure,"[39] which establishes general procedural rules applicable to all civil and commercial lawsuits. These provisions are heavily influenced by the French and Egyptian Codes of Civil Procedure.[40] In addition to the Code, some sector-specific statutes provide special proceedings or exceptions in areas such as administrative law, labour law, constitutional law, and capital markets.[41] Where no specific procedural rule is provided in a special statute, the general rules of the Code shall apply. Notably, there is no comprehensive framework for class proceedings

[37] See e.g. Marcello Gaboardi, *supra* note 32 at 73–86.
[38] Jasminka Kalajdzic, *supra* note 34 at 426.
[39] *Decree law* No.38/1980 *on Civil and Commercial Procedure* [Kuwaiti Code of Civil Procedure].
[40] Azmi Abdel-Fattah Attia & Musaed Saleh Al-Anzi, *supra* note 12 at 39.
[41] *Law No. 14 of 1973 Establishing the Constitutional Court*; *Decree Law No. 20 of 1981 Establishing a Chamber in the Court of First Instance to Hear Administrative Disputes*; Law No. 7 of 2010 Establishing the Capital Markets Authority and Regulating Securities; *Law No.6 of 2010* on *Labour Law in the Private Sector.*

in Kuwait, neither in the Code nor in any special statute. Nevertheless, it remains essential to analyze the existing procedural framework to identify any alternative procedural tools for aggregating claims. This analysis serves two purposes: to show the inadequacy of current procedural tools in addressing mass disputes and to assess the procedural system's capacity for accommodating class actions. To achieve this, the following examines both the procedural mechanisms provided by the Kuwaiti Code of Civil Procedure and by sector-specific statutes.

A. Procedural Tools in the Kuwaiti Code of Civil Procedure

As discussed above, a class proceeding involves suing on behalf of others, prompting the question of whether the Kuwaiti law accommodates this concept. According to the Kuwaiti Code of Civil Procedure, a plaintiff must have "standing", which requires showing a "personal and direct interest" in the case at hand. It is not permissible to sue on behalf of others without a mandate, whether a legal or contractual mandate.[42] Having standing in a case is the primary admissibility requirement, based on the "*pas d'intérêt, pas d'action*" principle.[43] Article 2 of the Kuwaiti Code of Civil Procedure codifies this principle, providing that "No claim or defense shall be admissible unless the party raising it has a legitimate interest recognized by law."[44] The Code does not recognize any form of "collective standing" by which an individual could sue on behalf of others without their explicit consent. Accordingly, under Kuwaiti law, it is not possible for an individual or a legal person to commence a lawsuit alleging damages on behalf of all persons who have suffered harm, as the court would likely dismiss the case for lack of standing. Alternatively, it would be accepted as an individual lawsuit, the result of which would only bind the plaintiff.

[42] An exception to this rule exists in Kuwaiti labour law, which will be further discussed below.
[43] Annick Tribes, *Le rôle de la notion d'intérêt en matière civile* (Paris: Université de droit, d'économie et de sciences sociales de Paris, 1975); Azmi Abdel-Fattah Attia & Musaed Saleh Al-Anzi, *supra* note 12 at 542.
[44] Art 2 Kuwaiti Code of Civil Procedure [translated by author].

Nevertheless, according to the Kuwaiti Code of Civil Procedure, it is possible to aggregate claims in a mass dispute in two ways: multiplicity of parties at the outset of the proceeding and intervention during the proceeding. However, as discussed in greater detail below, both mechanisms are inadequate in addressing mass disputes.

1. Multiplicity of Parties

At the outset of a lawsuit, multiple plaintiffs can jointly sue a defendant if their claims share common issues in the interest of judicial economy.[45] This is called multiplicity of parties, which refers to the combination, in a single proceeding, of individual claims raising common issues. For example, if tenants of a building want to sue the landlord on the same cause of action, they may do so collectively by filing a single statement of claim. The same goes for a labour dispute, where employees file a suit against the employer for breach of contract. Filing a lawsuit collectively in this manner instead of multiple individual lawsuits avoids the negative consequences of repetitive litigation and conflicting judgments.

This method, however, is not the most effective in addressing mass disputes due to the individualistic nature of litigation. Aggregating multiple parties in a single claim is only possible when there is prior acquaintance and agreement among the plaintiffs to sue collectively. This is particularly impractical in a mass dispute where gathering all affected parties is challenging and some will inevitably be excluded. These excluded parties must then file separate lawsuits, leading to repetitive litigation. Furthermore, plaintiffs can also act independently within the proceeding, introducing additional claims or counterclaims, which complicates and prolongs the proceeding further.

[45] Fathi Wali, *Explaining the Civil Judiciary Law in Knowledge and Practice, part one* (Cairo: Dar Al-Nahda Al-Arabia, 2017) at 721.

2. Intervention

Intervention is a procedural mechanism that allows a third party to join an existing lawsuit when claiming a right related to the subject matter of the case, thereby becoming a party to the litigation and bound by the outcome. For instance, in an automobile accident, multiple injured persons may seek to intervene in the lawsuit to claim damages against the defendant. This approach aggregates their claims into a single proceeding without the need to file new individual lawsuits, which saves time, effort, costs, and potentially avoids conflicting judgments.[46]

Intervention in Kuwait can be voluntary (requested by a third party) or forced[47] (requested by one of the parties or by order of the court, in which case it may be called "impleading").[48] Intervention and impleading are regulated by articles 86, 87 and 88 of the Kuwaiti Code of Civil Procedure, found under the "Incidental Proceedings (Claims)" title. A question that arises is whether these provisions could be used effectively to aggregate claims in a mass dispute as an alternative to class proceedings. Not all three types of intervention mentioned are relevant in answering this question.

First, forced intervention (impleading) is excluded from consideration in a mass dispute. Forced intervention occurs when one of the parties seeks to implead a third party or when the court acts *sua sponte*. A plaintiff in a mass dispute might attempt to use this mechanism to include all potentially harmed persons. However, article 86 of the Kuwaiti Code of Civil Procedure provides that "The opposing party has the right to include in the case *whoever was eligible to be sued* when it was filed."[49] The wording of this article requires that an impleaded party be someone who could

[46] Azmi Abdel-Fattah Attia, Kuwaiti Civil and Commercial Procedure Law, Book Two, 4th ed (Kuwait: Dar Al-Kutub Foundation, 2017) at 347–367.
[47] The Kuwaiti law does not use the term "forced intervention", but rather the word "*eidikhal"* which is equivalent to impleading. It also means insertion, entry, or bringing in.
[48] Azmi Abdel-Fattah Attia *supra* note 46 at 351.
[49] Art 88 Code of Civil Procedure (Kuwait) [translated by author, emphasis added].

have been sued at the time of filing (holds proper defendant status). Other fellow class members (e.g. injured individuals from the automobile accident) do not meet this criterion, as they do not hold proper defendant status at the time the lawsuit was initiated.

Similar issues arise for forced intervention by order of the court on its own initiative (*sua sponte*). The court may implead whomever it deems must be involved to serve the "interest of justice" or "reveal the truth."[50] Hypothetically, the court could use this power to implead other harmed individuals in a mass dispute for the "interest of justice." However, the court cannot identify all potential claimants, nor is it obliged to do so. Assuming such intervention were possible, it raises significant concerns about judicial impartiality. Consequently, both forms of forced intervention are inapplicable and impractical, failing to fully address the particular nature of mass disputes. These limitations redirect attention to voluntary intervention. This form of intervention is either *aggressive* or *conservatory*, as provided in article 87 of the Kuwaiti Civil Procedure Code, which reads as follows: "Anyone with a legal interest may intervene in the case [to assist] the parties, or request a ruling for himself in a claim related to the lawsuit."

In a conservatory intervention, the intervener joins one of the parties to assist or support their position and claims. This form of intervention is irrelevant when considering mechanisms for aggregating claims, as the intervener here is not seeking any redress for themselves, but merely providing support to a party. On the other hand, voluntary intervention is considered "aggressive" when the intervener seeks redress for themselves by claiming a right in dispute against the parties or one of them, rather than merely assisting or supporting a party.

While aggressive intervention can be used as a tool for aggregating claims and promoting procedural economy, it cannot serve as an alternative to class proceedings in addressing mass

[50] Art 88 Code of Civil Procedure (Kuwait).

disputes and does not prevent repetitive litigation. This procedure is impractical from a procedural standpoint due to its inherently individualistic nature, particularly in terms of filing and admitting the intervention. Each intervention must follow standard case filing procedures, either by written request before the hearing or by oral request during the hearing.[51] The court is then required to examine each intervention application individually to assess the admissibility requirements, i.e. the intervener's interests and the connection to the lawsuit.[52] This impracticality is more evident when there is a large number of potential intervenors. For instance, if 50 harmed individuals seek to intervene, the court will have to examine 50 intervention applications, leading to an increased burden on the court and significant delays in the judicial process. Moreover, intervention applications can be submitted at any point before the pleadings conclude and the case is reserved for judgment, creating an open timeframe that can significantly prolong proceedings. Without a fixed deadline, third parties may delay resolution by intervening late in the litigation process, increasing uncertainty and procedural complexity for all parties. This issue is exacerbated by the treatment of intervention applications under Kuwaiti law as incidental claims (counterclaims), which existing parties can contest, further contributing to delays and complications.

From a practical standpoint, unless the lawsuit gains the public's or media attention, potential persons who may want to intervene are unlikely to know about it due to the absence of formal notice procedures, making them miss the opportunity to join. Kuwaiti law does not mandate notice to invite potential plaintiffs to join a mass dispute proceeding. As a result, affected

[51] Art 87 Code of Civil Procedure (Kuwait).

[52] For an intervention application to be admissible, two primary prerequisites must be met: the requesting party must demonstrate a significant interest in the matter at hand and there must be a connection between the intervention and the subject matter of the original dispute. A connection exists when adjudicating the intervener's request alongside the original claim is necessary for the proper administration of justice. Article 85 of the Code of Civil Procedure provides the legal basis for these requirements which reads as follows "The plaintiff or defendant may submit incidental claims that are connected to the original claim, a connection that makes it appropriate for the proper administration of justice to consider them together."

individuals who might consider filing an aggressive intervention could remain unaware of the existing lawsuit. Assuming there is public attention and potential claimants are notified of the existing lawsuit, the intervention procedure still requires active filing and additional costs. Unlike class proceedings, which streamline the process by allowing a representative to act on behalf of many, the involvement of multiple independent parties increases complexity and inefficiency. Therefore, aggressive intervention is not a viable solution for mass disputes.

Overall, the rules of civil procedure in Kuwait do not allow for class proceedings nor for collective standing. The available procedural tools are not tailored for mass disputes and are inadequate in addressing such complexities. Given that the Kuwaiti Code of Civil Procedure was promulgated in 1980, the legislator at the time may not have foreseen the potential for disputes to become as complicated and widespread as they are today,[53] rendering the current rules insufficient to adequately address these modern challenges.

B. Procedural Tools in Sector-Specific Statutes (Special Statutes)

The Kuwaiti legislator has enacted several statutes to protect particular interests in many sectors, for example *Law No.6/2010 on Labour law in the Private Sector*; *Law No.39/2014 on Consumer Protection*; and *Law No.42/2014 on Environment Protection*. Since these statutes address areas fertile for mass disputes, one might ask if these statutes provide for some form of class proceedings or an equivalent mechanism. Unfortunately, they do not, except in labour law. The following will provide an overview of each of the three sector-specific statutes' rules regarding collective proceedings.

[53] Bryant G. Garth & Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 Buffalo L Rev 181 at 183–85, 195–96.

1. Labour Disputes

Law No.6/2010 on Labour Law in the Private Sector ("Labour Code") codifies the right to form labour unions that protect the interests of employees, work to improve their financial and social situation, and represent them in all matters concerning them.[54] As legal persons, unions have standing to sue for their personal affairs, independent of the interest of their members. For instance, they may seek to enforce contracts or claim damages for defamation against the union. Aside from that, the question that concerns this thesis is whether labour unions have "collective standing" to sue on behalf of their members in cases of collective disputes? The answer to this question requires looking at two provisions in the Labour Code: the collective labour contract, and collective labour disputes.

Firstly, articles 111-122 of the Labour Code govern "Collective Labour Contracts." These contracts determine the terms and conditions of work between one or more labour unions or associations and one or more employers or their representative from the employers' unions.[55] In general, unions do not have standing to sue on behalf of one or more of their members. An exception to this rule can be found in article 122 of the Labour Code, which provides that "Workers' and employers' unions that are a party to a collective labour contract may file all lawsuits arising from a breach of the contract's provisions in the interest of any of its members without a need for a mandate." This right is granted to unions due to the special importance of the collective labour contract for the union that is a party to it.[56] While the code gives unions the authority to sue on behalf of any member without a mandate, it remains an individual lawsuit. Disputes arising from a collective labour contract do not necessarily lead to collective redress, as article 122 does

[54] Art 99 Labour code (Kuwait).
[55] Art 111 Labour code (Kuwait).
[56] Khaled Jassim Al-Hindiani, & Abdulrassol Abdulredha, *Explanation of the provisions of the Kuwaiti Labour Law No. 6 of 2010*, 3d ed (Kuwait: Kuwait National Library, 2012) at 469.

not preclude individuals from pursuing lawsuits independently.[57] Nevertheless, it is important for later discussions within this paper to highlight that article 122 recognizes the concept of "representation without a mandate."

In the absence of a collective contract, unions have standing to sue for collective interests. As a representative of the common interests of its members, the union may exercise the right to initiate lawsuits to defend these interests.[58] This type of legal action is close to what is known in the French literature as "*action associationnelle.*"[59] However, this is not a class proceeding *per se* even if it addresses "collective" interests. Unlike class actions, which consolidate individual claims for damages, an *action associationnelle* is brought by an association acting on its own legal standing to protect collective interests of its members, rather than enforce individual rights.

Secondly, the Labour Code recognizes "collective labour disputes" and stipulates special out-of-court proceedings governed by articles 123-132. The code defines collective labour disputes as "the disputes that arise between one or more employers and all of their workers or a group of them because of work or because of working conditions."[60] Accordingly, for a labour dispute to be considered collective under Kuwaiti law, it must meet two conditions. First, the dispute must concern a group of employees regardless of the form of the group, a union or committee composed of employees, or a number of employees.[61] Second, the subject of the dispute must concern work or working conditions. Working conditions include, for example, wages, working hours, overtime, promotion etc. As for work, it is comprehensive and broad. It includes additional working conditions such as industrial security, welfare, social and health services. It also includes disputes

[57] *Ibid* at 335.
[58] *Ibid.*
[59] See Serge Guinchard, "L'action de groupe en procédure civile française (1990) 42 RIDC n°2, 599.
[60] Art 123 Labour code (Kuwait).
[61] Khaled Jassim Al-Hindiani, & Abdulrassol Abdulredha, *supra* note 56 at 474.

related to employment and training.[62] The Explanatory Note of the Labour Code further elaborates that "It goes without saying that the provisions of this chapter (collective labour disputes) only govern ongoing labour relations between the two parties to the dispute (the employer and the workers). Otherwise, the dispute will be considered an individual dispute, no matter how many parties there are."[63]

When a collective labour dispute arises, the disputing parties must resolve the dispute through special multi-step out-of-court proceedings stipulated in the Labour Code.[64] The Kuwaiti legislator mandates a special three-step dispute resolution mechanism for collective labour disputes that begins with negotiations and ends with mandatory arbitration, which is considered one of the innovations of the Labour Code. The decision of the arbitral tribunal is final, as it is not subject to any appeal, and binding on all parties. Even though this proceeding is conducted out of court, it seems to be the only mechanism close to a class proceeding in Kuwaiti law. By mandating out-of-court dispute settlement, the legislator not only reduced the burden on courts, but also made sure the dispute is resolved quickly and efficiently within specified relatively short periods. This policy aims to address the power imbalance between the parties and protect the employees who are considered the "weak" party.

This analysis of the Kuwaiti Labour Code shows two remarkable features: first, the recognition of the concept of suing on behalf of others without a mandate; and second, a recognition of collective disputes similar to class proceedings, characterized by the presence of a class, common issues, and a representative. This suggests that Kuwaiti law is not entirely resistant to collective mechanisms and, at least in specific contexts like labour disputes, has already

[62] *Ibid* at 475.
[63] Law No. 6 of 2010 on *Labour Law in the Private Sector*, Explanatory Note.
[64] Arts123–132 Labour code (Kuwait).

embraced procedural tools that share core principles with class actions. The existence of these mechanisms within the legal framework indicates that the broader implementation of class actions may not be incompatible with Kuwaiti legal traditions.

2. Consumer Protection Disputes

Law No.39 of 2014 on Consumer Protection ("Consumer Protection Code") is a comprehensive legal framework designed to safeguard consumer rights and ensure fair practices in commercial transactions. It establishes guidelines for product safety, quality standards, defective products, advertising practices, and all aspects of consumer protection.

For the purposes of protecting consumers and their interests, the code outlines procedures for consumer complaints and enforcement of consumer rights through regulatory authorities. However, it does not explicitly mention or facilitate class proceedings. As previously mentioned, class actions typically require a procedural framework allowing one or more representatives to litigate on behalf of a group with similar claims, which appears absent in the Consumer Protection Code. Instead, these provisions empower the government to act to protect the public interest rather than enabling consumers to band together in a single proceeding. For example, the Consumer Protection Code establishes the "National Committee for Consumer Protection"[65] and grants it, *inter alia*, standing to file lawsuits on behalf of the collective interests of consumers. This authority is stated in article 6, paragraph 2, which provides that "The committee is competent in the following […] 2- Receiving complaints from consumers and consumer protection associations, examining and investigating them, informing the competent authorities, and filing lawsuits related to the interests of consumers and intervening in them." Additionally, the Consumer Protection

[65] This Committee is a permanent committee established by a decree of the Minister of Commerce and Industry of Kuwait. *See* Art 2 *Law No.39 of 2014 on Consumer Protection* (Kuwait).

Code gives private consumer protection associations standing to sue in the collective interest of consumers: it provides in article 8 that "Without prejudice to the provisions regulating private associations, associations established for the purposes of this Act shall be responsible for protecting the consumers and defending their interests. To achieve this, they may exercise the following: a-The right to initiate or intervene in lawsuits related to consumers' interests. …"

It is important to emphasize that the Committee's power to "file lawsuits" suggests a form of public interest litigation or representative action, which is a significant step toward addressing collective consumer grievances. However, this resembles an *action associationnelle*, rather than a class action, as the Committee represents the collective interests in a broader regulatory and enforcement capacity rather than individual consumers directly. This distinction highlights the procedural limits of the current system.

Although the Consumer Protection Code focuses on safeguarding consumer rights and recognizes collective interests, it does not provide a special proceedings framework. In contrast, the French legislator introduced a comprehensive, special procedural framework for collective consumer disputes with *Law No. 2014-344 of 17 March 2014*, which amended the Consumer Code (*Code de la consommation*). This law established a group action by which certain associations can bring collective actions and a group (class members) can be constituted via an opt-in system after the decision on liability has been reached.[66] A similar procedural vehicle is absent from Kuwaiti law.

Due to the absence of specific procedural provisions or mechanisms for class actions in the Consumer Protection Code, the rules of the Kuwaiti Code of Civil Procedure apply. However, as previously discussed, this framework does not provide for class proceedings. The historical

[66] *Code de la consommation* L.423-1 to L.423-16 and R. 423-1 to R.423-23.

individual conception of legal action remains deeply entrenched within the framework of the Kuwaiti civil law legal system. Moreover, since this type of action does not address the subjective rights of the consumers, individuals retain the ability to pursue their own claims, creating the potential for repetitive litigation, a challenge that remains unaddressed in Kuwaiti consumer law.

3. Environmental Disputes

Consisting of nine books, *Law No.42/2014 on Environment Protection* is a comprehensive statute that aims to safeguard Kuwait's natural environment and promote sustainable development practices. It addresses various aspects of environmental conservation, pollution control, waste management, and biodiversity protection. Book Eight of the Environment Protection law on "Civil Liability and Compensation of Environmental Damage" creates an environmental civil liability and awards monetary and injunctive relief for harmed persons. However, the provisions of Book Eight are not procedural; they are substantive in nature. For instance, article 161 of the Environment Protection law stipulates that "this law does not prevent any natural persons or juridical persons from claiming compensation for the damages suffered as a result of pollution from whoever is liable for such pollution, whether with or without any contractual relationship." To further ensure compliance, article 172 of the environmental law provides that "any citizen or an association concerned with environmental protection may resort to the competent administrative and judicial bodies for the purposes of implementing the provisions of this law and related executive regulations."

These provisions do not establish a collective proceeding akin to a class action. Instead, they allow for individuals or groups with an interest in environmental protection to file lawsuits or seek administrative remedies to ensure compliance with the law and related regulations. These articles merely grant citizens and associations the right to act in the public interest without giving

them "collective standing" or providing any form of special class proceeding. While the Kuwaiti environmental law facilitates public interest litigation by allowing broader participation in legal enforcement, it lacks the structured mechanisms of a class action as understood in jurisdictions with formalized class action frameworks. Therefore, any claims that will be pursued by virtue of the provisions of the Environment Protection law are subject to the rules of the Kuwaiti Code of Civil Procedure, which neither facilitate class proceedings, nor provide a practical means for aggregating claims. Without a proper class action mechanism, the widespread nature of environmental harm that causes the same injury to a large number of people will result in duplicate litigation on the same factual and legal issues, just like the Umm al-Hayman case.

The analysis in this chapter reveals that neither the provisions of the Kuwaiti Code of Civil Procedure nor the special statutes provide the necessary procedural framework to accommodate class actions or effectively address mass disputes. In a nutshell, a class proceeding cannot be commenced under the current procedural framework. The inherited civil law system of procedure in Kuwait is tailored to address personal and individual rights. As Cappelletti notes "The new social, collective, 'diffuse' rights and interests can be protected only by new social, collective, 'diffuse' remedies and procedures."[67] While Kuwaiti law does recognize litigating on behalf of "collective interests" in contexts such as labour disputes and consumer protection, these mechanisms differ from the essence of a class action. This recognition marks a step forward in expanding access to justice and addressing shared grievances. However, it falls short of establishing a procedural framework that enables the collective enforcement of individual rights through true representative litigation. The rigid conceptions laying in the background remain a

[67] Mauro Cappelletti, *supra* note 31 at 647.

significant hurdle to effectively protecting subjective rights that are individually and personally violated. Current frameworks in the special statutes do not permit the enforcement of both objective[68] and subjective rights within the same procedure, leaving gaps in the protection and resolution of collective and individual claims.

The absence of adequate mechanisms for addressing mass disputes in courts suggests that it may be relevant to consider the introduction of class actions in the Kuwaiti legal system, as a potential solution for addressing mass disputes adequately and efficiently. This necessity raises important questions about how legal systems evolve to address emerging challenges. Can a class action be successfully transplanted into the Kuwaiti legal system—a civil law jurisdiction? Moreover, how can the Kuwaiti legal system respond to the challenges that class actions pose? Exploring these questions requires a sound methodological approach. To properly assess the potential introduction of class actions in Kuwait, it is essential to consider the broader context of legal transplants and comparative legal analysis, which will be addressed in the next chapter.

[68] Objective rights refer to "A set of socially established and sanctioned rules of conduct that are imposed on members of society." Gérard Cornu, ed, *Vocabulaire juridique*, 7th ed (Paris: Presses Universitaires de France 2005) sub verbo "droit": droit objectif [translated by author] (Original : "Ensemble de règles de conduite socialement édictées et sanctionnées, qui s'imposent aux membres de la société."). For subjective rights, *see supra* note 36.

Chapter Two: The Comparative Method and Legal Transplants

To answer the core question of this thesis—whether class actions can be successfully transplanted into the Kuwaiti legal system—the comparative law method appears most helpful. Comparative law has long been used as a tool for legal development and improving domestic law, including in the field of class actions.[69] The necessity of addressing issues related to mass claims has prompted comparative investigations aimed at adopting and adapting foreign procedural laws.[70] The study of legal transplants, specifically, became one of the standard methodological approaches to the discipline of comparative law.[71] Hence, when considering the implementation of class proceedings in a given jurisdiction, it is helpful to examine the procedures used in another jurisdiction through such a comparative method. However, importing foreign solutions can pose challenges and risks without a thorough understanding of the systems, as it may lead to unexpected consequences. While civil law scholars have long explored the potential implementation of class actions in civil law jurisdictions,[72] they have seldom examined the issue in the specific context of Middle Eastern countries.[73] They have also failed to provide a reliable framework for how class actions may be adapted to the peculiarities of legal systems in the region. Therefore, establishing a sound and informed methodology for such a transplant is critical to identifying limitations, challenges and objections associated with such a legal transplant.

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[69] Joachim Zekoll, "Comparative Civil Procedure" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019) at 1331.
[70] *Ibid*.
[71] John W. Cairns, "Watson, Walton, and the History of Legal Transplants" (2013) 41:3 Ga J Int'l & Comp L 637 at 638.
[72] *See* Duncan Fairgrieve & Eva Lein, *supra* note 5; Richard B. Cappalli & Claudio Consolo, "Class Actions for Continental Europe? A Preliminary Inquiry" (1992) 6:2 Temple Int'l & Comp L J 217; See also, Linda Silberman, "The Vicissitudes of the American Class Action–With a Comparative Eye" (1999) 7:2 Tul J Int'l & Comp L 201; Samuel Issacharoff & Geoffrey P Miller, "Will Aggregate Litigation Come to Europe?" (2009) 62:1 Vanderbilt L Rev 179.
[73] Nisreen Salama Mahasneh *supra* note 7; Mohamed Nour Shehata, *supra* note 7.

The aim of this chapter is to establish a methodology for analyzing the possibility of a successful transplant. By delving into the literature on legal transplants and comparative law, this chapter underscores the importance of contextual analysis to ensure compatibility between the borrowed legal mechanism and the recipient system's cultural, institutional, and procedural norms. Through this lens, the chapter sets the stage for identifying the challenges of transplanting this legal mechanism and exploring ways to address them. This contextual and nuanced analysis is necessary if one is to consider establishing a class action model tailored to the Kuwaiti legal system.

This chapter begins by exploring the theoretical and practical significance of using the comparative and the concepts of legal transplants (I), in addition to explaining the terminology used (II). It then outlines and justifies the selection of jurisdictions for comparison (III). Following this, the chapter defines the scope and object of the comparison and examines in general terms the theoretical usefulness of the concept of legal culture (IV). The chapter concludes by presenting the three-stage comparative methodology adopted in this thesis.

I. Comparative Law and Legal Transplants

The idea of introducing class actions in Kuwait essentially consists in a form of legal borrowing or what is known in the literature as "legal transplants." The literature on legal transplants is rich, and the idea of procedural transplants is not novel. Legal transplants, however, have not usually been the result of a systematic search for the most suitable foreign model.[74] In the context of law reform, where legislators or scholars seek to improve the legal system, it has become obvious to look at foreign models. However, a successful rule or legal institution in a certain

[74] Edward M Wise "The Transplant of Legal Patterns" (1990) 38:suppl_1 Am J Comp L 1 at 6.

jurisdiction may not work as well in a different jurisdiction and context. Indeed, not all transplants are successful. Transplants that were not based on a well-developed theory have often failed.[75] Legal transplants do not serve as an independent method of comparative analysis; rather, they are more accurately viewed as an objective or an outcome.[76] Simply replicating foreign law can hardly be regarded as a "method"; instead, it exemplifies a lack of methodology in comparative law.[77] Therefore, a deeper and more thorough contextual approach is necessary.

Assessing whether borrowing class actions that operate within a common law system of civil procedure works within the context of Kuwait's civil law system of civil procedure requires a contextual approach. Transplanting class actions into the Kuwaiti legal system without conducting a proper analysis of the preexisting legal order is a "blind transplant" and could lead to an unsuccessful adoption of class actions due to significant differences in the two legal traditions. Legal transplants must be made with adaptations and modifications to avoid compatibility issues with "pre-existing domestic procedural structures and preferences."[78] Conducting proper substantial adaptations is what Gidi calls a "responsible transplant."[79]

II. Choice of Terminology

The metaphor of a "legal transplant" referring to the borrowing of legal rules and institutions remains controversial among scholars. Alan Watson defines a legal transplant as "the

[75] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, "The Transplant Effect" (2003) 51:1 Am J Comp L 163 (the authors discuss a few examples of unsuccessful transplants). See also e.g. Ahmad A. Alshorbagy, "On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law" (2012) 22:2 Indian Int'l & Comp L Rev 237.
[76] Mark Van Hoecke, ed, *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 3rd ed, translated by Tony Weir (Oxford: Oxford University Press, 1998); Esin Örücü, "Methodologies for Comparative Law" in Jan M Smits, ed, *Elgar Encyclopedia of Comparative Law*, 2nd ed (Cheltenham, UK: Edward Elgar, 2012) 42.
[77] *Ibid*.
[78] Joachim Zekoll, *supra* note 69 at 1333.
[79] Antonio Gidi, *supra* note 23 at 314.

moving of a rule or a system of law from one country to another, or from one people to another."[80] A number of scholars remain skeptical of the term transplant, as it implies "displacement" and often argue that it may not accurately capture the complexities of legal borrowing.[81] Other alternative terms besides transplant include circulation of legal models, transfer, transposition, and reception.[82] For Örücü, borrowing with adaptation is better described as "transposition," which she considers more appropriate than the term "transplant."[83] Transposition, as she defines it, refers to the "tuning" and adaptations required for a transplant to be successful. Örücü critiques the legal transplant theory as "in need of refinement" and advocates for substituting it with "legal transposition."[84]

Establishing the appropriate term to use, or finding the best description of this phenomenon and testing different metaphors, is beyond the scope of this thesis. Thus, despite the terminology being "surrounded by some uncertainty,"[85] the term 'transplants' will be utilized metaphorically throughout this thesis as a generic term to express the process of borrowing, adapting, and integrating legal concepts or frameworks from one jurisdiction into another. Nevertheless, the critiques mentioned above serve as a helpful reminder of the importance of a nuanced and contextual approach to avoid failing transplants.

III. Choice of Jurisdictions

When deciding to use the comparative method, the choice of comparators – in this case, of jurisdictions to compare – is a significant decision. In the context of adopting class actions, it seems

[80] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens: The University of Georgia Press, 1973) at 21.
[81] *See* Esin Örücü, "Law as Transposition" (2002) 51:2 Intl & CLQ 205.
[82]Michele Graziadei, "Comparative Law, Transplants, and Receptions" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019) at 444.
[83] Esin Örücü, *supra* note 81.
[84] *Ibid* at 206.
[85] Michele Graziadei, *supra* note 82.

rather obvious to look at the common-law countries where such a procedural mechanism exists. The presence of innovative procedural mechanisms in a given jurisdiction provides valuable insights for addressing challenges within the domestic legal framework. Thus, this thesis relies on Canada as the main jurisdiction used for the purposes of the comparative analysis, due to its well-established class action regime.

Class actions in Canada are regulated at the provincial level. The legislative frameworks across the Canadian provinces are nearly identical, all aiming to advance access to courts for the resolution of mass disputes.[86] However, any analysis of "Canadian class actions" must account for differences among provinces by focusing on specific jurisdictions. Therefore, the choice of which provinces to examine is critical, as reviewing all provinces would result in unnecessary repetition and redundancy. In comparative law, there is no point in comparing what is identical. For this thesis, the focus is on the distinct class action regimes of Ontario and Quebec, as these provinces not only have the most mature legislative regimes but also see the highest volume of class actions filed annually. Quebec (a mixed jurisdiction) was the first province in Canada to implement class actions.[87] Ontario followed as the first common law province to adopt class actions. Other provinces based their class action statutes on the Ontario model with some differences. Recent amendments made to Ontario's class action statute also provide a most current perspective on how that procedural vehicle can be tailored to address current challenges.[88]

Some may argue that Canada and Kuwait are so radically different that they share no relation and cannot be helpfully compared. As Alan Watson notes: "where there is no relation,

[86] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018) at 4.
[87] *An Act respecting the Class Action*, RSQ c. R.2-1 (repealed).
[88] *Class Proceedings Act*, SO 1992, c. 6, as amended by *Smarter and Stronger Justice Act*, SO 2020, c. 11 Sch 4.

there can be no comparative law."[89] However, this choice of comparators can be justified from two points of view.

From a practical point of view, it might initially seem logical for Kuwait to borrow from a jurisdiction that shares the same legal tradition or historical source, such as France or Egypt. However, Egypt does not have a class action mechanism, and France only introduced class actions in 2014 with a limited scope and reported deficiencies.[90] The class action framework in France is undergoing reform, in line with the EU Directive 2020/1828 on representative actions.[91] In contrast, Canada has a longer and more established history with class actions. Additionally, the availability of a rich body of legal literature in Canada reinforces its suitability as a model for comparative analysis in the context of law reform.

From a scholarly point of view, there is a shared common legal history between Quebec and Kuwait. Kuwait's legal system is based primarily on the French civil law tradition and its procedural law is a mix between the French and the Egyptian codes of civil procedure. On the other hand, Canada, a bijural country, primarily follows the common law tradition based on English common law, with Quebec being the exception as a mixed jurisdiction, where the civil law tradition applies in private law matters.[92] The common element between Kuwait and Quebec is that both have significant French civil law influence. Of course, while Quebec's and Kuwait's legal systems share historical origins, they are not identical. Similarities between the donor system

[89] Alan Watson, *supra* note 80 at 7.
[90] *See* Pierre-Claude Lafond, "L'action de groupe française ou l'art de rater une belle occasion" (2016) 68:2 RIDC 319; Benjamin Bénézeth, *The Pursuit of Effectiveness: Toward an Opt-Out Class Action in France* (LL.M. Thesis, McGill University, 2015).
[91] EU, *Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC*, [2020] OJ, L 409/1.
[92] Rosalie Jukier, "Canada's Legal Traditions: Sources of Unification, Diversification, or Inspiration?" (2018) 11:1 J Civ L Stud 75; Rosalie Jukier, "Inside the Judicial Mind: Exploring Judicial Methodology in the Mixed Legal System of Quebec" (2011) 6:1 J Comp L 54.

and the recipient system make the transplant process easier, it does not mean that differences make the transplant impossible.

Thus, it is important to understand the mixed nature and historical origins of Quebec's procedural law. Quebec originally inherited continental civilian procedure from France as a result of French colonialism. After it became a British colony in 1763, Quebec's procedural system gradually evolved towards a "common law/adversarial notion of procedure."[93] Several key elements of common law procedure and evidence were transplanted into Quebec over time, for example the distinction between a pre-trial and trial stages and discovery, which are foreign to the civilian procedural system. Quebec's procedural law today can be described as civil law in form (the form of a code), and common law in substance.[94]

Despite the dominant common law adversarial element, some recent amendments to Quebec's procedural law have moved the system towards what Professor Jukier has described as "swings of the pendulum" in the civilian direction.[95] These civilian elements serve to bridge the gap between Kuwait's and Canada's distinct approaches to civil procedure.

While Kuwait and Canada have different legal traditions, there are interesting similarities that create a balance between shared elements and contrasting features. Differences between compared jurisdictions should not be viewed negatively; rather, they provide valuable points for comparison.[96] To ensure a meaningful comparison, some level of similarity is necessary to avoid irrelevance, while differences prevent redundancy and offer valuable insights. Comparing systems that are entirely identical serves no purpose, just as comparing those with no shared elements.

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[93] Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure" (2015) 93:1 The Can Bar Rev 211 at 213.
[94] *Ibid*.
[95] *Ibid.*
[96] Gerhard Dannemann, "Comparative Law: Study of Similarities or Differences?" in in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2019).

Thus, Ontario provides an example of a purely common law approach to class actions, while Quebec represents a mixed jurisdiction perspective. Although the class action frameworks in Ontario and Quebec share many similarities, their differences reflect the influence of legal, cultural and historical factors. Together, these two provinces offer a balanced foundation for a fruitful comparative exercise. Having justified the comparison of the Kuwaiti legal system and the Canadian legal system, the next step is to establish the scope and object of comparison.

IV. Object and Scope of Comparison

As will be discussed in detail in the following chapter, the object of the transplant is a "procedural mechanism," not a substantive rule. On this point, Otto Kahn-Freund argues that procedural law is not appropriate for transplantation and considers it a "misuse of comparative law."[97] His main thesis is that the law of procedure is inherently linked to the allocation of power and the organization of courts, which Montesquieu referred to as *lois politiques*. These characteristics make procedural law particularly resistant to transplantation. He emphasizes that:

> All that concerns the technique of legal practice is likely to resist change. In most respects, the organization of the courts and the legal profession, the law of procedure, and the law of evidence help to allocate power and belong, in Montesquieu's sense, to the *lois politiques*. Comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organisation and procedure may lead to frustration and may thus be a misuse of the comparative method.[98]

Kahn-Freund emphasizes that the degree to which any rule or institution can be transplanted depends on its position along the continuum from "mechanical" to "organic." Procedural rules, being deeply rooted in the political, constitutional, and institutional frameworks of a country, fall

[97] Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37:1 Modern L Rev 1 at 12-20.
[98] *Ibid* at 20

closer to the "organic" end and are thus highly resistant to adaptation in foreign contexts. He argues that "All rules which organize constitutional, legislative, administrative, or judicial institutions and procedures are designed to allocate power—rule making, decision making, and above all, policy-making power. These are the rules which are closest to the 'organic' end of our continuum and are the most resistant to transplantation."[99] Kahn-Freund further observes that procedural laws and judicial organization are shaped by the distribution of power both within the legal profession and the broader political structures, noting that institutions and procedures often reveal inherent barriers tied to these structures.[100] He warns of the potential dangers of transplants between legal systems with fundamentally different power structures. Nevertheless, Kahn-Freund acknowledges exceptions to this argument, for example, the adoption of the French *Conseil d'État* model by various Continental countries.[101]

Kahn-Freund's discussion of the challenges and risks inherent in legal transplantation is particularly valuable when considering the adoption of class actions, prompting an evaluation of whether his arguments hold true in this specific context. Indeed, the implementation of common law procedures in Kuwait, such as a jury system, may face strong rejection due Kuwait's unique legal and social structure, which is influenced by tribal dynamics. Given Kuwait's relatively small population, strong community ties and nepotism, impartial jury selection may indeed be difficult.

However, Kahn-Freund does not necessarily suggest that transplanting procedural law is impossible, but sheds light on the risks and challenges associated with transplanting procedural law that scholars and legislators must be aware of and consider. In the context of mass disputes and access to justice, his argument becomes less significant, as "[s]hared *human* problems, require

[99] *Ibid* 17.
[100] *Ibid* at 19. As he explains, "[...] If we consider those institutions and procedures which express the power of the legal profession and the distribution of power within the legal profession, we see the barriers."
[101] *Ibid* at 18.

similar responses from legal systems."[102] Since Kahn-Freund's argument, several successful transplants of class actions in civil law jurisdictions occurred such as in Brazil.[103] These experiences show that borrowing procedural law is possible with proper adaptation. The issue of multiple related claims is a challenge to every judicial system and not peculiar to common law jurisdictions. Hence, the challenges posed by mass claims have prompted comparative studies aimed at adopting procedural mechanisms from other jurisdictions. As Örücü notes "Global problems of our day need global solutions or interrelated local solutions."[104]

Moreover, borrowing a class action procedure as a tool to aggregate claims does not necessarily entail borrowing the system of procedure or changing the organization of courts. Identifying the scope and object of the transplant is important in responding to this argument. The scope and object of the transplant is limited to the class action proceeding, and not the rules of civil procedure that apply to all proceedings. Some objections to class actions in civil law jurisdictions are objections against "common law style" civil procedure such discovery and cross examination procedures.[105] However, as will be shown in this thesis, procedures like discovery are not a specific feature of class actions but are a part of the rules of civil procedure, which are not necessary to transplant along with the class action mechanism. This thesis argues that a class action procedure can be separated from the procedural framework it operates within, and can be adapted to fit into a different procedural framework. As Gidi frames it: "When comparing class action rules, one must distinguish between the specific characteristics of the class action procedure

[102] Esin Örücü, *supra* note 81 at 221 [emphasis added].
[103] Código de Defesa do Consumidor [Consumer Defence Code], Law No 8.078 of 11 September 1990 (Brazil), arts 81–104; Antonio Gidi, *supra* note 23.
[104] Esin Örücü, *supra* note 81 at 222.
[105] Antonio Gidi, *supra* note 23.

(collective civil procedure or class litigation) and the regular system of civil procedure that lies in the background (individual civil procedure or single-party litigation)."[106]

Understanding the specific characteristics of the class action procedure requires a "black letter law" analysis. However, in the context of procedural transplants, a "black letter law" analysis alone is insufficient, as it overlooks the underlying legal culture. Comparative analyses that disregard social and cultural factors and the broader context in which the law operates may become an "abuse" risking rejection or failure of transplanted procedures.[107] A contextual approach therefore is critical for this thesis, as civil procedure is culturally constructed.

This approach contrasts with Watson's theory, which argues that transplants can occur independently of social and cultural factors, claiming that "the transplanting of legal rules is socially easy."[108] He notes that it is possible that "a foreign rule can be successfully integrated into a very different system and even into a branch of the law which is constructed on very different principles from that of the donor."[109] Watson argues that a detailed understanding of the social, cultural, or political contexts of the donor or the recipient is not essential for the successful transplantation of law. He suggests that the success of legal transplants depends more on the technical functionality and adaptability of the borrowed laws rather than their cultural or societal origins. However, Örücü challenges this view, asserting that the real difficulties in legal transplants lie not in the substance or form of the law, but in the "transposition of *values and content*."[110] Similarly, Legrand critiques Watson's oversimplified understanding of legal rules,[111] arguing that "[t]he meaning of the rule is […] a function of the interpreter's epistemological assumptions which

[106] *Ibid* at 321.
[107] Otto Kahn-Freund, *supra* note 97 at 27.
[108] Alan Watson, *supra* note 80 at 21.
[109] *Ibid* at 55.
[110] Esin Örücü, *supra* note 81 at 222 [emphasis added]
[111] Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4:2 Maastricht J Eur & Comp L 111.

are themselves historically and culturally conditioned,"[112] emphasizing the inseparability of rules from their cultural and historical contexts. Kahn-Freund further reinforces this critique, stating that comparative law requires "[…] a knowledge not only of the foreign law, but also of its social, and above all its political, context."[113]

These perspectives underscore the importance of understanding the broader environment in which laws operate. Differences in legal, cultural, social, and political factors are the primary sources of incompatibility in legal transplants. Failure to account for these factors can lead to what is known as the "transplant effect," where a mismatch between pre-existing rules and transplanted laws causes inefficiencies.[114] This phenomenon highlights the critical need to align transplanted laws with the recipient country's existing rules, traditions, and societal values to ensure their effectiveness.

Addressing social and cultural factors, therefore, is essential in a procedural transplant, since procedural law "is often the best reflection of the legal culture of a given society."[115] According to Stephen Goldstein, "societies may see their basic values reflected more in their procedural systems than in their substantive law."[116] Piché further contends that "[c]ivil procedure is an extraordinarily fertile terrain for the cultural analysis of law and to learn about law's place in culture."[117]

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[112] *Ibid* at 114.
[113] Otto Kahn-Freund, *supra* note 97 at 27.
[114] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *supra* note 75 at 171.
[115] Rosalie Jukier, *supra* note 93 at 213.
[116] Stephen Goldstein, "The Odd Couple: Common Law Procedure and Civilian Substantive Law" (2003) 78:Issues 1 and 2 Tul L Rev 291 at 293.
[117] Catherine Piché, "The Cultural Analysis of Class Action Law" (2009) 2:1 J Civ L Stud 101 at 141; Stephen Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977) 77:5 Columbia L Rev 866.

Many scholars highlight the vital relationship between civil procedure and culture.[118] Oscar Chase, for instance, emphasizes that "[d]ispute processes are in large part a reflection of the culture in which they are embedded."[119] He argues that the selection of dispute resolution procedures within a society reflects the choices shaped by its social structure, traditions, collective beliefs, and cultural values. Similarly, William Felstiner discusses how social organization shapes dispute processing, asserting that these practices are rooted in a society's values, psychological needs, historical experiences, and its economic, political, and social structures.[120]

Class actions are no exception to the interplay between law and society. Piché describes class actions as a "mirror of societal structure and culture" and specifically highlights the importance of the concept of "modern legal culture" in the class action law context.[121] According to Piché, there is a reciprocal relationship between class actions and culture: class actions shape culture, and culture, in turn, shapes class actions. She illustrates this dynamic, for example, through the shift in the judicial role toward increased managerial judging.[122] The context of culture also explains why certain legislative choices are made.[123]

These scholars bring our attention to important factors and challenges to consider when borrowing legal institutions, significantly informing transplant methodology. They warn that "any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of

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[118] See for example Mauro Cappelletti, "Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe" (1971) 69:5 Mich L Rev 847; Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, UK: Ashgate, 2006).
[119] Oscar G. Chase, Law, *Culture, and Ritual: Disputing Systems in Cross-Cultural Context* (New York: New York University Press, 2005) at 2. See also Oscar G. Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50:2 Am J Comp L 277; Oscar G. Chase, "Some Observations on the Cultural Dimension in Civil Procedure Reform" (1997) 45:4 Am J Comp L 861.
[120] William L. F. Felstiner, "Influences of Social Organization on Dispute Processing" (1975) 9:1 Law & Soc'y Rev 63. See also Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986).
[121] Catherine Piché, *supra* note 117; Lawrence M. Friedman, "Is There a Modern Legal Culture?" (1994) 7:2 Ratio Juris 117.
[122] Catherine Piché, *supra* note 117 at 125.
[123] *Ibid* at 110.

rejection."[124] Their observations do not imply that differences between the recipient and donor systems make transplanting impossible. Rather, they highlight the importance of adapting the transplanted legal institutions to the social, cultural, and political contexts of the recipient system to enhance their acceptance and effectiveness. This nuanced understanding underscores the need for a contextual approach in legal transplants to mitigate the risks of rejection and ensure successful integration.

In sum, laws are deeply rooted in the socio-political and cultural environment of their origin, and procedural law, including class actions, is no exception. Legal transplantation requires careful evaluation of how foreign laws align with local conditions, including political structures, cultural norms, and social environments, to avoid misuse of comparative law. Because laws are inherently tailored to their specific contexts, their wholesale adoption in a different environment is highly challenging. Substantial adaptation is therefore crucial. Accordingly, to explore the compatibility of the Canadian class action model with the Kuwaiti legal system and address the risks and objections identified in the legal transplants literature, this thesis adopts a contextual and comparative methodology that considers the socio-political, cultural, and legal differences between the two systems and how they apply in the context of class actions. These social and cultural differences will "guide" the substantial adaptations that must occur for a successful transplantation in Kuwait.

The comparative methodology used in this thesis follows three stages. The first two stages entail describing the law and its context in the legal systems under consideration. The first stage involves an analysis of the recipient system (Kuwait)—the soil in which the object will be transplanted. This step was the focus of the previous chapter. The second stage, which will be

[124] Otto Kahn-Freund, *supra* note 97 at 27.

addressed in the following chapter, focuses on the donor system and the object of the transplant. This entails an analysis of the Canadian class action mechanism itself (the object of the transplant) along with its underlying culture within the Canadian legal system. This analysis aims to frame the object of the transplant concretely and further clarify its scope. Understanding the differences in the two legal systems, primarily the judicial system and the underlying culture, sheds light on the objections to class actions in the recipient system and the specific challenges to transplanting. Hence, the third stage, as will be addressed in chapter 4, aims to address these objections through a process of adaptation. This approach helps adapt class actions to the peculiarities of local and cultural needs in Kuwait while being aware of the challenges and risks noted by scholars, ultimately conducting a successful, responsible, and informed legal transplant. Accordingly, the following chapter will turn to the second stage, examining the Canadian class action model and its legal culture.

Chapter Three: The Canadian Class Action Model

Inspired by the American Federal Rule 23 of the *Federal Rules of Civil Procedure*,[125] class action legislation was first introduced in Canada in Quebec in 1978,[126] followed by Ontario in 1992 with the enactment of the *Class Proceedings Act*[127]. Although class actions in Canada share similarities with those in the United States, significant procedural and substantive differences exist between the two countries' collective proceedings.[128] Notably, there is no "unified" Canadian class action, as the regimes differ among the Canadian provinces.

As part of the comparative methodology outlined in the previous chapter, the next step is to thoroughly examine the "object" of the transplant in the donor system before considering its transplantation into the Kuwaiti legal system. This allows for the identification of its key features and their thoughtful adaptation to the receiving system, ensuring a more precise understanding of the transplant's objectives. Thus, the purpose of this section is to introduce the Canadian class action model as a special procedure for addressing the situation of a series of similar or related claims, thereby providing collective access to justice. The richness of the Canadian class actions literature leaves little room for new contributions, yet a brief, necessarily descriptive analysis can still provide value by framing the discussion in a comparative context, particularly from a civil law perspective. This chapter first presents the objectives and advantages of the class action and the challenges they pose (I) and then highlights the common features of Canadian class actions (II), with reference to the legislation in Quebec and Ontario.

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[125] Federal Rules of Civil Procedure, r 23, 28 USC App.
[126] *An Act respecting the Class Action*, RSQ c. R.2-1. See also Garry D Watson, "Class Actions: The Canadian Experience" (2001) 11:2 Duke J Comp & Intel Law 269.
[127] *Class Proceedings Act,* SO 1992, c. 6 [CPA]. See also Michael A Eizenga and Emrys Davis, "A History of Class: Modern Lessons from Deep Roots" (2011) 7:1 Can Class Action Rev 3.
[128] Jasminka Kalajdzic and Catherine Piché "Cold Facts from the Great White North Empirical Truths, Contemporary Challenges and Class Action Reform" in Brian T. Fitzpatrick & Randall S. Thomas eds, *The Cambridge Handbook of Class Actions: An International Survey* (Cambridge: Cambridge University Press, 2021) at 109.

I. The Objectives and Advantages of Class Actions

As a procedural mechanism, class actions offer several advantages that make them a powerful tool for promoting justice in certain contexts. The Supreme Court of Canada recognized the importance of class action as a vital tool for the efficient resolution of mass disputes in *Western Canadian Shopping Centres Inc v Dutton*, where it said:

> The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.[129]

Preceding that, the Ontario Law Reform Commission's Report on Class Actions[130] suggested that class actions serve three main objectives: judicial economy; access to justice; and behavior modification. These objectives were reaffirmed in *Dutton* and presented as advantages of class actions.[131] Many other cases, such as *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*[132] and *Atlantic Lottery Corp. Inc. v Babstock*,[133] continue to reiterate these objectives. These objectives play a significant role in a class action, as they serve as a lens through which courts analyze the certification criteria. Thus, the following paragraphs will explore these three advantages in more detail.

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[129] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 26 [*Dutton*].
[130] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) at 117 [OLRC] online: <https://archive.org/details/reportonclassact01onta>.
[131] Dutton, *supra* note 129 at paras 27–29.
[132] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 at paras 6, 60.
[133] *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 68.

An example of a classic product liability case can demonstrate how the Canadian class action model achieves these advantages. For instance, imagine a manufacturer distributes 1,000 units of a product that turns out to be defective. If each of the affected consumers were to pursue an individual lawsuit to seek compensation for the damages they suffered, the courts would be overwhelmed with a flood of nearly identical cases, each involving the same product liability issue against the same defendant. This scenario would create a significant strain on judicial resources, with the potential for inconsistent judgments and varied outcomes. Moreover, many individuals with smaller claims might find the cost of litigation prohibitive, might lack the required legal knowledge or fear to become involved in litigation, deterring them from pursuing their rights at all.

In contrast, a class action instead of a multiplicity of individual suits aggregates all these similar claims into one action, favouring **judicial economy**. Judicial economy is achieved by preventing repetitive litigation of the same events, or in the words of the Supreme Court, "unnecessary duplication of fact-finding and legal analysis."[134] The efficiencies created by this process allow judicial resources to be redirected towards addressing other disputes,[135] which can potentially reduce court backlog. Judicial economy benefits not only the courts, but both the plaintiffs and defendants by reducing the overall costs of litigation.[136] Potential plaintiffs will not need to initiate separate lawsuits, and defendants will litigate the disputed issue only once, reducing the number of lawsuits against them. Moreover, class actions can avoid conflicting judgments and inconsistent outcomes relating to the same events, further enhancing substantive justice for affected individuals.

[134] *Dutton*, *supra* note 129 at para 27.
[135] *Ibid.*
[136] *Ibid.*

Secondly, class actions enhance **access to justice** by "making economical the prosecution of claims that would otherwise be too costly to prosecute individually."[137] This can be achieved through the distribution of litigation costs among a large number of plaintiffs, which transforms individually non-viable claims[138] into collectively viable claims.[139] Consider the earlier product liability example: if each individual claim is worth only 100$, these individuals may be reluctant to vindicate their rights in court because the costs of litigation (or the time involved in pursuing them) exceed the value of the claim. The failure to assert an existing substantive remedy may reflect the presence of barriers precluding access to the courts. A class action, on the other hand, can overcome these barriers to justice for mass disputes at a cost that is proportionate to the rights involved. By offering a structured way to address widespread grievances within the existing judicial system, class actions help alleviate "social frustration" that arises when courts and administrative agencies are unable to protect individual rights effectively.[140] As the Supreme Court expressed in *Dutton* "Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied."[141]

While 'access to justice' is a fluid expression, in the class action context, access to justice is often associated with economic barriers, which focus on the "potential of class actions to allow for cost-sharing, making individually non-viable claims feasible."[142] This focus on the economic understanding of access to justice is clear in the Supreme Court's judgments in *Dutton* and *Hollick.*[143] However, this is only one aspect of access to justice.

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[137] *Ibid* at para 28.
[138] Another term that is used to refer to these types of claims is "economically non-viable claims," which are cases that are not worth pursuing on an individual bases.
[139] OLRC, *supra* note 130 at 119.
[140] *Ibid* at 130.
[141] *Dutton*, *supra* note 129 at para 28.
[142] Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47:1 Alta L Rev 185 at 194.
[143] *Hollick v Toronto (city),* 2001 SCC 68 at para 15 [*Hollick*].

Access to justice can be impeded by several barriers to achieving justice, which are often categorized into economic and non-economic (social and psychological) barriers. These barriers may prevent the pursuit of legitimate claims through individual litigation, leaving substantive law unenforced. The economic barriers described above, draws the distinction between "individually recoverable, individually nonrecoverable, and nonviable claims."[144] Non-economic barriers, on the other hand, include for example: the complexity of the system, unintelligibility of legal texts, inaccessibility of legal services, ignorance of the availability of substantive legal rights, fear of involvement in the legal process, power imbalances between plaintiffs and defendants (e.g. small businesses may be reluctant to sue more powerful companies), and socio-cultural and demographic characteristics of litigants (e.g. limited language proficiency, age).[145] Numerous cases do not make their way to court, not due to their lack of merit or importance, but because of these economic, social, and psychological barriers.[146] By providing leverage against large defendants and psychological security through safety in numbers, class proceedings can overcome such barriers,[147] resulting in increased access to justice. Despite the fact that access to justice in class actions is often approached with a focus on economic considerations, courts have tempered this focus and shed light on the non-economic barriers in some instances.[148] The Court highlights that class actions have the potential to "[…] allow claimants to overcome psychological and social barriers

[144] The OLRC adopted this classification scheme from the Harvard Law Review that categorizes claims based on the relationship between the size of a claim and the expense of enforcing it, either individually or through a class action. Claims are divided into three types: individually recoverable claims, individually nonrecoverable claims, and nonviable claims. An individually recoverable claim is one where pursuing separate litigation is economically rational, even without class action procedures. An individually nonrecoverable claim is too small to justify the expense of independent litigation but justifies the lesser cost of participating in a class action. A nonviable claim is one where the cost of pursuing even a share of a class judgment exceeds the potential recovery. See OLRC, supra note 130 at 116–117.
[145] OLRC, *supra* note 130 at 188.
[146] *Ibid* at 127.
[147] Mathew Good, *supra* note 142 at 192.
[148] *AIC Limited v. Fischer* 2013 SCC 69 at para 27 [*Fischer*] [emphasis added].

through the representative plaintiff who provides guidance and takes charge of the action on their behalf."[149]

Similarly at the provincial level, an Ontario Superior Court judge strongly refused to "accept the implicit proposition that the question of whether 'access to justice' is served by a class proceeding turns on economic considerations alone."[150] The judge asserted that "[i]t would be inconsistent with the goals of the [*Class Proceedings Act*], and the admonition of the Supreme Court in *Hollick* that it 'should be construed generously', to simply examine the economics of litigation in determining whether a class proceeding meets the goal of providing 'access to justice'. Although class proceedings serve a primary purpose of permitting meritorious, non-economic claims to be litigated, there are cases where economic considerations are not the only barriers to litigation."[151]

Emphasis on such non-economic obstacles is crucial to ensuring complete access to justice. As Mathew Good expresses it: "Only by overcoming all of the barriers that prevent the vindication of legitimate rights will there truly be access to justice."[152] This focus is particularly significant in the Kuwaiti context, where economic or financial barriers to litigation are nearly non-existent, and non-economic barriers are predominant.

Litigation in Kuwait is more financially accessible than many other countries. Unlike some jurisdictions, Kuwaiti lawyers do not bill by the hour; instead, they charge a minimal fixed fee or work based on a contingency fee basis. The latter is often the case due to the large number of practicing lawyers in Kuwait, making it a highly competitive legal market. The cost regime

[149] *Ibid* at para 29 [footnotes omitted]. See also *Bisaillon v Concordia University* 2006 SCC 19 at para 16
[150] *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd*, 2002 CarswellOnt 4272 at para 54, [2002] OJ No 4781, 118 ACWS (3d) 530.
[151] *Ibid* at para 55.
[152] Mathew Good, *supra* note 142 at 205.

primarily follows a "loser pays" model,[153] with attorney fees assessed and awarded at the judge's sole discretion.[154] Given the low costs of court and attorney fees, the current regime does little to discourage litigation. Yet, non-financial barriers, such as those mentioned above, remain significant in Kuwait. The complexity and time-consuming nature of the litigation process may still discourage litigants from pursuing small-value claims, making them question whether prolonged legal proceedings are worth the effort. While the financial barrier is weaker compared to other legal systems, relatively low fees can still pose a barrier in small-value claims, where the cost of legal representation may outweigh the amount at stake.

Thirdly, class actions have the potential to deter the conduct of actual or potential wrongdoers, which is known in the literature as **behaviour modification**. The Supreme Court has recognized this goal in *Dutton*, stating that "[c]lass actions serve efficiency and justice by ensuring that actual wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery."[155]

While individual civil litigation has the potential to prevent wrongdoers from taking advantage of their misconduct, class actions can further contribute to the achievement of this goal because of their "potential to overcome economic and other barriers to litigation."[156] As noted by

[153] Arts 119–123 Code of Civil Procedure (Kuwait). A lawsuit with a determined value is subject to a proportional fee of 2.5% on amounts up to ten thousand dinars and 1% on any amount exceeding ten thousand dinars. For non-determined value lawsuits, the fee does not exceed 5 dinars. See *Law no. 17 of 1973 on Judicial Fees*, arts 6–7.
[154] Upon reviewal of Kuwaiti judgemnts, 500 KWD is the highest amount awarded in attorney fees. Recent judgments awarded 20 KWD, e.g. Mahkamt al-Tamiez [Court of Cassation] 31 January 2021, no 19,74/2013 (Kuwait); Mahkamt al-Tamiez [Court of Cassation] 31 August 2020 No 2430/2019 (Kuwait). Judgments awarding 30–500 KWD: Mahkamt al-Tamiez [Court of Cassation] 4 December 2019 no 62/2019 (Kuwait); Mahkamat Al-Istinaf [Court of Appeal] 19 May 2018 No 983/2018 (Kuwait); Mahkamat Al-Istinaf [Court of Appeal] 5 May 2019 No 784/2019 (Kuwait).
[155] *Dutton*, *supra* note 129 at para 29.
[156] OLRC, *supra* note 130 at 144.

the OLRC, behaviour modification is achieved "by making the defendant 'internalize' the cost of its harm, modifying behaviour through market mechanisms, even where a defendant receives no material benefit from harm that it has caused."[157] Moreover, class actions involve the rights of numerous affected individuals, often leading to substantial financial recoveries. These lawsuits not only result in significant financial costs but also frequently attract considerable public attention. Defendants in class actions are typically large corporations with valuable reputations to uphold, so the potential damage to a corporation's public image from such actions can be severe. Thus, the fear of reputational damage can potentially deter the wrongful behavior of defendants and others in similar positions.[158]

In this context, class actions can function as both a preventative and a corrective measure. On the preventative level, the threat of a class action lawsuit may prompt defendants to change their behavior to avoid the potential consequences of litigation.[159] On the corrective level, when a class action is filed, defendants may be encouraged to settle before trial to evade excessive litigation costs and the risk of an unfavorable decision that could result in significant financial damages and reputational harm. In cases involving injunctive relief, modification of wrongful behavior is more explicit, as the court orders defendants to cease the harmful conduct and implement specific measures to prevent future violations.[160] A successful class action, therefore, sets an example for others in similar situations as the defendant, encouraging them to adjust their behavior to avoid similar legal consequences, thereby promoting greater compliance with the law. While it is debatable whether behavior modification is a proper role for class actions,[161] it is

[157] *Ibid* at 141.
[158] Catherine Piché, "Class Actions in Quebec: Highlights of a Unique Procedure" (2021) 22:3 Revista Eletrônica de Direito Processual 170 at 175.
[159] *Ibid.*
[160] OLRC, *supra* note 130 at 140.
[161] One hand, commissions like the Scottish Law Commission and the Australian Law Reform Commission contest behavior modification as a proper role for class actions, while others strongly endorse class actions as a regulatory

undeniable that "[b]ehaviour modification is essentially an inevitable, albeit important, by-product of class actions."[162] Although the OLRC emphasizes judicial economy and access to justice as the primary objectives of class actions, it also acknowledges that behavior modification is also an important outcome, making behavior modification a complementary objective.[163]

In addition to these three major advantages, the broad range of the Canadian class action that addresses a wide range of legal disputes further enhances access to justice. The Canadian class action model is trans-substantive, meaning that this procedural mechanism can, in principle, be pursued in any area of substantive law.[164] As the legislation does not restrict the class action procedure to certain sectors, class actions have evolved to address a wide range of legal disputes, e.g. consumer protection, securities fraud, privacy law, environmental law, health law, and many others. This approach contrasts with most European models that limit class actions to certain sectors of the law.[165] However, one must note that in Quebec, the Quebec Court of Appeal recently confirmed that class actions cannot be brought when the dispute falls exclusively within the jurisdiction of an administrative tribunal.[166]

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device: See e.g. Craig E. Jones, "The Class Action as Public Law" in Janet Walker, H Michael Rosenberg & Jasminka Kalajdzic, eds, *Class Actions in Canada: Cases, Notes, and Materials*, 3rd ed (Toronto: Emond Montgomery Publications Limited, 2024) at 17; Mauro Cappelletti, *supra* note 31. See also Jasminka Kalajdzic, "Public Goals by Private Means, & Public Actors Protecting Private Interests: A Response to Professor Jones" (2012) 53 Can Bus L J 371; David Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective Means" (1987) 62:3 Indiana LJ 561.

[162] OLRC, *supra* note 130 at 145.

[163] *Ibid*.

[164] Janet Walker et al, *Civil Litigation Process: Cases and Materials*, 9th ed (Toronto: Emond Publishing, 2021) at 860.

[165] In France, for example, class actions were limited in consumer and competition law when they were first introduced by virtue of Loi n°2014-344 du 17 Mars 2014 (also known as Loi Hamon), which amended the *Code de la consommation*. However, in 2016, the scope of group actions expanded in include the health sector through Loi n° 2016-41 du 26 Janvier 2016. In the same year, Loi n° 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXIe siècle (1) permitted class actions in environmental law, discrimination cases, and data protection cases. Italy followed a similar approach to France. Under the previous Italian legal framework, class actions were limited to claims related to consumer law. However, with the introduction of Law No. 31/2019, class actions are now available to anyone seeking compensation for the violation of homogeneous individual rights, regardless of the subject matter of the laws that establish the rights alleged to have been violated.

[166] *Veer v Boardwalk Real Estate Investment Trust*, 2019 QCCA 740; Jérémy Boulanger-Bonnelly, "Actions Collectives et Tribunaux Administratifs: Un Vide Juridictionnel À Combler" (2022) 67:4 RD McGill 453.

After defining the class action and identifying their main objectives, it is crucial to look at the technical features of the procedure, as well as their potential benefits and risks.

II. Features of the Canadian Class Action Model

The following section outlines the major procedural features of class proceedings, drawing from the legislative frameworks in Quebec and Ontario.

A. A Representative Action (Absence of a Mandate)

Reflecting on the definitions presented in the first chapter, the class action mechanism can be described as a "representative action", wherein a lawsuit is commenced by a representative plaintiff – who could be a natural person or a legal person – on behalf of himself and on behalf of an unnamed group of people who have common legal claims without needing explicit consent from each member. Based on this framework, the law gives this representative plaintiff "collective standing" which enables him or her to sue on behalf of the class members, who are usually absent from the proceedings. This feature is one of the most important features distinguishing North American class actions from individual litigation. As noted previously in chapter one, the Quebec CCP in article 571 explicitly emphasizes the absence of the mandate.[167] Similarly, section 2 of the CPA highlights the representative nature of the class proceeding stating that "One or more members of a class of persons may commence a proceeding in the court *on behalf of the members of the class*."[168]

This feature reduces the burden on affected members to take action, thereby promoting the goals of access to justice and judicial economy discussed above. However, it also presents risks,

[167] Art 571 CCP "A class action is a procedural means enabling a person who is a member of a class of persons to sue, *without a mandate*, on behalf of all the members of the class and to represent the class." [emphasis added]
[168] CPA, s 2 (1) [emphasis added].

such as potential conflicts of interests between class members and the representative plaintiff, inadequacy of representation, and unfair outcomes for the class members[169] An unfavorable outcome binds the absent class members, which some civil law scholars may view as violation of the right of defense and the *principe du contradictoire.*[170] To circumvent these risks, civil law jurisdictions like France, limit representation to some associations and prohibit individuals from initiating class actions. In Canada, there are many procedural safeguards designed to protect the interests of the absent members and mitigate these risks, including the certification requirement and the adequacy of representation criterion discussed in the second feature of class actions as follows.

B. A Two-Step Procedure – Certification / Authorization

Class proceedings in Canada undergo two procedural stages. The first stage is certification (authorization in Quebec,) and it refers to "the preliminary hearing by which the class action can only proceed if and when the court condones the validity of that form of suit."[171] To be certified (authorized), the class must meet specific "certification criteria," which determine the suitability of the dispute for class action treatment. Understanding these criteria is particularly important when considering the transplantation of the class action mechanism into the Kuwaiti legal system, as they provide a structured framework for evaluating its applicability in a different legal and cultural context. This framework can guide the adaptation of class action procedures to Kuwait's legal system by addressing key questions, such as the commonality of issues among claimants.

[169] Jasminka Kalajdzic, "Self-Interest, Public Interest, and the Interests of the Absent Client: Legal ethics and Class Action Praxis" (2011) 49:1 Osgoode Hall L J 1; Geoffrey P Miller, "Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard" (2003) U Chicago Legal F 581.
[170] Azmi Abdel-Fattah Attia, *supra* note 46 at 233.
[171] Rachael Mulheron, *supra* note 25 at 23.

Despite some variations among the common law class proceedings acts, in every province (except Quebec) there are generally five common certification criteria outlined in section 5 of Ontario's *Class Proceedings Act* ("CPA"), as follows: the pleadings disclose **a cause of action**; there is an **identifiable class** of persons; there must be **common issues**; a class proceeding is the **preferable procedure** for the resolution of the common issues (preferability); and there is a **suitable representative plaintiff** (adequacy of representation).[172] In 2020, the CPA added new criteria of *superiority* and *predominance* to determine the preferability of a class proceeding, and Prince Edward Island subsequently adopted these changes.[173] According to these criteria, the class action must be superior to other reasonably available means of resolving the claims, such as administrative proceedings or alternative remedial programs (superiority), and the common questions of fact or law must predominate over individual issues (predominance).[174]

In Quebec, the four authorization criteria are set out in article 575 of the CCP, which provides that:

> The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
> (2) the facts alleged appear to justify the conclusions sought;
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

Quebec is known for being plaintiff-friendly, as the authorization criteria are less strict than in other provinces, especially with the absence of the preferability criteria. That being said, some litigants have relied on the principle of proportionality – which provides that the parties must

[172] CPA, s 5 (1)
[173] *Class Proceedings Act*, RSPEI 2021 c.30.
[174] CPA, s 5 (1.1).

ensure that the proceedings they choose are proportionate in terms of costs and delays – to make similar arguments.[175] In this context, the Supreme Court in *Vivendi Canada Inc. v Dell'Aniello* confirmed that while the principle of proportionality is undeniably important, "the motion judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the established criteria."[176] Notably, both the Ontario CPA and Quebec CCP state certain grounds that do not bar to certification to further promote access to justice. These include, for example, situations where the relief claimed includes damages requiring individual assessment after determination of the common issues, the relief claimed relates to separate contracts involving different class members, the number of class members or the identity of each class member is not known, or where the class members are part of a multi-jurisdictional class action already under way outside Québec.[177] The Supreme Court of Canada in many cases emphasized that the authorization criteria should be interpreted flexibly and broadly to truly provide access to justice.[178]

If the representative plaintiff is successful at the certification stage, the claim will move to the second stage, which is the "common issues trial," as the decision on certifying a class is not a determination of the merits but merely a procedural determination of whether the proceeding is appropriate to proceed as a class proceeding.[179] The Supreme Court confirmed this in *Marcotte v. Longueuil (City)*, stating that: "the motion for authorization to institute a class action acts as a screening mechanism and does not allow for an advance review of the merits of the case."[180]

[175] Art 18 CCP.
[176] *Vivendi Canada Inc. v Dell'Aniello,* 2014 SCC 1 at paras 66–68.
[177] CPA, s 6; Art 577 CCP.
[178] *See e.g. Infineon Technologies AG v Option consommateurs,* 2013 SCC 59 at para 60 [*Infineon*].
[179] CPA s 5 (5).
[180] *Marcotte v. Longueuil (City)* 2009 SCC 43, at para 22 [footnotes omitted].

As a filtering stage, certification screens out inappropriate cases from proceeding, striking a balance between enabling class proceedings with necessary restrictions to protect defendants from frivolous actions. It acts as a "counter-balance" to reforms that may be perceived as too favorable to class members,[181] providing protection not only for absent class members, but also for defendants. As the Supreme Court asserted in *Infineon:*

> At this stage, the court's role is merely to filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of art. 1003. The objective is not to impose an onerous burden on the applicant, but merely to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims.[182]

Similarly, as reiterated in *L'Oratoire Saint-Joseph du Mont-Royal*:

> At the authorization stage, the court plays a 'screening' role. It must simply ensure that the applicant meets the conditions of art. 575 C.C.P. If the conditions are met, the class action must be authorized. The Superior Court will consider the merits of the case later. This means that, in determining whether the conditions of art. 575 C.C.P. are met at the authorization stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted.[183]

Certification achieves other several benefits. It acts as a shield to protect absent class members from risks of inadequate representation,[184] and enhances effectiveness in managing complex litigation. Moreover, it furthers certainty among class members through the certification order or the authorization judgment, which will be notified to the class members, making relevant information accessible. Such information is outlined in article 576 of the CCP and similarly section 8 of the CPA: A description of the class (class definition), the name and information of the representative plaintiff(s), the main common issues to be dealt with collectively, the conclusions

[181] Rachael Mulheron, *supra* note 25 at 24.
[182] *Infineon*, *supra* note 178 at para 61.
[183] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra* note 131 at para 7.
[184] OLRC, *supra* note 130 at 281.

or relief sought in relation to those issues, and time limit and procedures for opting out.[185] Out of these elements, the definition of the class is the most crucial element of the authorization judgment, as it describes the class whose members will be bound by the class action judgment, and entitled to opt-out. The Supreme Court highlighted the importance of class definition in *Dutton* where it said:

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.[186]

This process and emphasis on objective criteria by which members of the class can be identified also protect class members from the risk of "sloppy class definition" which has res judicata consequences.[187] As elaborated below, class actions have an extended res judicata effect (*ultra partes*) that binds absent members. Thus, an improperly defined class could lead to binding judgments on individuals who were not adequately represented or informed, barring future claims by the final judgment in the class action due to a vague or imprecise class definition.

C. Method of Determining Class Membership – Opt-out Model and Extended Res Judicata Effect

Opting out is the procedure by which a class member expresses their intent of not participating in the class action. According to this method, the judgment on the common issues

[185] Art 576 CCP; CPA, s 8.
[186] *Dutton*, *supra* note 129 at para 38.
[187] Edward H. Cooper, "Class Action Advice in the Form of Questions" (2001) 11:215 Duke J Comp & Intl L 215 at 231.

will bind all class members unless they opt-out. By opting out, individuals will not be bound by the result of the class action, retaining the right to pursue individual legal action against the defendant individually. Only after a class is certified, members have the right to opt-out in the manner and within the time limit specified in the authorization judgment[188] (or certification order.)[189] The result of the opt-out method is an extended res judicata effect that binds members absent from the proceedings (*ultra partes*[190]). On the contrary, most European jurisdictions adopt an "opt-in" model whereby only those who have expressed their will to join the class will be bound by the result.[191] This approach was utilized as a way of getting around the concept of having one's rights determined without consent and mandate to participate in litigation.[192]

Although this extended res judicata effect entails a risk of binding absent class members with an unfavorable outcome, the opt-out system combined with accompanying notice requirements function to ensure procedural due process.[193]

D. Notice

For the protection of the absent class members' interests, notice to class members on authorization and settlements is mandatory in Quebec. When a class action is authorized, a notice is published or notified to potential class members to inform them about the progress and potential outcomes of the lawsuit. Adequate notice is crucial as it upholds the principles of due process by

[188] Art 576 CCP.
[189] CPA, s 9.
[190] Latin expression meaning "beyond the parties." This term will be used hereinafter to describe the binding effect of res judicata in class actions judgements.
[191] Duncan Fairgrieve & Eva Lein, *supra* note 5; Catherine Piche, "Critical Impressions of the Collective Access to Justice Provided in the Model European Rules of Civil Procedure from a Quebec Perspective (2021) 11:1 IJPL 13.
[192] Rachael Mulheron, *supra* note 25 at 29.
[193] Steven T.O. Cottreau, "The Due Process Right to Opt Out of Class Actions" (1998) 73:2 NYU L Rev 480; Michael Mattioli, "Opting Out: Procedural Fair Use" (2007) 12:3 Virginia JL & Technology 1.

ensuring that class members potentially affected by the class action receive sufficient information to make informed decisions about their involvement, including the right to opt-out.

The Canadian legislation provides comprehensive provisions on notices in class proceedings. In Quebec, the contents of notices include, in addition to the information in the authorization judgment, the contact information of the representative plaintiff's lawyer, a statement that class members have the right to seek intervenor status in the class action and the right to opt out of the class and specifying the procedure and time limit for doing so, a statement that only the representative plaintiff or any intervenor are responsible for paying legal costs, and any additional information the court considers useful.[194] The form, date and method of publication of the notice is determined by the court to accommodate the nature of the class action, the composition of the class and the geographical location of its members.[195] Additionally, if the court it considers it necessary for the protection of their rights, it may at any stage of class action order a notice to be published or notified to the class members, which must be clear and concise.[196] In addition to ordering the publication of a notice to class members, the authorization judgment may also order the representative plaintiff or a party to make information on the class action available to the class members by setting up a website, for example.[197]

Similarly, in Ontario, sections 17-22 of the CPA provide flexible notice provisions, allowing the court to tailor the notice process to best inform class members of important developments, such as notice of certification,[198] notice where individual participation is required,

[194] Art 579 CCP.
[195] Art 579 CCP. This article also allows individual notifications and abbreviated notices.
[196] Art 581 CCP.
[197] Art 576 CCP
[198] CPA, s 17(2). The court may dispense with notice if it considers it appropriate.

and notice to protect interests of affected persons, which all specify the contents and means of giving notice.[199]

By ensuring transparency and inclusivity, these notice provisions help maintain the integrity of the class action process and protects the interests of all potential claimants.

E. Broad Judicial Authority

In contrast to individual lawsuits, the court has broader managerial powers over the class action for the purpose of protecting the interests of absent class members. Traditionally, in North American civil procedure, the adversarial culture assigned judges a passive adjudicator role, while the parties exercised more active control over the proceedings.[200] Class actions, however, provided fertile ground for an evolution towards managerial judging.[201] During the course of the proceeding, judges are "expected to maintain an active managerial role in protecting absent parties and promoting efficiency."[202] This transformation in the judicial role is the result of the increasing size and complex nature of class actions and the emergence of new diffuse, collective and social rights that need further judicial protection and active intervention.[203] The nature of the class action and its purposes requires this active managerial role.

Extended judicial supervision in class action legislation can be seen, for example, in the judicial approval of settlements.[204] In individual lawsuits, parties may settle without a court

[199] *Ibid* ss 17–19.
[200] H. Patrick Glenn, "La responsabilité des juges" (1983) 28:2 RD McGill 228; Hugh F Landerkin & Andrew J Pirie, "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82:2 Can Bar Rev 249; Marc Galanter & Mia Cahill, "Most Cases Settle: Judicial Promotion and Regulation of Settlements" (1994) 46:6 Stan L Rev 1339; Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 J Empirical Legal Stud 459; Mauro Cappelletti, "The Law-Making Power of the Judge and Its Limits: A Comparative Analysis" (1981) 8:1 Monash UL Rev 15; Hein Kotz, "The Role of the Judge in the Court-Room: The Common Law and Civil Law Compared" (1987) 1987:1 J S Afr L 35.
[201] Catherine Piché, *supra* note 117 at 128–129.
[202] H. Patrick Glenn, "Class Actions and the Theory of Tort and Delict" (1985) U T L J 35:3 287 at 297.
[203] Catherine Piché, *supra* note 117 at 139.
[204] CPAs 27.1(1); Art 590 CCP.

approval under the principal of party autonomy in the adversarial systems of civil procedure.[205] In a class action, however, the court must approve the settlement agreement to protect the interests of the absent class members who do not participate in the proceedings.[206] To approve a settlement, the court must ensure that the settlement is fair, reasonable and in the best interests of the class.[207] Moreover, court approval is also required for discontinuing or abandoning the proceeding,[208] and waiving the status of representative plaintiff.[209]

While the concept of an "active" judge –as will be explained in detail in Chapter 4– may be familiar to the judicial system in Kuwait, this active role in common law system differs significantly. This distinction presents a potential challenge, as the Kuwaiti judicial system is unfamiliar with the type of judicial activity now undertaken by Canadian judges.

In short, the Canadian class action provides a sophisticated mechanism to address mass disputes, making its potential transplantation into Kuwait worth exploring. However, upon examining this mechanism, certain fears, risks and challenges may arise, including concerns about its compatibility with Kuwait's legal and cultural framework. For instance, the opt-out model, a cornerstone of the Canadian approach, prompts inquiries into whether it aligns with Kuwait's legal culture. Thus, it is vital to address these concerns, analyze potential obstacles, and propose solutions tailored to Kuwait's unique legal environment. Thus, the next chapter examines the key objections to class actions in Kuwait and explores potential ways to tailor this model to the Kuwaiti legal system.

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[205] Rules of Civil Procedure, RRO 1990, Reg 194 (Ont) r 49; Art 220 CCP.
[206] Catherine Piché, *supra* note 117 at 129.
[207] To further protect the interests of the class members, the CCP requires in article 590 that the approval of settlements cannot be given unless a notice specifying the nature of the transaction, method of execution chosen, and the date the transaction will be submitted to the court for approval has been given to the class members. The notice must also inform class members that they may assert their contentions before the court regarding the proposed.
[208] CPA s 29(1).
[209] Art 589 CCP.

Chapter Four: Transplanting the Canadian Model into the Kuwaiti Legal System

In the previous chapters, this thesis has identified the absence of a class action framework in Kuwait and demonstrated how procedural mechanisms currently available to litigants are inadequate for efficiently resolving mass disputes. Drawing on the comparative law method, particularly through the lens of legal transplants, this thesis explored the Canadian class action model as a potential solution for Kuwait. However, introducing this model in Kuwait raises several objections, many of which are not peculiar to civil law jurisdictions, as similar concerns have also arisen in common law jurisdictions.

Class proceedings pose various challenges, including procedural complexities, economic risks, social and constitutional concerns, and ethical considerations. Addressing all of these issues is beyond the scope of this thesis. However, as explained in Chapter Two, transplanting procedural mechanisms into another jurisdiction requires careful adaptation to the recipient legal system's culture and normative landscape. Accordingly, rather than attempting to address every possible concern that may arise from class actions, this chapter focuses on the most significant objections—those that directly interact with foundational legal principles in the Kuwaiti legal system.

By addressing these challenges, this chapter seeks to overcome the perceived obstacles to implementing class actions and pave the way for their adaptation to the recipient legal system. Ultimately, it provides a vision for what a Kuwaiti class action model could look like. Accordingly, this chapter first addresses six key challenges arising from transplanting class actions in Kuwait (I) and then proposes some fundamental elements of a potential class action model adapted to the Kuwaiti legal system (II).

I. Challenges Arising from Transplanting Class Actions in Kuwait

Some of the fundamental aspects of civil procedure in Kuwait, inspired by the country's legal tradition and culture, may appear in tension with class actions and may lead observers to doubt the appropriateness of transplanting that model to the Kuwaiti legal system. Although these potential objections are numerous, this section focuses on those that appear most fundamental, as they conflict with key doctrines and principles of civil law codified in Kuwaiti law. These issues are also significant because they stem from some of the core elements of class actions discussed in this thesis, including collective standing and the extended res judicata effect.

A. Collective Standing and the Right to Take Legal Action (*Droit d'action*)

One of the key challenges in adopting class actions is the issue of collective standing, which concerns whether a representative plaintiff has the right to sue on behalf of all class members, representing both their personal interests and those of the class. As discussed in Chapter Three, collective standing is central to class actions, as it allows one or a few individuals to litigate on behalf of a group with common legal or factual issues, thereby overcoming barriers to litigation and enabling collective redress. This framework, however, clashes with the traditional conception of standing and adjudication that Kuwait – and many other jurisdictions – continue to follow. Under Kuwait's traditional individual conception of standing, the right to institute legal proceedings belongs solely to the person who holds the substantial right forming the cause of action.[210] Under the Canadian class action model, the representative plaintiff lacks a direct, personal interest in suing for other class members, yet is allowed to do so without their consent.

[210] Azmi Abdel-Fattah Attia & Musaed Saleh Al-Anzi, *supra* note 12 at 523–527; Fathi Wali, *supra* note 45 at 121, 142–143. *See* also Frédéric Bachand, "Le droit d'agir en justice" (2020) 66:1 McGill LJ 109.

The sections that follow attempt to reconcile this type of collective standing, which is key to class actions, with the traditional conception of standing in Kuwaiti law.

1. Reconciling Collective Standing with Traditional Standing

The concept of individual standing, which requires requires that a claimant demonstrate a direct and personal legal interest in the dispute, stems from the idea that the right to take legal action is a procedural subjective right.[211] This strict requirement creates tension with class actions, which allow a representative plaintiff to litigate on behalf of others' interests.

One way to overcome the tension between traditional standing and class actions is to recognize the emergence of new collective and diffuse rights. The growth of "meta-individual rights and interests" is an undeniable reality of contemporary societies.[212] These collective and diffuse rights transcend the traditional personal-interest model. However, because of the lack of appropriate procedural mechanisms for vindicating these new types of rights, there is a pressing need for a flexible approach to legal standing, which would allow these rights to be properly addressed in court. Thus, recognizing a new form of objective rights opens the door for broadening standing rules, justifying the acceptance of a collective view of legal action.

Restrictive standing doctrines can significantly impede collective litigation by failing to account for the special nature of the interests at stake. Therefore, to protect these new rights, the Kuwaiti legal system "must abandon the orthodox and individualistic principles of civil procedure, which traditionally have demanded the existence of a personal and direct interest in the outcome of the litigation and thus have not allowed such absentee representation."[213] Adopting class action and expanding standing rules is a necessary social response to evolving societal needs. Rejecting

[211] Henry Motulsky, "Le droit subjectif et l'action en justice" in Henry Motualsky, ed, Écrits, études et notes de procédure civile (France: Dalloz, 1973) 85 at 97.
[212] Cappelletti, *supra* note 31 at 648.
[213] Antonio Gidi, *supra* note 23 at 363

collective standing and resisting expanding the expansion of standing doctrine ultimately means rejecting the class action mechanism as a whole.

The Quebec experience illustrates a notable shift from an individualistic perspective to a more collective one in class action litigation. Initially, Quebec courts approached class actions with an individualistic conception of justice.[214] Judges perceived class actions as "a series of individual actions, an aggregate of individual claims."[215] However, in recent years, there has been a shift away from this individualistic perspective, with judges increasingly embracing a more collective view, "recognizing the collective dimension of the individual prejudice and the collective effect of the breach."[216]

While the concept of collective standing is not explicitly recognized, the Kuwaiti legislator has made efforts to acknowledge exceptions to traditional rules, as seen in Chapter One with collective labour disputes and collective actions by unions on behalf of the professions they represent and the interests of their members. These exceptions demonstrate a willingness to accommodate collective standing in specific areas. From there, there is only a small step to make to recognize such collective standing more broadly in the context of class actions. Once the law recognizes the concept of collective standing, the second fundamental question is: Who should be granted the right to represent the interests of the class (collective standing)? In other words, who should be allowed to qualify as the "representative plaintiff"?

2. Who Should be Granted Collective Standing?

Comparative analyses highlight two approaches: granting collective standing either to individuals (natural persons) or to organizations, or sometimes to both. In Canada, a class

[214] See e.g. *Gosselin v Quebec (Attorney General)* 2002 SCC 84 at paras 48–51.
[215] Catherine Piché, *supra* note 117 at 138.
[216] Pierre-Claude Lafond, *Le Recours Collectif, le Role Du Juge et sa Conception de la Justice: Impact et Évolution* (Cowansville: Éditions Yvon Blais, 2006) at 229-230 [translated by author].

representative does not need to be an organization; rather, they must demonstrate that they can provide adequate representation and that their claims are typical of those of other class members.[217] In contrast, many European jurisdictions restrict collective standing to associations.[218] This restriction, according to Issacharoff and Miller, serves four objectives. First, it aims to prevent the rise of American-style entrepreneurial class action attorneys. Second, it ensures that the class representative is competent and loyal in advocating for absent class members. Third, it seeks to guarantee that the representative has the financial resources to cover litigation expenses. Finally, it reflects a jurisprudential concern that a randomly authorized individual provides an insufficient basis for courts to recognize and protect the interests of absent class members.[219]

While these goals reflect legitimate concerns, they do not always hold true in practice. First, regarding the fear of entrepreneurial lawyers, individual standing in class actions does not necessarily lead to "lawyer-driven entrepreneurial litigation," nor does organizational standing necessarily prevent it. For example, individual collective representation has not resulted in "abusive or frivolous class litigation" in neither Quebec nor Ontario.[220] In fact, experience in the United States suggests that the selection of consumer organizations to act as class representatives may not prevent class litigation from being dominated by self-interested attorneys.[221]

Second, although organizations can represent large groups, there is a risk that the diversity of interests within the class may not be fully captured or addressed. Not all class members may

[217] See Chapter Three, II, A.
[218] See e.g. article L621-1 of Code de la consommation (France).
[219] Samuel Issacharoff & Geoffrey P. Miller, *supra* note 72 at 192–193.
[220] Catherine Piché, *supra* note 191 at 26. Some commentators, however, challenge this view. The Quebec Court of Appeal not only recognizes that class actions encourage entrepreneurial lawyering but also highlights its beneficial aspects. See *Sibiga c Fido Solutions inc.*, 2016 QCCA 1299 at para 102.
[221] The Private Securities Litigation Reform Act (PSLRA) of 1995 aimed to reduce lawyers' control by requiring the lead plaintiff to be the class member with the largest financial stake, typically institutional investors. While this led to some oversight of class counsel and possibly lower attorneys' fees, it did not significantly alter the dominance of entrepreneurial attorneys, who continue to control securities class actions much as they did before the reform. *See* Samuel Issacharoff & Geoffrey P. Miller, *supra* note 72 at 196–97.

agree with the organization's strategy or objectives. Issacharoff and Miller highlight this concern, noting that "even dedicated and idealistic people may not act as faithful champions when their guiding principles do not overlap with the interests of those they are assigned to represent […] The interests of nonprofit consumer organizations may reflect ideological considerations that may not necessarily coincide with the economic interests of consumers."[222] To mitigate this issue, they suggest limiting the representative role of associations and organizations to their own members rather than extending it to all individuals affected by the challenged product or practice. While Issacharoff and Miller's concern is valid, restricting representation with membership requirement could significantly narrow access to justice, especially for individuals who lack the means or organization to bring claims on their own.

Third, while associations may have more expertise and resources than individuals, making them potentially efficient representatives, this may not always be the case. The assumption that associations are best suited to represent the interests of a class is also not necessarily valid. Associations may lack the personal connection to the claim that individual class members have, which can undermine the legitimacy and impact of the case. Without direct harm or vested interest in the outcome, an association's advocacy may appear less compelling or authentic. In contrast, an individual class member who has directly suffered harm has a deeper connection to the interests of the class. This proximity to the harm not only strengthens their arguments but also enhances their ability to represent the common concerns of the class more effectively. If an association itself has no direct interest in the litigation and lacks a genuine connection to the experiences and concerns of the class members, then it is clear that it is an unsuitable representative for their interests.

[222] *Ibid.*

Finally, restricting collective standing to associations may hinder the effectiveness of class actions in the Kuwaiti context. In general, the role of non-profit organizations in the country is relatively weak, with many organizations failing to fulfill their intended roles. In October 2024, the Minister of Social Affairs dissolved seven public benefit associations for violating *Law No. 24/1962 on Clubs and Public Benefit Associations*,[223] due to their lack of activity and their failure to provide services to society for years.[224] Additionally, the Ministry has identified about 22 other inactive associations that fail to adhere to regulations or fulfill the goals for which they were established, and has warned them that failure to rectify their status could result in dissolution.[225] The structural weaknesses of these organizations, coupled with instances of mismanagement, corruption, and political influence,[226] have eroded public trust. Associations are not free from abuse, corruption and political influence, which may affect the population's trust in them. If associations struggle to manage their internal affairs, how can they be relied on and trusted to litigate on behalf of the interests of class members? Some associations proved their inability to carry out such a responsibility.

Moreover, there are fewer than 200 registered associations in Kuwait. According to the Ministry's reports, out of 183 officially registered associations, approximately 140 are active, while only a small number operate at an average level.[227] Mass disputes cover a wide range of

[223] This law governs the establishment, regulation, and oversight of clubs and public benefit associations in Kuwait. It specifies certain grounds outlined in article 27 that grant the Council of Ministers the authority to dissolve associations.
[224] "Officially.. Dissolving 7 public benefit associations", *AlAnbaa* (19 October 2024), Online: <alanba.com.kw/1278278>.
[225] George Atef, "Dissolving 9 public benefit associations and warning 13", *Aljarida* (26 Sebtember 2024), Online: <aljarida.com/article/75990 >; "Periodic evaluation of 'civil society associations'" *AlAnbaa* (30 December 2024), Online: <alanba.com.kw/1289293>.
[226] Youssef Abdul Karim Al-Zankawi, "Remnants of Imagination: Why Do Kuwaiti Public Benefit Societies Fail?" *Aljarida* (24 November 2023) Online:<aljarida.com/article/45561>; Dr. Adel Fahd Al-Mashal, "Public Benefit Associations" *Alrai* (3 September 2022) Online: <alraimedia.com/article/1604768/>
[227] George Atef, "The number of public benefit associations decreased from 203 to 183 associations", *Aljarida* (30 December 2024), Online: <aljarida.com/article/85896>.

issues, making it unrealistic to expect an association to exist for every type of dispute. Given this reality, restricting collective standing to organizations in Kuwait may not align with its legal culture nor with the current state of its civil society.

3. Choice for Kuwait

Rather than limiting standing to either individuals or associations, Kuwait would benefit from a more flexible approach—one that allows both individual and institutional claimants to bring class actions. In some cases, an individual may be a better choice, while in others an association may be a better fit. Just as associations may not always pursue the class's interests, an individual representative may also have priorities that do not align with the entire class. These risks remain an inevitable feature of class actions. Adequate representation cannot be predetermined through predefined categories.

Thus, a Kuwaiti class action law should be flexible, allowing both natural and legal persons to serve as class representatives without restricting representation to specific entities. Rather than imposing rigid limitations, representation should be governed by adequacy criteria, assessed on a case-by-case basis. In Canadian class actions, adequacy of representation is a key certification criterion. Courts carefully consider whether the representative plaintiff can fairly and adequately protect the interests of all class members. The Supreme Court of Canada, in *Dutton*, outlined various factors that courts may consider when evaluating adequacy, which include the proposed representative's motivation to prosecute the claim, financial ability to bear litigation costs, the competence of their legal counsel, and the absence of conflicts of interest with other class members.[228]

[228] *Dutton, supra* note 129 at para 41.

The challenge for Kuwait is that civil law judges have historically lacked the power, inclination and professional ability to scrutinize the adequacy of representation.[229] As a result, some authors have argued that civil law judges are ill-equipped to perform the same evaluative functions as a North American judge, including assessing adequacy of representation.[230] To address this challenge, the legislator may assist judges by providing clear criteria for adequate representation, drawing inspiration from Canadian case law.[231] The legislator may also provide illustrative, non-exhaustive examples of circumstances that may render a representative inadequate or, conversely, confirm adequacy. For instance, a representative may be deemed inadequate if their claim is atypical of the class, leading to a misalignment of interests. Conversely, adequacy may be confirmed when the representative has a direct personal stake in the case, and actively participates in the litigation process. Despite its novelty, this approach is tailored to Kuwait's legal and social context, particularly the zealous and fervent behavior of Kuwaiti litigants.[232] Despite the weak role associations generally play in Kuwait, a well-designed class action model could incentivize them to become more active and accountable, potentially improving their role in collective litigation. New associations may also emerge with the specific goal of launching class actions. Only the future will tell whether such a framework will foster greater engagement from associations in Kuwait.

Collective standing and the representation of absentees clashes with the long-established doctrine of res judicata, constituting yet another challenge to be addressed as follows.

[229] Antonio Gidi, *supra* note 23.
[230] *See* Richard B. Cappalli & Claudio Consolo, *supra* note 72 at 288–291.
[231] See note 227.
[232] See *supra* note 4.

B. *Ultra Partes* Res Judicata

As demonstrated in the previous chapter, Canadian class action judgments bind all members who fall under the definition of the class, even those who were unaware of the lawsuit or did not participate in it, whether the outcome is favorable or not. The extension of the binding effect to absent class members, who are not formal parties to the action, conflicts with the deep-rooted contours of the doctrine of res judicata, which constitutes a further challenge to transplanting the class action procedure into Kuwait.

This challenge is not peculiar to civil law jurisdictions; the res judicata doctrine also holds significant weight in common law. Nevertheless, the notion of res judicata in common law is broader than in civil law. In common law, res judicata encompasses both claim preclusion and issue preclusion (Collateral Estoppel), while civil law is limited to claim preclusion.[233] Claim preclusion prevents parties from relitigating the same claim after a final judgment, whereas issue preclusion bars the re-litigation of specific issues that were already decided in a prior case, even in a different claim. In class actions, however, unlike traditional common law res judicata, the CPA limits the binding effect of class action judgments to common issues specifically identified in the certification order.[234] Class action statutes have thus modified the traditional application of res judicata in this context.[235] This suggests that transplanting class actions in civil law jurisdictions does not require adopting traditional common law res judicata, including the issue preclusion element. It supports the argument that class actions can be integrated into a civil law framework without fundamentally altering the doctrine of res judicata. Accordingly, the question of doctrinal compatibility is narrowed to the *ultra partes* aspect of res judicata.

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[233] See K R Handley & George Spencer Bower, *Res Judicata,* 5th ed (Ohio: LexisNexis, 2019); Donald J Lange, *The doctrine of res judicata in Canada* 5th ed (Toronto: LexisNexis Canada Inc., 2021).
[234] CPA s 27 (3).
[235] For a detailed discussion, See OLRC *supra* note 130 at 753–770.

1. The Tension

There is an undeniable tension between class actions and the doctrine of res judicata. On one hand, the res judicata doctrine provides finality to judgments and thus preserves judicial resources by preventing repeated litigation of the same claims or issues, while also protecting non-parties by limiting the effects of the decision to the parties involved and their privies.[236] On the other hand, the representative nature of class actions also aims to prevent repetitive litigation and inconsistent judgments by extending the res judicata effect to absent class members, going beyond the traditional contours of the doctrine.[237]

The fact that the traditional doctrine of res judicata is limited to the immediate parties to the dispute poses a challenge to the collective nature of class action. Adhering to an individualistic conception of res judicata defeats the very purpose and goals of class actions in achieving judicial economy and consistency, reducing them to no more than individual lawsuits. To fulfill these purposes, the judgment must have a binding effect *ultra partes* (beyond the parties). As the OLRC asserts "[…] if a class action judgment were not to bind class members, benefits such as [judicial economy] could not be achieved. In fact, it is axiomatic that the very merit or utility of a class action lies in the res judicata effect of its judgment on the common questions."[238] The *ultra partes* nature of res judicata is, therefore, a fundamental characteristic of class action proceedings.[239]

However, this *ultra partes* res judicata effect remains a legitimate concern as it "may place a class member in a position of disadvantage," as they may be prejudiced by an unfavorable

[236] Donald J Lange, *supra* note 233 at Ch 1.2; Azmi Abdel-Fattah Attia & Musaed Saleh Al-Anzi, *supra* note 12 at 207–212.
[237] See e.g. Geoffrey Hazard, John L. Gedid, Stephen Sowie, "An Historical Analysis of the Binding Nature of Class Suits" (1998) 146:1 U Pennsylvania L Rev 1849 at 1850; *hollick supra* note 143 at para 15,18.
[238] OLRC, *supra* note 129 at 766.
[239] Antonio Gidi, *supra* note 23 at 387.

outcome.[240] The following aims to reconcile the res judicata effect in class actions within the Kuwaiti legal system.

2. Resolving the Tension in Kuwait

Res judicata is codified in article 53 of the Kuwaiti *Law of Evidence in Civil and Commercial Matters*,[241] which provides that

> Judgments that have acquired the authority of res judicata shall serve as conclusive evidence regarding the issues they have resolved in the dispute. […] However, such judgments shall only possess this authority in disputes involving the same parties, provided their capacities remain unchanged and the matter pertains to the same right in its subject and cause. […].

The challenging element of this definition in the context of class actions is the limitation of res judicata to the "same parties." As res judicata applies exclusively to the parties and not to third parties (non-parties), it is important to define them. In this context, a third party refers to any individual or entity not directly involved in the litigation or represented in the proceeding, including those who did not participate as plaintiffs, defendants, or interveners. However, certain individuals, despite their absence from the proceeding, are not considered third parties. For example, minors represented by guardians are deemed legally present through their representatives.[242] Accordingly, anyone who was present or legally represented in the litigation is not regarded as a third party. The key question is where absent class members stand in this classification under Kuwaiti law.

At first glance, absent class members appear to be third parties who have not had their day in court and would therefore be excluded from the res judicata effect. One solution to reconcile this tension in Kuwait is to give the notion of "same parties" a narrow interpretation that excludes

[240] OLRC *supra* note 130 at 766.
[241] *Decree-Law No. 39 of 1980 Issuing the Law of Evidence in Civil and Commercial Matters* [translated by author and emphasis added].
[242] Azmi Abdel-Fattah Attia *supra* note 46 at 307–312.

class members. To justify this interpretation, it is important to understand the unique position of class members. While they are not formal parties to the proceeding, they are also not complete strangers to the litigation. Represented by the class representative, they have a direct interest in the dispute, as the rights at issue pertain to them.

Furthermore, several procedural safeguards protect class members, including a right to opt-out, the right to object and appeal, extensive notice mechanisms that ensure they are informed of all relevant details pertaining to the action, and judicial scrutiny over adequacy of representation. Class members are also carefully defined in the certification/authorization judgment to ensure clarity regarding their participation and entitlements. These rights and procedural safeguards reinforce the idea that class members are not mere "third parties." If they were truly complete strangers, why would the law give them such protections? These rights exist because class members have a legitimate interest in the class suit. With these procedural safeguards in place, it is no longer persuasive to consider absent class members as complete strangers, especially given that these safeguards alleviate concerns that an extended conception of res judicata may prejudice these members. Pursuant to this interpretation, the *ultra partes* nature of res judicata in the context of class actions seems compatible with the traditional contours of that doctrine in Kuwait.

The compatibility of the *ultra partes* effect with the Kuwaiti legal system is further supported by the recognition of similar concepts in Kuwaiti law, as discussed in the first chapter regarding collective labour disputes.[243] In these disputes, the arbitral award is binding on all parties, despite their absence from the proceedings. Kuwaiti law also explicitly acknowledges representation without a mandate in disputes arising from collective labour contracts. This is the case even if

[243] See Chapter One, III, B, 1. Page 26.

these provisions lack many of the procedural safeguards that class actions offer. This existing recognition of an extended res judicata doctrine within the Kuwaiti legal system.

To conclude, the Canadian class action model is not incompatible with the Kuwaiti legal system when it comes to the scope of res judicata. An extended conception of res judicata is a fundamental element of a class action regime that must be clearly defined to avoid any ambiguity regarding who is bound by the class action judgment and its effect on subsequent litigation. Thus, to preserve the essence of class actions and achieve their objectives, legislation should specify that judgments on issues common to the class bind all members, as defined by the court, except those who have excluded themselves from the class. This model improves access to justice by increasing participation of class members, while also protecting defendants from repeated litigation on the same issues. However, necessary corollaries of this model include various safeguards which should also form part of a Kuwaiti class action regime, including an opt-out procedure, detailed notice requirements, and judicial scrutiny over adequacy of representation, which all together constitute the cornerstone of due process, justifying an expanded res judicata doctrine. With the tools provided by technological developments, including the potential implementation of electronic notices, as well as increased legal awareness among citizens in Kuwait, class actions could achieve their full potential by ensuring due process for absent class members.

C. The Mechanism for Constituting the Class: Opt-out and Opt-in Regimes

For a "class" action to be launched, there must be, of course, a "class" of persons. The method of determining who qualifies as a class member and will be bound by the class action judgment is a critical yet controversial topic in class actions. The debate primarily revolves around the choice between opt-in and opt-out models of class membership. In the opt-out model, potential victims are by default considered members of the class, without requiring affirmative action to be

included. In contrast, the opt-in model requires individuals to take affirmative action to be included in the class and be bound by the judgment. Another model is "mandatory class actions," where class members are automatically included in the class but have no option to opt-out.[244]

Civil law scholars are reluctant to adopt the opt-out model, questioning its compatibility with the civil law legal framework. According to Jacob Ziegel, the primary reason for its limited acceptance in European jurisdictions lies in differences in litigation culture.[245] These concerns must be addressed, as the opt-out model, unlike the opt-in approach, holds significant potential for enhancing access to justice and the effective enforcement of the class action.[246] The key question is whether the opt-out model is doctrinally compatible with the Kuwaiti legal system.

To better understand the implications of class membership, it is essential to examine the origins of both models and the rationale behind the legislator's choice. The Canadian approach and its underlying justifications merit consideration, as does the European approach and its rejection of the opt-out mechanism. While the literature extensively debates the advantages and disadvantages of both models,[247] it remains important to briefly highlight these considerations in the context of Kuwaiti legal and cultural traditions.

1. The Opt-in Approach

The opt-in model is favored by civil law jurisdictions because it respects individual autonomy, ensuring that class members explicitly choose to participate.[248] This approach aligns with traditional conceptions of legal action, which prioritize individual litigation over collective

[244] Steven T.O Cottreau, *supra* note 193 at 480.
[245] Jacob Ziegel, "Class Actions to remedy Mass Consumer Wrongs: Repugnant Solution or Controllable Genie? The Canadian Experience" (2009) 27 Penn St Intl L Rev 879 at 893.
[246] See Catherine Piche, "Class Action Value" (2018) 19:1 Theoretical Inquiries L 261.
[247] See e.g. Jules Stuyck, "Class Actions in Europe? To Opt in or to Opt Out, That Is the Question" (2009) 20:4 European Bus L Rev 483.
[248] Samuel Issacharoff & Geoffrey P. Miller, *supra* note 72 at 202.

redress. Proponents argue that the opt-out forces class members to sue the defendant, depriving them of their right to take legal action and interfering with their freedom of choice. By contrast, the opt-in model ensures genuine consent from class members and upholds the principle that each individual has a personal right to pursue legal action or not. Additionally, proponents argue that an opt-in model enhances the manageability of class actions by filtering out uninterested or passive claimants, ultimately resulting in a smaller, more engaged class. While some might view a smaller class as a weakness, proponents see it as an advantage. Business and defense interests particularly favor the opt-in model, as it reduces settlement pressure and limits damages exposure.[249] As Dodson notes "the larger the class, the larger the pressure on defendants."[250] The preference for the opt-in model is rooted in viewing class actions primarily through the lens of individual litigation, framing class actions within a traditional and individualistic conception of legal action.

The primary argument against the opt-in model is that it seems to overlook the fundamental rationale and objectives of class actions. By resulting in smaller classes, this model weakens the enforcement of class actions and prevents them from reaching their full potential. The OLRC went even further to argue that this model does not constitute a true class action.[251] Upholding a strict idea of individual justice contradicts the concept of strength in numbers carried by the class action. It weakens the enforcement of class actions "because it will compensate only those who opted-in while acknowledging and condemning malpractices that reach a larger number of victims."[252] For example, the opt-in model is particularly ill-suited to modern consumer societies, where mass

[249] Scott Dodson, "An Opt-In Option for Class Actions" (2016) 115:2 MICH L Rev 171 at 187.
[250] *Ibid* at 187.
[251] OLRC, *supra* note 130 at 483 ("Finally, we would like to emphasize that, in our view, the institution of a 'true' opt in procedure would result in the creation of a procedure that is not a class action at all. Like several American commentators, we would characterize a procedure that obliges each class member to join the action after certification as merely a 'permissive joinder device.'")
[252] Benjamin Bénézeth, *supra* note 99 at 73

transactions and small-value contracts are prevalent.[253] Requiring individuals to take affirmative action to be included "would result in freezing out the claims of people" and defeat the purpose of class actions in overcoming financial, social and psychological barriers that precluded them from taking action in the first place.[254] Furthermore, this model also risks exposing defendants to repetitive litigation, as individuals who do not opt in reserve the right to sue individually. The fewer the opt-ins, the greater the likelihood of individual lawsuits, leading to increased uncertainty and reduced finality for defendants.

2. The Opt-out Approach

The opt-out model offers significant advantages in access to justice and enforcement. By binding individuals who have not expressly opted out, it maximizes the aggregation of claims while still preserving individual autonomy. Compared to opt-in models, opt-out systems are more inclusive, facilitating broader participation. By yielding larger class sizes, the opt-out model facilitates broader distribution of the damages obtained and ensures a more comprehensive binding effects of judgments. The larger the class, the more meaningful and impactful the remedy becomes.[255] Additionally, the opt-out model provides greater certainty and finality to the defendants by reducing the risk of subsequent litigation.[256] It is particularly beneficial for small claims, where individual litigation is unlikely. Ziegel asserts that the choice of the opt-out model is inevitable for ensuring the efficient conduct of class actions and maximizing their effectiveness.[257]

[253] *Ibid.*
[254] Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967) 81 Harvard L Rev 356 at 397–98.
[255] Catherine Piché, *supra* note 191 at 23.
[256] *Ibid* at 24.
[257] Jacob Ziegel, *supra* note 245 at 289.

The Canadian class action follows an opt-out approach, rejecting the opt-in regime primarily because it is viewed as a barrier to justice. The OLRC acknowledged that various factors—such as fear of legal involvement, misplaced concerns over legal costs, apprehension about potential retaliation from employers or others, and even the pressures of daily life—could deter class members from taking the necessary steps to opt in.[258] Ultimately, while opt-in and opt-out regimes seem to achieve similar objectives, they are grounded in different means and philosophies. As Piché observes, "the opt-in approach is based upon a philosophy of restricted entry to collective redress for a limited numbers of individuals, while the North American approach is open to a broader access to justice."[259]

Although both models may require class members to take affirmative action, the consequences differ significantly. Under an opt-in model, not taking affirmative action results in smaller classes, reduced compensation, and the risk of repetitive litigation, whereas in an opt-out model, it results in a larger class, and greater finality. While each model offers advantages, the opt-out approach provides stronger access to justice, particularly when procedural safeguards are in place. Given these benefits, examining its feasibility and doctrinal compatibility within the Kuwaiti legal system is crucial.

3. The Doctrinal Feasibility of an Opt-Out Model in the Kuwaiti Legal Framework

While the opt-out model may initially seem misaligned with the Kuwaiti conception of the legal action, it is not incompatible with the country's legal system. Within the opt-out model, when a class member is notified of the action and does not opt out, their inaction can be seen as implicit acceptance of the court's jurisdiction. Some authors draw a parallel with contract law, noting that

[258] OLRC, *supra* note 130 at
[259] Catherine Piché, *supra* note 191 at 24.

the opt-out mechanism reflects the principle of "silence as acceptance," which is similarly recognized in contract law within the framework of offer and acceptance.[260] Kuwaiti law recognizes silence as a legitimate form of consent. This principle is reflected in article 44, paragraph one of the Kuwaiti Civil Code,[261] which provides that "Silence is not considered as a statement, but silence in a situation that necessitates clarification is deemed acceptance." The Explanatory Note of the Civil Code[262] further clarifies that because silence is a "negative position," it can only signify acceptance when silence is "accompanied by special circumstances that support its indication of it." Since silence may, under certain conditions, serve as an indication of consent, the Explanatory Note elaborates on the criteria for determining such circumstances, as recognized by Hanafi Muslim jurists. It explains that when the nature of a transaction and the surrounding circumstances require the offeree to expressly reject an offer, their failure to do so—remaining silent—serves as a clear indication of acceptance.[263] This suggests that in situations where an express rejection is expected but not provided, silence can be interpreted as acceptance of the offer. Essentially, in specific contexts where rejection is required, inaction implies agreement.

By analogy, the opt-out mechanism can be understood within this framework, as class members are given an opportunity to opt out, and their silence in response to clear notification may constitute valid acceptance. In the context of class actions, the notice serves as a type of offer to the class—an offer to be represented in the litigation. Given the circumstances, they are required to explicitly reject this offer by opting out if they do not wish to be bound. If they fail to do so—

[260] Michael Mattioli *supra* note 193 at 6. However, some proponents of the opt-in model argue against this idea. See e.g. Debra Lyn Bassett, "Class Action Silence" (2014) 94 BUL Rev 1781 at 1783 arguing that ("the most sensible interpretation of class members' silence is confusion, not consent"); Linda S. Mullenix, "Ending Class Actions as We Know Them: Rethinking the American Class Action" (2014) 64 Emory LJ 399 arguing that the opt-out system is an "artifice of implied consent."
[261] *Decree Law No. 67 of 1980 Issuing the Civil Code* (Kuwait).
[262] *Ibid*, Explanatory Note.
[263] *Ibid*.

that is, if they remain silent—their inaction can be interpreted as acceptance. The process of notifying individuals about the class action and their right to opt out mirrors the offer-and-acceptance framework recognized in the Civil Code. A class member who does not opt out effectively consents to be represented through their silence.

The argument that the opt-out model entails litigating on behalf of others "without consent" is not entirely accurate. Upon closer examination, both the opt-in and opt-out require consent—one is implicit, and the other is explicit. Notably, in both models, whether opting in or failing to opt out, class members are not considered formal parties to the lawsuit.[264] Therefore, the argument that the opt-in model increases class member involvement or mitigates the *ultra partes* res judicata effect is unconvincing, as class members remain non-parties even when they opt in. Through this lens, both the opt-out and opt-in models entail an *ultra partes* res judicata effect.

In short, the opt-out procedure can be connected to the principle of silence as acceptance in the Kuwaiti Civil Code. This conclusion shows that despite its common law origin, the opt-out class action model is not incompatible with the Kuwaiti legal landscape. Furthermore, that model comes with several safeguards including notices that inform class members of their rights and the potential consequences of the class action, thus preserving due process.

Having established the compatibility of the opt-out model with the Kuwaiti legal system, the subsequent question that arises is whether it is the most "appropriate" approach for Kuwait.

4. The Choice for Kuwait

Both the opt-out and opt-in models offer distinct advantages, with proponents of each presenting compelling arguments in their favor. Their arguments, however, are presented as "a

[264] Antonio Gidi, *supra* note 23 at 339.

rigid dichotomy of one-size-fits-all models."[265] According to Scott Dodson, the suitability of each model depends on the specific needs of different classes. He argues that "[t]he one-size-fits-all premise of the class-action debate ignores the reality that some class actions might warrant an opt-out mechanism, while others might warrant an opt-in mechanism."[266]

Dodson gives an illustration of two mass disputes, personal injury and securities, to highlight how different classes may require different procedural approaches. In the personal injury case, where claims have a high expected value, an opt-in model respects claimant autonomy and ensures a strong, engaged class. In contrast, the securities case assumes a large number of shareholders with varying claim values, where commonality is stronger, and an opt-out model ensures broader participation while allowing large stakeholders who experienced significant depreciation to opt out if desired.[267]

While the opt-out model is favoured by many commentators, "a rigidly uniform system" may not be suitable for every case.[268] The choice between these two models should be guided by their suitability for different types of disputes, litigants' behavior, and achieving the objectives of class actions. The decision should take into account the geographical, cultural, and social factors in Kuwait. In a small country like Kuwait, with a tight-knit community, where news spread quickly, concerns about small, ineffective classes or notice failures are less pressing. Even if a class is small, its impact can still be strong and solid.

Since mass disputes vary in their needs, a flexible approach would be more suitable for Kuwait. As a result, Kuwait should adopt a default opt-out model while granting courts discretion to employ an opt-in model when appropriate. Judicial discretion should be guided by statutory

[265] Scott Dodson, *supra* not 249 at 188.
[266] *Ibid*.
[267] *Ibid*.
[268] *Ibid* at 189.

criteria for determining when an opt-in approach may be preferable. These criteria could include whether individual claims are substantial enough to justify independent litigation and whether a significant number of class members would opt in. Additionally, considerations such as judicial economy, consistency in decisions, and the broader binding effects of the judgment should be taken into account.

This approach is similar to the approach taken in the ELI-Unidroit Model European Rules of Civil Procedure, adopted in 2020, and certain European jurisdictions, where courts decide on a case-by-case basis whether an opt-out mechanism would be preferable.[269] The key difference between this thesis' suggestion and the European approach is that the latter defaults to opt-in, while the former defaults to opt-out. Many commentators argue that opt-out enhances access to justice; as Piché notes, "a default opt-in approach to collective proceedings is likely to guarantee restricted access to collective redress and compensation."[270] While the default opt-out approach with discretionary opt-in combines the advantages of both models, it carries the risk of further prolonging the litigation process.

D. The Role of the Judge and the Adversarial Legal Culture

As demonstrated in the previous chapter, class actions have reshaped the role of the judiciary in Canada, which might raise concerns about their compatibility with the judicial function in Kuwait. This leads to the question of whether the Kuwaiti judiciary can effectively be assigned such tasks and responsibilities or if there is a fundamental incompatibility between class litigation and the judicial function in Kuwait. The different roles of the civil law and common law judges present an ostensible challenge to transplanting class actions.

[269] ELI & Unidroit, *Model European Rules of Civil Procedure*, Rule 215(2) (2020).
[270] Catherine Piché, *supra* note 191 at 23.

Critics of the implementation of class actions in civil law jurisdictions point to the radical differences in the systems of civil procedure, particularly the role of the judiciary and the adversarial culture in Canada. Scholarship tends to stereotypically classify systems of civil procedure as "adversarial" in common law and "inquisitorial" in civil law. In an adversarial system, the parties are the masters of the proceeding, building on the principle of "party-autonomy," while the court plays a passive, inactive role.[271] The parties are responsible for gathering evidence, presenting issues, and determining the scope of the case, while the judge's role is to oversee fairness and proper application of the law.[272] In contrast, the inquisitorial system places procedural control in the hands of the judge, who plays a more active role, with the court having greater authority over the litigation.[273] The civilian judge "[…]controls the evidentiary process and performs the critically important function of exploring and sifting evidence."[274] The role of the judge in judicial proceedings as well as their education, appointment processes, law making powers, and status, differs significantly between the two legal traditions.[275]

This classification, however, tends to provide a superficial and inaccurate description of much current civil litigation, which might be misleading and insufficiently nuanced.[276] Contemporary trends demonstrate that, while traditional distinctions still exist, a growing convergence between the two traditions attenuates some differences.[277] As Resnik frames it, "[n]o

[271] *Foundations of Civil Justice: Toward a Value-Based Framework for Reform*, (Switzerland: Springer, 2015) at 65–72
[272] See Hein Kotz, *supra* note 200 at 39–40.
[273] J. A. Jolowicz, *On Civil Procedure* (Cambridge University Press, New York, 2000) at 175–182; Geoffrey C. Hazard "Discovery and the Role of the Judge in Civil Law Jurisdictions" (1998) 73:4 Notre Dame L. Rev 1017 at 1017–20; Stephen Goldstein, *supra* note 116 at 295–301.
[274] Rosalie Jukier, *supra* note 93 at 215.
[275] *Ibid*.
[276] *Ibid* at 214.
[277] Seon Bong Yu, "The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries" (1999) 2:2 Intel Area Rev 35 at 42.

system of justice is purely adversarial or inquisitorial."[278] Therefore, to address this objection against class actions, it is essential to examine the roles of judges in both Kuwait and Canada, along with evolving trends in each jurisdiction. It is also essential to understand what a class action demands from the judge and whether these demands can be met in within the framework of the Kuwaiti legal system.

On one hand, Canada's civil procedure is rooted in traditional adversarial processes, which have defined the judicial role as passive. However, this approach shifted dramatically toward a more active judiciary with the introduction of new rules on case management, including pre-trial conferences, for instance.[279] Judges in Canada now play a more active role, engaging with parties in chambers, overseeing case preparation and management, influencing the course of litigation, and facilitating settlement discussions. In Quebec, the 2002 reforms to the Code of Civil Procedure significantly expanded the role of judges by introducing case management as part of their duties. Judges were given a more active role in the pre-trial process, acting as case managers responsible for ensuring the orderly progress and effective management of proceedings.[280] This shift in the judicial role reflects a broader social and cultural trend that Cappelletti characterizes as the "massification" of cases. Cappelletti explains that the emergence of new collective and social rights, driven by this phenomenon, requires "active intervention by the state and other public entities."[281] Judicial case management is a type of such intervention.[282]

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[278] Judith Resnik, "Managerial Judges" (1982) 96:2 Harv L Rev 374 at 382.
[279] See Chapter Two, III page 41; Chapter Three, II, E page 67; Rosalie Jukier, *supra* note 93 at 227; Hugh F Landerkin & Andrew J Pirie, *supra* note 200; Frédéric Bachand, "Les principes généraux de la justice civile et le nouveau Code de procédure civile" (2015) 60:2 McGill LJ 447; Catherine Piche, "Administering Justice and Serving the People. The Tension between the Objective of Judicial Efficiency and Informal Justice in Canadian Access to Justice Initiatives" (2017) 10:3 Erasmus L Rev 137 at 145, 147.
[280] Bill 54, *An Act to reform the Code of Civil Procedure*, 2nd Sess 36th Leg, Quebec, 2002, (assented to 8 June 2002).
[281] Cappelletti, *supra* note 31 at 646. See also Abram Chayes, *supra* note 32.
[282] Catherine Piche, *supra* note 117 at 129; Judith Resnik, *supra* note 278.

In the context of class actions, the role of the common law judge has further swinged from a "passive adjudicator […] to that of active systems manager."[283] Class actions have further reinforced the active judicial role in civil proceedings, as these cases involve the rights of absent class members who could be bound by an unfavorable outcome, requiring judges to "[…] act on behalf of people who have not requested judicial intervention, to give judgment in the absence of proof of the requisite elements of each class member's claim."[284] Moreover, this shift is driven by the growing size and complexity of class actions, which requires "hands-on" management and active involvement in the prosecution of the class action.[285]

In Kuwait, on the other hand, although elements of an inquisitorial tradition are predominant, the judicial system does not fully conform to the stereotypes found in the literature, such as a "judge-driven" process and leaving little authority to the parties. Instead, contemporary practice shows that functions and powers are divided between the parties and the court, reflecting a division of functions and powers, striking a balance in the litigation process.[286]

Kuwaiti judges play a significant, active role over the course of the proceeding, such as acting on their own motion (*sua sponte*) to delay proceedings, manage and rank evidence, appoint experts, order notices, and request necessary documents, all while maintaining a neutral impartial position. However, there are limitations to this active authority. In a mass dispute, for instance, when a judge identifies other victims similarly situated to the plaintiff, the judge cannot mandate their intervention in the case. Notably, an "active judge" in Kuwait differs from Canada. Kuwaiti judges do not "manage" cases in the Canadian sense; they do not participate in pre-trial

[283] Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'" (1979) 92:3 Harvard L Rev 664 at 667.
[284] H. Patrick Glenn, "Class Actions in Ontario and Quebec" (1984) 62:3 Can B Rev 247 at 270.
[285] OLRC *supra* note 130 at 446.
[286] This is refered to as "the reciprocal role between the judge and the parties." See Azmi Abdel-Fattah Attia, *supra* note 46 at 209.

conferences or actively encourage settlements. Despite these differences, Kuwaiti judges use their discretion broadly to promote the highest levels of procedural due process and integrity and maintain balance in the judicial process.

This comparative analysis of contemporary judicial practices reveals that the active role courts play in class actions is not a major challenge for Kuwait. In fact, the active role Canadian judges assume in guiding the proceeding and protecting absent members in class actions is not completely foreign to Kuwaiti judges, as they already perform a similar gatekeeping function. Granting class action judges broad authority is essential in class action legislation. An active judicial role is commendable, as it serves the critical public function of protecting the interests of both absent class members and defendants, especially when some traditional rules in individual litigation (e.g. res judicata) are given a broader scope.

The active judicial role extends beyond simply directing the proceedings. As Glenn observes "It is not enough simply to revise rules of res judicata, standing and proof and then proceed as before. Absent parties must be protected by the court (conflict of interest of class representatives and their counsel is a common theme in class action discussion) and the size and complexity of the litigation requires active management from above as opposed to simple party direction."[287]

While the roles of Kuwaiti and Canadian judges share similarities, the introduction of class actions in Kuwait will require imposing new responsibilities. Thomas D. Rowe argues that "[c]ivil law concepts of the judicial role, […] may not mesh readily with the kind of managerialism displayed by many American judges in processing class actions and fostering settlements."[288] Class actions, with their inherent complexity, will demand additional management and supervision

[287] H. Patrick Glenn, *supra* note 284 at 268–69.
[288] Thomas D. Rowe, *supra* note 32 at 157 at 160.

tools for judges to be able to act as case managers. While procedural tools used in individual litigation could support the active management and steering of class actions, Kuwaiti judges will also require new, tailored class action management tools similar to their common-law counterparts, to address the unique risks posed by class actions. For example, as seen in the Quebec *Code of Civil Procedure*, courts have extensive powers to safeguard the interests of absent class members and not prejudice them. For instance, article 585 mandates that the representative plaintiff obtain court authorization to amend pleadings, discontinue the application, withdraw a pleading, or renounce rights arising from a judgment. Additionally, the court can impose conditions necessary to protect the rights of class members, ensuring that admissions by the representative plaintiff do not unfairly prejudice the class.[289] These management tools exemplify the type of authority and oversight that could inspire effective judicial practices for class actions in Kuwait.

In short, the argument that class actions are incompatible due to differences in judicial roles between common law and civil law traditions is unpersuasive, as contemporary trends reveal a convergence in judicial functions across these systems. The shift in the role of the common law judge demonstrates how the traditionally passive, adversarial judge can evolve in response to social changes. Class actions, in particular, have positively influenced judicial culture by requiring greater judicial involvement. Implementing class actions in Kuwait, where judges already play an active role, could yield similar positive effects. If a common law judge can transition from a traditionally passive role to an active one, what would prevent a civil law judge from evolving from an active role to an even more engaged and dynamic role? As Edward Cooper observes:

> Individual participation and control may indicate a point at which inquisitorial systems have an advantage over adversarial systems. Each increase in the level of the judge's responsibility for directing and defining the litigation reduces the importance of party participation and the significance of conflicting interests. In

[289] Art 585 CCP.

> time, class-based litigation may prove more suitable to civil law systems than to the common law systems that have fed its early growth.[290]

E. The Certification Stage

When transplanting class actions in Kuwait, two key issues pertaining to certification arise: whether certification should be required and, if so, how the certification procedure should be adapted to Kuwait's procedural framework.

Some jurisdictions question the necessity of a formal certification hearing. For example, in Australia, there is no certification stage; an action commenced as a class action proceeds unless a judge orders otherwise.[291] There are, however, threshold criteria that must be met i.e. numerosity of plaintiffs and commonality of the issues raised, and these criteria may be assessed at trial.[292] Critics argue that certification hearings lead to unnecessary delays and expenses. Mulheron explains the Australian Law Reform Commission's considerations:

> The Commission considered, provided that the defendant had a right to dispute the validity of the procedure at any time, and that adequate opt-out notice was legislated for, that the interests of the parties were sufficiently protected, and that in class litigation, as in any other, the onus should be upon the defendant to prove that the formal steps for instituting an action had not been complied with (rather than upon the plaintiff to prove that they were). It concluded that there was 'no value in imposing an additional costly procedure, with a strong risk of appeals involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency.'[293]

The success of the "no certification" approach remains doubtful and has faced criticism.[294] This thesis advocates for a two-stage certification approach, emphasizing the importance of certification in advancing the three core objectives of class actions— their "raisons d'être".[295] As

[290] Edward H. Cooper, *supra* note 187 at 225.
[291] Federal Court of Australia Act 1976 (Cth), pt IVA, as amended by s 3 of the Federal Court of Australia Amendment Act 1991 (Cth).
[292] Rachael Mulheron, *supra* note 25 at 23-28.
[293] *Ibid* at 25
[294] Edward H. Cooper, *supra* note 187 at 231.
[295] Jasminka Kalajdzic, *supra* note 86 at 49.

noted in the case law,[296] these three objectives serve as the foundation for certification decisions—judges assess whether an ordinary lawsuit should be transformed into a class action through this lens.[297]

Certification is an "extremely textured and nuanced"[298] judicial process that ensures cases meet the necessary criteria before proceeding. As discussed in Chapter Three,[299] certification is an essential stage that ensures a thorough review of the dispute's suitability for class action treatment, further protecting the interests of all stakeholders. Given their unique nature, class actions require distinct treatment and greater scrutiny than individual cases.

In the context of transplanting class actions to the existing procedural framework in Kuwait, implementing a regime without some means of special judicial authorisation could lead to procedural inefficiencies. The following analysis demonstrates the consequences of adopting a "no certification" model in Kuwait. Here, the certification criteria are not in question, but rather the focus is on when and how these criteria should be assessed, regardless of their exact formulation.

1. A No-Certification Approach for Kuwait?

When translating the concept of certification to a civil law audience, a useful parallel may be established with admissibility requirements, *i.e.* interest (standing). In addition to the general admissibility requirements that apply in any lawsuit, there are "special admissibility requirements" for certain lawsuits, e.g. the filing of a grievance prior to filing administrative law claims[300] and

[296] See e.g. *Seidel v TELUS Communications Inc.*, 2011 SCC 15 at para 135; *Dutton*, *supra* 129 note para 28; *Hollick supra* note 143 at para 15.
[297] *Ibid.*
[298] Rachael Mulheron, *supra* note 25 at 25.
[299] Chapter Three II, B.
[300] Article 8 of *Decree-Law No. 20 of 1981 establishing a chamber in the General Court to consider administrative disputes* (Kuwait).

the filing of a complaint in individual labour lawsuits.[301] In these cases, in addition to examining interest (standing), the court must also determine if the plaintiff previously filed a grievance or a complaint; otherwise, the case will be deemed inadmissible. Based on this framework, the certification criteria could be considered special admissibility requirements and be examined just like any admissibility requirement. However, that solution poses some difficulties, as explained further below.

In Kuwait, a defense of inadmissibility may be presented at any stage of the proceedings,[302] and under article 83 of the Kuwaiti *Code of Civil Procedure*, the court has discretion to rule on such defenses independently or alongside the ruling on merits.[303] This procedural flexibility suggests that class action certification could be incorporated into existing mechanisms without introducing an entirely new procedural layer. Treating class action certification criteria as "special admissibility requirements" and using the current procedural provisions in articles 81 and 83 would result in an approach very similar to the Australian one, where there is no formal certification procedure.

However, implementing a class action regime relying solely on these provisions without a means of preliminary judicial authorization creates the risk of procedural objections being raised at any stage of the proceedings, causing further delays and uncertainties. Additionally, it is inappropriate to treat the certification criteria as mere admissibility requirements, as these criteria—such as commonality, adequacy of representation, and typicality—are far more complex than the basic admissibility issues typically encountered in individual actions. In contrast,

[301] Art 146 Labour Code (Kuwait).
[302] Art 81, para 1 Kuwaiti Code of Civil Procedure.
[303] Art 83 Kuwaiti Code of Civil Procedure "The court shall rule on the defenses independently unless it orders them to be joined to the subject matter, in which case the court shall state what it has ruled on both the defense and the subject matter." [translated by author]

determining the appropriateness of a class proceeding through a special hearing at the outset would potentially save time and effort while promoting greater certainty for the parties involved and absent class members.

Furthermore, while the Kuwaiti *Code of Civil Procedure* theoretically allows courts to issue a judgment of admissibility independent of judgment on the merits, this practice is only rarely followed. Thus, a Kuwaiti class action should formally adopt a special mandatory certification stage, where the court scrutinizes the certification criteria before proceeding with the class action on the merits.

Having established the importance of a formal certification stage, the subsequent issue is how such a procedure can be integrated into Kuwait's legal framework

2. Integration of Certification Within Kuwait

In Canada's common law system of civil procedure, certification occurs at the pre-trial stage. In Kuwait, however, there is no distinction between pre-trial and trial stages. To integrate certification into Kuwait's procedural framework, a formal certification stage could be introduced, creating a functional distinction similar to the pre-trial phase in common law systems. As Cooper observes, "Development of a system of group litigation requires consideration of the role of pretrial procedure or the absence of any particular distinction between pretrial and trial."[304] Notably, a pre-trial approach is not entirely foreign to Kuwait's judicial system, which already employs two-stage proceedings as a filtering mechanism in constitutional cases and appeals before the Court of Cassation.

In appeals to the Court of Cassation, applications are presented to the Court held in the Consultation Chamber, consisting of five judges. This chamber examines whether the cassation

[304] Edward H. Cooper, *supra* note 187 at 237.

application meets formal requirements, particularly the existence of valid grounds for cassation.[305] If the court finds that it is inadmissible due to a defect in its form, invalidity in its procedures, or its being based on reasons other than those specified in the *Code of Civil Procedure*, it issues a non-appealable decision with concise reasons. If the court deems the application admissible, it schedules a session to consider the appeal.[306] Similarly, in constitutional appeals filed by individuals, the Consultation Chamber of the Kuwaiti Constitutional Court scrutinizes the seriousness of the application requirement.[307]

This formal process is similar to a certification process in Canada. Accordingly, the Kuwaiti legal system has, to some extent, a pre-trial procedure where the admissibility requirements can be assessed in special proceedings. Given the unique nature of class actions, they could undergo a similar preliminary review in a Consultation Chamber within the General Court of first instance. However, a limitation of the Consultation Chamber is that parties or their counsel do not participate or present arguments or evidence, which could undermine the fairness of the certification stage. Participation from the representative plaintiff or their counsel, and from the opposing parties, may be necessary to demonstrate adequacy and meet other certification requirements. Nevertheless, in principle, the Consultation Chamber concept provides a foundation for adopting a two-stage proceeding.

Due to the complexity of class actions, this thesis suggests mandating the competent court to issue an independent decision on certification or authorization. This decision should include critical information, such as the representative plaintiff's information, the steps class members must take to opt out, and the deadline for doing so, following the Canadian model. This suggestion,

[305] Art 153 Code of Civil Procedure (Kuwait).
[306] Art 154 Code of Civil Procedure (Kuwait).
[307] Art 4 bis *Law No.14 of 1973 Establishing the Constitutional Court amended by Law No. 109 of 2014*.

despite its novelty to the Kuwaiti judicial practice, particularly within the General Court, aligns with the aforementioned article 83 and could therefore be integrated harmoniously to the existing framework of Kuwaiti civil procedure.

II. Proposed Class Action Model for Kuwait

A class action model for Kuwait should balance access to justice with judicial efficiency. Any amendments to existing laws should align with these objectives while considering Kuwait's legal culture. While some elements of class actions can mesh with the current Kuwaiti legal framework, other elements may require further statutory amendments to function properly. This proposal does not offer a comprehensive framework but instead focuses on basic structural questions. While some proposals were made throughout this chapter, the following recommendations outline other key structural and procedural reforms necessary for establishing an effective class action framework in Kuwait.

A. Overcoming the Challenges

Molding the class action according to existing provisions of civil procedure may limit its effectiveness, as these provisions were not designed to accommodate collective litigation and may fail to address the unique challenges it presents. Legal evolution is inevitable, and change is necessary to sustain an effective and just procedural system. Adhering to traditions may hinder the effective functioning of class actions. Just as consumer and commercial laws allow exceptions or deviations from the standard legal rules to address unique challenges, class actions should similarly permit deviations from ordinary procedural rules to address mass disputes. While ordinary procedures are designed to handle straightforward, individual cases, class actions inherently address more complex issues that require tailored procedural adaptations to be effective.

Adopting class actions and making necessary amendments to existing law is merely a response to the social and cultural change—what Cappelletti calls the "massification"[308] of disputes. Disputes are no longer confined to individual transactions. The technological revolution has further introduced new and complex legal challenges across multiple areas of law. Plurality of disputes requires plurality of remedies and procedures. Legal systems should be adapting to the needs of society and not rigidly adhering to legal traditions.

Legal systems should cease to treat long-established doctrines as gospels or unchangeable scriptures. These doctrines can be changed, adapted, or even abandoned when necessary to respond to social and cultural change. As established in Chapter Two, law –specifically civil procedure– is culturally constructed. After all, through history, certain long-established doctrines where abandoned or adapted, as seen with the transition of the role of the judiciary in North America. There is no simple solution, and plurality of procedures and remedies are inevitable.

B. Legislative and Institutional Framework

A robust class action system in Kuwait requires both legislative and institutional reforms to pave the way for a successful transplant. First, implementing class actions will require comprehensive legislation, either as a separate statute or an additional Book in the *Code of Civil Procedure*. The latter approach, which is adopted in Quebec, potentially achieves better consistency. Second, the law should also designate the competent court to hear class actions. Establishing a new specialized chamber or tribunal within the General Court with exclusive jurisdiction over class actions would ensure consistency and streamline the efficient resolution of class actions. A specialized "Class Action Court" might also prevent prolonged litigation over jurisdictional questions and avoid confusion. Quebec adopts a similar approach, with a specialized

[308] Mauro Cappelletti, *supra* note 31.

chamber in the Superior Court in charge of class actions and a designated group of judges hearing all applications for authorization. The Kuwaiti legislator may also establish sub-chambers within this court for specialized areas of substantive law where class actions are most common (e.g. consumer, competition and capital markets). This approach will necessitate special judicial training to equip judges with the expertise needed to manage complex class proceedings effectively.

C. Scope and Applicability

A class action statute should specify the areas of substantive law suitable for class action treatment. Should class actions be allowed in all areas of law? While trans-substantivity—the application of class actions across all areas of law—has advantages, its absolute application may not always be appropriate.

Since it is hard to predict future disputes, the scope of the statute should be broad enough to include all areas fertile for mass disputes, while allowing flexibility for emerging issues. A class action may proceed in any instance where a civil cause of action is invoked, including based on civil, commercial, administrative, and environmental laws. Nevertheless, the legislator may explicitly exclude certain disputes where class actions may not be appropriate, or where an alternative remedy is provided. Indeed, in some instances, addressing mass harm outside the class action framework may be preferable. For example, in 2018, Kuwait experienced heavy rainfall that caused widespread damage to streets, vehicles, and homes due to inadequate infrastructure. To prevent repetitive litigation over government liability, the Council of Ministers formed a committee that provided compensation for those affected by the heavy rain. Although this dispute was suitable for class action treatment, it was efficiently dealt with outside courts. In *Fischer*, the Supreme Court emphasized that judges should first assess whether statutory alternatives better

achieve the objectives of class actions—access to justice, behavior modification, and judicial economy—before certifying a class proceeding.[309]

[309] *Fischer*, *supra* note 148 at paras 35–37.

CONCLUSION

This thesis explored the feasibility of transplanting the class action mechanism into the Kuwaiti legal system. The first chapter showed how justice is hindered by the inefficiency of handling widespread claims on an individual basis. Current procedural mechanisms in Kuwait fail to efficiently address mass disputes, resulting in inconsistent outcomes. In response, this thesis explored whether class actions could be successfully introduced in Kuwait. Chapter Two laid the theoretical and methodological foundation for this inquiry by addressing legal transplants and comparative law methodology. It emphasized that transplants should not be undertaken blindly; rather, they must be adapted to the receiving jurisdiction's context. This thesis emphasized the importance of contextualizing legal transplants rather than assuming their seamless integration.

Building on this foundation, Chapter Three explored the Canadian class action model, a well-developed model tailored to Canada's legal landscape. It examined the framework's essential elements, its procedural innovations, and the challenges it raises. The Canadian experience demonstrates that class actions require careful legislative and judicial calibration to balance access to justice and judicial economy. By examining the challenges related to the essence of the class actions in Chapter Four, this thesis has shown how class actions can be integrated into the Kuwaiti civil law system and overcome the challenges that have historically impeded their adoption in civil law jurisdictions.

The research has revealed interesting findings. While differences exist between the Canadian and Kuwaiti legal systems, there are significant areas of convergence that support the introduction of class actions in Kuwait. Many procedural features commonly associated with common law jurisdictions, such as the opt-out regime, collective standing, and *ultra partes* res judicata, while seemingly incompatible with fundamental principles of Kuwaiti civil procedure,

can be reconciled through existing legal doctrines within the country's civil law tradition. On the contrary, some aspects of class actions, while seemingly consistent with Kuwait's procedural framework, such as the more active judicial role, may require further development to catch up to the level of managerial judging in Canada.

Importantly, the existence of a few collective redress mechanisms to class actions within Kuwait suggests that the system is more receptive to class actions than resistant. Although consumer and environmental laws in Kuwait currently lack a comprehensive collective procedure, they establish rights that are well-suited for class action treatment. Introducing a class action mechanism would provide a procedural avenue for enforcing these rights, ensuring greater consistency and efficiency in adjudicating mass claims. This thesis contributes to the discourse on comparative procedural law and legal transplants by reinforcing the idea that class actions are not merely procedural tools but also instruments of legal culture, policy, and judicial philosophy. Specifically, it highlights the flexibility of class actions as a procedural mechanism, demonstrating that they can be molded to fit different legal traditions while preserving their core function: enabling collective redress for widespread harm.

Class actions are inherently complex, and no single thesis can address all aspects of their implementation. While this thesis has addressed foundational questions, many issues remain for future research. Key technical issues of class actions, such as forms of relief, assessment of damages, methods of distributing awards, enforcement mechanisms, rights of appeal, settlement fairness, and cost regimes, warrant further exploration. Questions such as whether a different cost regime should be adopted for class actions, whether and to what extent rights of appeal should be granted, and how judges would assess collective damages are critical considerations for the legislator. Moreover, the implementation of class actions in Kuwait requires addressing key

administrative aspects, particularly judicial training. Before adopting this new procedural regime, judges must receive comprehensive education to enable them to adapt to it and ensure its proper enforcement. Proper judicial training is essential for effectively applying complicated procedural steps such as certification and opt-out mechanisms.

To better understand the implications of class actions, future studies could examine how class action in Kuwait may, or may not, foster a settlement culture and how that might affect the judiciary's role. In Canada, class actions contributed to a strong settlement culture, facilitated by managerial judging; whether Kuwait will be responsive or resistant to such a culture will be an interesting trend to follow. Investigating whether similar dynamics could emerge in Kuwait, given its distinct legal framework, would provide valuable insights. Additionally, further research is needed to assess the impact of class actions on Kuwait's codified substantive law. Would the introduction of class actions require amendments to existing substantive law and available remedies? To what extent can current statutes serve as substantive bases for class action claims? A thorough examination of the compatibility—or potential incompatibility—of Kuwait's substantive legal framework with collective litigation is essential.

The international dimensions of class actions in the Kuwaiti context also merit exploration. While multi-jurisdictional class actions may not be a pressing issue within Kuwait due to the country's small size, cross-border questions could arise within the Gulf Cooperation Council (GCC). For instance, could a Kuwaiti class action judgment have legal implications for citizens of other GCC countries? Could residents of neighboring states participate in Kuwaiti class actions, or seek to enforce such judgments across borders? These questions highlight the need for further research on the intersection of class actions and transnational legal considerations in the region.

Beyond doctrinal and procedural concerns, future research should also examine the practical implications of class actions in Kuwait. Empirical studies on judicial capacity, legal awareness among litigants, and the willingness of courts to adopt a more managerial role would provide valuable insights.

Notwithstanding their importance, these issues are beyond the scope of this thesis. Each of these topics has been the subject of extensive bodies of literature and would require careful consideration in the Kuwaiti context. However, before considering these technical details, the legislature must first recognize and accept the fundamental principles of class actions: collective standing, representing absent class members, and a more active judicial role. Only once these core concepts are acknowledged as compatible with Kuwait's legal system can specific choices, including compensation methods and cost regimes, be carefully tailored to achieve the objectives of class actions while aligning with Kuwait's legal culture.

Finally, this thesis suggests that legal transplants, particularly in procedural law, require more than statutory enactment—they demand judicial and cultural adaptation. Successful implementation of class actions in Kuwait would depend not only on legislative reform but also on judicial engagement, legal education, and the broader acceptance of collective litigation as a legitimate means of resolving disputes. While no model is perfect, the Canadian class action system offers valuable insights, and with substantial adaptation, it can serve as an inspiration for Kuwait in addressing mass disputes efficiently and equitably.

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