

The Impact of *Mens Rea* on the Concept of Murder: A Comparative Study

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Abstract

This research paper conducts a comprehensive comparative analysis of the influence of mens rea on the legal definition of murder in Kuwait and the United States criminal laws. The concept of mens rea, or guilty mind, plays a central role in determining the culpability of individuals in criminal law. The Kuwaiti legislature adopted legal provisions aligned with US law to make its criminal justice system more effective. US criminal law comprises the Model Penal Code (MPC), which includes general rules concerning crimes and punishment. Kuwaiti criminal law depends on two groups of statutes and the determination of *mens rea*, which refers to the mental state as explained in the definition of offenses. In Kuwait, the crime of murder is evaluated through the presence of specific elements, namely *mens rea* or intent to inflict serious bodily injuries, and the death that results from resisting arrest. There is a felony-murder rule under US law in which death occurs during the commission to commit specified felonies, but in Kuwaiti law, there is no recognition of the felony-murder rule. As the punishment for murder is severe, Kuwaiti law must follow several procedures to ensure that punishment is issued fairly.

Keywords: Murder, mens rea, felony-murder rule, US jurisprudence, Kuwait, model penal code

Introduction

The concept of mens rea is the cornerstone of criminal law that plays a pivotal role in defining the crime of murder. In 1960, the year the Kuwaiti Penal Code was promulgated, the Kuwaiti legislature adopted the following philosophy to address homicide cases: “No matter how reckless you are, no matter how much violence you commit or how you committed your crime, you are not guilty of murder.” In Kuwait,ⁱ the homicide rate has been increasing since the 1990 Iraqi invasion. The surge in homicide rates has been ten times greater than those before the first Gulf War and has affected three categories of crime: murder, assault leading to death, and vehicle accidents constituting negligent homicide under Kuwaiti law.ⁱⁱ

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Statistics show that annual homicide rates before the Iraqi invasion did not exceed one in the country. The rate gradually began to rise, reaching 5 in 1994—4 years after the invasion, 8 in 1998, and 10 in 2012 (Al-Watan, 2014, p. 5). After nine years, the rate doubled (Qabas, 2021, p. 4) and in 2021, it reached 30 homicides (Qabas, 2022, p. 3). Studies indicate several reasons for the rise in murder rates. Some attribute it to the widespread proliferation of weapons following the invasion (Al-Anba, 2021, p. 4; Al-Anba, 2022, p. 3). Others claim that there was no incentive for people to abide by the law, no deterrent against committing a crime, and the lack of adequate criminal penalties (Al-Anba, 2021, p. 4; Al-Anba, 2022, p. 3). A third group of studies blames the homicide rate on action movies, violent discourses on social media, electronic games that contribute toward spreading a culture of violence, weak family control, poor morals, divorce, and the lack of young people's engagement in useful activities (Al-Anba, 2021, p. 4; Al-Anba, 2022, p. 3).

The Kuwaiti legislature has tried to solve this issue on two occasions, but both attempts failed. First, in 1991, it enacted the Weapons Act, which included increased sanctions against possessing certain weapons, such as guns and pistols.ⁱⁱⁱ In 1992, after the crime rates increased, the legislature enacted the Weapons Search Act, which gave the government absolute authority to search for weapons over a large area without indicating a specific location (s. 4, Kuwait Weapons Search Law, 2005).

Lenient laws have contributed toward an increase in crime rates and have influenced people's conduct, just as laws with harsher penalties have acted as a deterrent. Rules that deal with offenses and punishments are considered outdated and incompatible with the demands of contemporary Kuwaiti society—the Kuwaiti Criminal Act issued in 1960 was derived from the Bahraini Criminal Act. Another challenge is the difficulty involved in amending the rules as a result of complicated procedures and the legislature's assumption that there are more important issues to be resolved first, such as political crises and the conflict between the executive and legislative authorities. Therefore, it is necessary to focus on how Kuwaiti criminal justice works in order to address the phenomenon of the rising murder rate. There are two ways to solve the rising crime rates: (1) to amend the law to define offenses better, and (2) to impose stricter punishments for offenses. This paper is concerned with the former.

The present study has selected the American legal system for comparison with the Kuwaiti legal system for a few reasons. The American system, which is very developed, belongs to a legal family different from the Kuwaiti legal system. Therefore, it can introduce new ideas to the Kuwaiti legislature that may contribute to the development of the criminal justice system in the country. Under the American legal system,^{iv} the scope of murder is much broader and more effective

than that under Kuwaiti law as the criminal law concepts of *mens rea*, the felony-murder rule and degrees of murder allow a broader interpretation of what constitutes murder. This paper suggests that the Kuwaiti legislature should follow the US law in expanding the scope of murder to make the Kuwaiti criminal justice system more effective.

The Model Penal Code (MPC) in the US is intended to encourage and assist state legislators in updating and standardizing the penal law in the country. The MPC was a project of the American Law Institute (ALI) and was published in 1962 following 10 years of development. Although it is not legally binding, over half of all US states have implemented criminal codes that have borrowed extensively from the MPC since its release in 1962. Even in jurisdictions that have not explicitly drawn from it, it has had a significant impact on criminal courts (Walker, 2010). Judges are increasingly turning to the MPC for doctrines and concepts underlying criminal responsibility (Walker, 2010).

It is important to mention that judicial precedent is of utmost importance in the American system and represents a distinction between the Kuwaiti and American jurisdictions. Under Kuwaiti law, a precedent can be deemed as a violation of one provision of the Kuwaiti Constitution, which controls the relationship between the branches of government. The relationship among the three branches under the Kuwaiti Constitution depends on the principle of separation of powers and cooperation (Art. 50, Kuwait Constitution). No branch is constitutionally allowed to infringe upon any other branch's power. Therefore, no court is legally obligated to follow the precedent issued by its higher court.

The research question of this study is whether the differences between the two legal systems regarding the concept of *mens rea* will result in an expansion of the concept of the crime of murder. To answer this question, the present study highlights the extent of differences between the US and Kuwait in the conceptual framework for the crime of murder.

Differences in the Law Governing Murder

The provisions addressing murder under US law are broader than those under Kuwaiti law. This is evident in the definition and forms of *mens rea*, the identity of the victim, and the supposed *mens rea*. These aspects are discussed below. The Definition of Mens Rea for Murder under US law^v is Broader than that Under Kuwaiti law. We first present the definition of *mens rea* and then discuss the differences between US and Kuwaiti Law.

Definition of *Mens Rea*

There are two commonly recognized definitions for the concept of *mens rea*. The first broad definition considers *mens rea* to be “a general immorality of motive” (Dressler, 2001, p. 11). The second and narrower definition is that *mens rea* is “the particular mental state provided for the definition of an offense” (Martin, 2014, p. 32). The latter definition is the focus of this paper, where *mens rea* is an element of an offense. *Mens rea* is critical because it is a substantive element of offenses and criminal activities, except for strict liability offenses (Elliott & Quinn, 2016, p. 40).

In the US and under the MPC approach, an individual must act purposely, knowingly, recklessly, or negligently to be held responsible for an offense, unless the violation is minor, in which case it does not constitute a crime and may be punished only with a fine or forfeiture (s. 2.02, MPC). Individuals act purposely when they achieve a specific result that they intend to cause (s. 2.02. (2)(a), MPC). Individuals act knowingly when they do something with the awareness that a particular result will ensue from their conduct (s. 2.02(2)(b), MPC). Individuals act recklessly when they consciously disregard a substantial and unjustifiable risk to human life (Sec. 2.02 (2)(c), MPC). They should not be permitted to behave in a manner that represents a gross deviation from the conduct of a law-abiding person.

The Kuwaiti legislature has understood different forms of *mens rea* under American law (purposeful, with knowledge, reckless, and negligent; Qashshoush, 2010, p. 189), but with a different scope, especially considering the crime of murder. Kuwaiti law does not differentiate between recklessness and negligence in terms of legal effects (Al-Shanawi, 1988, p. 762). Under Kuwaiti law, if the death of a human being results from a defendant’s conduct, the defendant can be guilty of murder or attempted murder, voluntary or involuntary manslaughter (negligent homicide), battery leading to death, or abetting suicide.

Murder comprises an *actus reus* and a *mens rea* (the state of mind: a person's mood and the effect that mood has on the person’s thinking and behavior) (Ghannam & al-Kandari, 2006, p. 134). The two elements can be found in the Kuwaiti Criminal statute. The article states that one “[w]ho kills a human being intentionally must be punished by death or life imprisonment” (s. 149, Kuwait Criminal Law, 1960). There are no definitions of *actus reus* and *mens rea* in the statute (Salem, 1993, p. 98). Therefore, the meaning can be inferred from court decisions and references to jurisprudence to which courts resort as a persuasive source of law. The following paragraphs focus on the two elements of *mens rea* as it is a critical difference between Kuwaiti and US law.

Knowledge is the first element in *mens rea*. It means that the defendant was aware of three important things: a living body, the danger of the defendant’s act, and the expected result. First, defendants must have known that their act was

inflicted on or directed at a living human. If they did not know the act was directed at a living human (Housnee, 1988, p. 344), they did not have the *mens rea* to commit murder. Second, the defendants must have known that their act was dangerous to another's life. This element means that the defendant must have known that their actions could cause death. Therefore, if defendants did not know that their act was dangerous to human life, they are not guilty of murder. Third, defendants must have expected that death would result from their actions (Al-Aifan & Bouarki, 2020, p. 80).

The second element of *mens rea* is desire. A defendant should seek both the act and the result of that act (al-Dhafiri, 2013, p. 375). The act of killing must be voluntary; otherwise, there is no *mens rea*. The Kuwaiti Supreme Court maintains that murder is a specific intentional crime. The Court asserted that the intent to kill should be determined by the Court based on the factual circumstances of the case (Kuwaiti Criminal Court, 1996, p. 295). It also declared that the Court should determine if there was an intent to kill in cases of intoxication and coercion (Kuwaiti Criminal Court, 1992, p. 8). Unlike US law, both the desire and knowledge of the criminal act are parts of *actus reus* (the act should be voluntary). Therefore, to declare defendants to be guilty of murder in Kuwait, they must have intended the result of their actions.

Scholars distinguish between two kinds of intent: direct and possible intent (Amer, 1989, p. 486). The former means that the defendant intended to violate the rights protected by law. They expected that death would surely result from their actions. There are two situations where a defendant can be found to have a direct intent. The first is when defendants intend to kill someone; for example, when they shoot and kill their victims (purposely under the MPC). The second situation is when defendants desire something other than killing the victim, but death will surely result from the act; for example, when they want insurance money for their ship and plant a bomb to explode the ship in the middle of the sea, thus causing the crew's death (knowingly under MPC). In both cases, *mens rea* for murder is present. Possible intent is present when defendants expect death from their actions and are pleased with the ensuing result. The evidence must be clear that the defendant desired the result indirectly, if not directly.

Some issues will not be considered in determining whether the defendants had the requisite *mens rea*. First, if they mistook a victim's identity, this mistake would not influence their state of mind (Houmd, 1983, p. 99). It does not matter if a defendant intended to kill a specific person or group of people (certain intent) or if the victim's identity is not important to the defendant (uncertain intent; Obeid, 1979, p. 310).

The Kuwaiti Supreme Court has declared that *mens rea* can be inferred from circumstances (Kuwaiti Criminal Court, 1993, p. 46). The Court has set out factors that may be considered to determine *mens rea*, such as the type of weapon used, the number of bullets shot, the location of the injuries, and the relationship between the defendant and victim (Kuwaiti Criminal Court, 1994, p. 76). These factors are not exclusive. The Kuwaiti Supreme Court has asserted that intent to kill is determined by the court without supreme censorship if the Court does not abuse its discretion (Kuwaiti Criminal Court, 1985, p. 158).

Recklessness as *Mens Rea* in a Murder Charge

Under the common law and MPC approach, the *mens rea* in murder cases can be identified using the terms “purposely,” “knowingly,” and “recklessly” (Hendy & Hutchinson, 2015, p. 111). Usually, under the MPC approach, the difference in the meaning of “purposely” and “knowingly” is plain. In murder cases, statutes do not distinguish between the common law and MPC approaches (Lafave, 2000, p. 233).

Recklessness is another basis on which the prosecution may build a charge of murder. In cases involving recklessness, a subjective standard will be invoked, which means that the prosecution will have to prove that the defendant was aware of the risk to another’s life and that, despite this awareness, they chose to act without care for the other’s life. Usually, courts consider such instances to be cases of extreme recklessness or involving a depraved heart to distinguish between extreme and normal recklessness required in criminal negligence under the MPC (*Washington v. Williams*, 1971).

To determine whether a defendant acted with extreme recklessness, US courts usually consider several factors. Based on precedent, no single factor will determine whether a defendant’s conduct is a wanton or willful disregard for the likelihood of causing death or bodily harm. The factors differ from case to case and can include defendants’ intoxication and the use of tools to commit a crime, such as a gun or a car. A third group of factors includes the site or place where the act occurred, such as a crowded street or house. Whether the defendant acted with extreme recklessness is factual; therefore, it is for the jury to answer (*State v. Register*, 1983). The MPC adopted the notion of the “depraved heart” (s. 210.(2)(1)(b), MPC). Therefore, under US law, a person can be charged with and convicted of murder even if they do not intend to kill or inflict serious bodily injury.

Recklessness in Kuwaiti law

Under the Kuwaiti law, recklessness^{vi} Does Not Count as *Mens Rea* for Murder. According to Kuwaiti law, individuals are guilty of negligent homicide when (1) they kill or cause the death of another by accident, or (2) death results

from the defendant's negligent or reckless acts or acts in violation of regulations (Al-Nuweibit, 2011, p. 167; s. 154, Kuwait Criminal Law, 1960). Under Kuwaiti law, a violation of this statute is a misdemeanor as the punishment is three years' imprisonment or a fine of 3,000 Kuwaiti dinars, or both (s. 154, Kuwait Criminal Law, 1960).

The *mens rea* in negligent homicide cases can be negligence, recklessness, or the violation of a regulation. In such cases, the defendant's conduct should constitute a deviation from a reasonable person's conduct (an objective standard) and should be the proximate cause of the result (al-Rajhi, 2020, p. 180). The law also requires a relationship between the defendants' will and the result. The relationship can either be that the defendants could have expected the result (a mistake with expectation) or could not have expected the result (a mistake without expectation; Ahmed, n.d., p. 684).

In the case of a mistake with expectation, the guilt depends on whether the defendant could have expected and prevented the victim's death if the defendant had acted more carefully. In the case of a mistake without expectation, the guilt depends on whether the defendant expected but did not desire the victim's death. Mistakes without expectation can be seen in two situations: (1) the defendant expected the victim's death but did not make sufficient effort or did not take steps to prevent it, or (2) the defendant expected the victim's death but did not care. The second situation is negligent homicide under Kuwaiti law which is equivalent to extreme recklessness (murder) under American law. Whether there was a fault with or without expectation, the *mens rea* is present in negligent homicide cases. In one case, there is no fault (*mens rea* of negligent homicide) when the defendant expects the victim's death, but they cannot do more than what a reasonable person could do in the same circumstances. There are several aspects of fault as the *mens rea* for negligent homicide. Fault can be the result of negligence, recklessness, or a violation of a regulation. Defendants act with negligence when they fail to act, notwithstanding an obligation to act (Latif, 2015, p. 552) and act with recklessness when they fail to act with sufficient skill, knowledge, or judgment (al-Mutairi, 2002, p. 103).

Under Kuwaiti law, defendants must know and desire both their act and the act's result to be guilty of murder, whatever the defendant's degree of recklessness during the act. In sum, recklessness does not serve as *mens rea* for murder under Kuwaiti law.

Intent to Inflict Serious Bodily Injury

Under the US legal system, the *mens rea* considered essential for a murder charge or conviction can be the intent to cause serious bodily injury. The *mens rea*

standard is getting closer to the traditional intent to kill, which is the *mens rea* required to prove murder. Malice aforethought is implied if a person kills with the intent to cause serious bodily injury to another, in the absence of circumstances mitigating the offense to the voluntary manslaughter, such as justification or excuse (*Commonwealth v. Marshall*, 1926). Usually, in states that grade murder by degree, this case constitutes second-degree murder or manslaughter. However, serious bodily injury is sometimes expressed differently, such as grievous or great bodily injury. No matter what it is called, serious bodily injury can be defined by statutes or courts. Most modern statutes do not explain the term “serious” within the context of bodily injury under murder provisions; rather, they do so under assault or battery provisions (Robinson & Cahill, 2011, p. 563).

Courts also try to base their definition of serious bodily injury on facts. For instance, individuals have a severe bodily injury if they must be treated in a hospital emergency room for abrasions to the hands and knees and a fracture of the jawbone (*State v. Miller*, 1971). Individuals who experience a broken rib, a black eye, and a two-and-a-half-inch cut to the back of the head requiring stitches have serious bodily injuries (*State v. Perry*, 1976). Prosecutors may face some difficulties proving intent to inflict based on whether a serious bodily injury or a bodily injury is required. Despite this, the intent is easily proven in some circumstances or inferred by additional circumstances, such as the use of a deadly weapon (*Bantum v. State*, 1952). Other circumstances may involve the use of hands or feet as weapons when the victim is an infant or a person enfeebled by old age or disease (*Bishop v. People*, 1968).

The MPC distinguishes between serious bodily injury and bodily injury in assault cases. The former creates a substantial disfigurement or protracted loss or impairment of the function of any bodily member or organ (s. 210.(0)(3), MPC). The latter implies physical pain, illness, or any impairment of physical condition (s. 210.(0)(2), MPC). Under the MPC, the intent to inflict a serious bodily injury amount to assault, unless it culminates in death. In this event, the case is governed by the extreme indifference to the value of the human life clause (s. 210.(2)(1)(b), MPC). Under American law, if the defendants intend to inflict or cause a serious bodily injury to the victim and the death results, the crime is murder.

Under Kuwaiti law, if the defendants who intended to inflict serious bodily injury caused another’s death, they will be guilty of the offense of battery leading to death. Battery leading to death is a general intentional offense under Kuwaiti law. Therefore, the *mens rea* required is general, which is on par with the standard required for all other battery offenses (Kuwaiti Criminal Court, 2001, p. 207). The general *mens rea* required for every battery offense comprises two elements: (1) knowledge and (2) desire (Kuwaiti Criminal Court, 2001, p. 207).

Knowledge means the defendants' knowledge that their act is directed toward a living human's body, as well as their knowledge about the danger and the expected result of their act. First, defendants must know that their act is directed at a living human (Namour, 2002, p. 134). Second, they must know that their act is dangerous to another human (Amer, 1989, p. 607). Without this knowledge, defendants do not have sufficient *mens rea* for battery. Third, they must expect that another human will suffer or be injured because of their action, whether a certain injury was expected (Salem, 1993, p. 184). The defendants must desire both the act and its result (offensive contact; Tharwat, n.d., p. 128). There is no issue with a voluntary act, but a problem often arises from the defendants' desired result. If they do not seek the result, they are not guilty of battery.

Defendants need not intend a specific offensive contact or harm (Al-Aifan & Bouarki, 2020, p. 231). An intent to cause any sort of offensive contact is sufficient *mens rea* for battery leading to death, as long as death results from the act. The Kuwaiti Supreme Court stated that battery offenses do not require specific intent, but a general intent is enough to constitute *mens rea* (Kuwaiti Criminal Court, 1993, p. 151). Under Kuwaiti criminal law, battery leading to death is a felony punishable by 10 years of imprisonment. Therefore, under Kuwaiti law, when defendants intend to inflict serious bodily injury causing death, they are guilty of battery leading to death, but not murder as in the US.

The Victim's Identity Can Change the Charge of Murder

In the US, if death results while a suspect is resisting arrest, the suspect can be charged with murder. In such cases, malice aforethought is implied (*Donehy & Prather v. Commonwealth*, 1916). Some courts have rejected this approach (*State v. Weisengoff*, 1919). Modern state statutes tend to oppose this approach, whereas some adopt it (s. 782.04(1)(a)(2)(p), Florida State Annotation Title), and others treat it as an aggravating circumstance if the intent to kill is present (s. 2903.01(E), Ohio State Annotation Title). A third group of statutes treats such cases as independent offenses (s. 22-2106, Colorado State Annotation Title). The last two groups of statutes require the killing to be intentional. The MPC does not allow resisting an arrest even if it is illegal. Under the MPC, it is presumed that a defendant was acting with indifference to human life if death resulted from flight after committing an offense (s. 210. (1)(2), MPC). Under American law, individuals can be charged or convicted of murder while acting with extreme recklessness. They intended to inflict serious bodily injury on or kill an officer trying to arrest them even if they did not intend to kill.

In Kuwait, if death results while resisting arrest, whether the victim was a police officer or an innocent person, the defendant's guilt will be primarily

determined based on their *mens rea*. In the country, the legislation did not recognize resisting arrest as an independent offense. Later, it categorized resisting arrest as a general offense defined as resisting a public employee while performing their duties. This is a misdemeanor because it is punishable by one year of imprisonment, a fine of 1,000 Kuwaiti dinars, or both (s. 135, Kuwait Criminal Law, 1960).

The Felony-Murder Rule

In the US, felony murder means that death occurs during the commission of or attempt to commit specified felonies (*Ortiz v. Dubois*, 1994), even if the defendants did not have malice aforethought (Dressler, 2001, pp. 516-519). There are several rationales for the application of the felony-murder rule such as deterrence, reaffirming the sanctity of human life, transferred intent, and easing the prosecutor's burden of proof (*Regland v. Hundley*, 1996). In the US, this rule is controversial and is not recognized by some states, such as Hawaii. Other states, like New Mexico, have made changes to the rule, such as the requirement for the defendants to have the requisite *mens rea* for murder for the rule to apply (*State v. Ortega*, 1991). The states that have adopted the felony-murder rule attribute malice to the defendant (*Nesbitt v. Hopkins*, 1995). Other states justify the felony-murder rule by requiring that malice transfers from the underlying felony to the resulting homicide (*US v. Kayarath*, 1997). The felony-murder rule represents a strict liability offense (Dressler, 2001, p. 515).

The scope of the application of the felony-murder rule poses numerous questions. For example, the defendant needs to have only *mens rea* to commit the underlying felony (*Flanders v. Meachum*, 1994). The *mens rea* for murder is not required. The felony-murder rule extends to co-conspirators if they have the *mens rea* for the underlying felony (s. 64, American Jurisprudence, Homicide, 1999). Courts are divided on whether a co-conspirator should be present at the scene of the underlying felony.^{vii} Some courts require the presence of a co-conspirator to invoke the felony-murder rule (*Commonwealth v. Waddy*, 1972), while others do not (*State v. Lowery*, 1982).

If defendants are found not guilty of the underlying felony, they are also not guilty of murder under the felony-murder rule (*Noel v. State*, 1998). They can be guilty of murder even if they committed the underlying felony outside of the jurisdiction where the death took place (*State v. Liggins*, 1996). A defendant can be guilty of murder even if the statute of limitation for the underlying felony has expired (*State v. Lacy*, 1996). The felony-murder rule has evoked much criticism because it is unfair in some circumstances, which this paper clarifies while explaining the limitations of the rule (Dressler, 1995, p. 483).

The first requirement is that the underlying felony must be inherently dangerous (*Champan v. State*, 1996). To determine this, courts adopt abstract and factual approaches. The former looks at the statute without considering the factual circumstances of the case to determine whether the felony was inherently dangerous (*People v. Phillips*, 1966). A common example of a statutory and inherently dangerous felony is kidnapping (*People v. Greenberger*, 1997). This approach has the advantage of giving a bright-line rule. The disadvantage is that it fails to consider the factual circumstances that play a role in determining whether the underlying felony is inherently dangerous (*State v. Stewart*, 1995). Some courts adopt the view that the question of inherent danger is mixed (*People v. Thongvilay*, 1998). In the factual approach, the inherently dangerous felony will be determined based only on factual circumstances (*Champan v. State*, 1996). Some courts assume that first-grade felonies are inherently dangerous (*State v. Mora*, 1997), but felonies of a lesser grade should be supported by factual circumstances that are deemed inherently dangerous (*State v. Bankert*, 1994).

The second requirement is that the underlying felony should not be part of the homicide, but should be distinct (*State v. Smallwood*, 1998). If the underlying felony is part of the homicide, the felony-murder rule will not apply (*State v. Campos*, 1996). For example, some statutes consider assault to be a felony like homicide (*Regland v. Hundley*, 1996). Burglary with an intent to assault may be deemed an independent offense from homicide (*US v. Loonsfoot*, 1990). One jurisdiction assumes that the felony-murder rule will not be barred unless the underlying felony is manslaughter (*Rodriguez v. State*, 1997). When a defendant's assault results in death, another court holds that the felony murder rule can be applied (*State v. Abraham*, 1994). The third requirement is that the homicide should be committed in furtherance of a common objective or purpose (*State v. Canola*, 1977). Therefore, if the victim was the co-conspirator, the felony murder rule would not apply (*US v. Tham*, 1997).

The last requirement is a *res gestae* instead of the underlying felony. This means that there should be no break in the chain of events leading from the initial felony to the act causing death (*Lee v. US*, 1997). Therefore, the time, distance, and relationship between the underlying felony and death are factors that will be considered in determining if the *res gestae* requirement is satisfied (*State v. Mims*, 1998). Some courts have declared that death must not be far from the underlying felony in time and distance (*State v. Russell*, 1993). Therefore, mere coincidence is not enough to allow the felony murder rule to apply (*Stouffer v. State*, 1997). Other courts require the act of killing to be committed during the underlying felony (*Knotts v. State*, 1995). Some courts have ruled that the consideration will focus on

the cause of death and not the death itself. Death need not occur immediately after the commission of the immediate underlying felony (*People v. Alvarez*, 1996).

The felony-murder rule does not require that the underlying felony be complete. If the defendant is in the attempt stage, the rule will apply if death results (*State v. Peou*, 1998). The felony-murder rule does not require the defendant to reach a specific point in the underlying felony when death occurs (*Owens v. State*, 1993). If the chain between the underlying felony and death is broken, the defendant is no longer guilty of murder unless the other rules of murder apply (*Commonwealth v. Kelly*, 1939). The question of whether the criminal activity ended before death is based on fact (*Carter v. US*, 1955). To determine a causal connection between the underlying felony and death, some courts use a "but for" standard (*Banhart v. US*, 1997), whereas others use a "proximate cause" standard (*People v. Motas*, 1994). The third group of courts requires only a direct link between death and the underlying felony (*State v. Gomez*, 1993). The MPC adopts an alternative approach to felony murder, which is considered as murder death that results from extreme recklessness (s.210.(1)(c), MPC). Finally, the degree of homicide is determined by the unlawful act of the defendants. If they committed a felony, the crime is murder. If the committed act is classified as a lesser grade than that of a felony, the crime is manslaughter. The crime is involuntary manslaughter if the act is lawful *per se*.

Kuwaiti criminal law does not recognize the felony-murder rule. Therefore, if death results while committing or attempting to commit a felony, the death will be subject to the general rules of murder, according to which, a defendant's guilt will determine their state of mind while committing the underlying felony. Therefore, homicide can be considered murder, battery leading to death, negligent homicide, or accidental death (no crime). If the defendants intend to kill while attempting to commit a felony, they would be guilty of murder. If the defendants have the intent to inflict serious bodily injury and death resulting from it, they would be guilty of battery leading to death. If the defendants have the *mens rea* for negligent homicide (mistake), they would be guilty of negligent homicide.

Kuwaiti criminal law adopts an approach somewhat like the felony murder rule. The similarity is that under both approaches, the legislation recognizes the unfairness of punishment if death occurs. To achieve fairness, it is necessary to increase the punishment. Under the felony-murder rule, punishment is increased by considering the resulting homicide to be murder. Kuwaiti criminal law adopts a less arduous approach, wherein if death results, the punishment will be increased, but the crime will never be considered murder. In some cases, the result will be the same between the Kuwaiti and American systems. There are several examples of the quasi-felony-murder rule approach. First, if someone gives a wrong signal to a ship or plane with the intent to harm people or things on board, they will be punished

with five years' imprisonment. If death results from this action, they will be punished with the death penalty or life imprisonment (s. 170, Kuwait Criminal Law, 1960). Second, if defendants intentionally commit an act that subjects others, using a public way, to danger, they will be punished with five years' imprisonment; but if death results, the sanction will be the death penalty or life imprisonment (s. 171, Kuwait Criminal Law, 1960). Third, in the case of intentional arson, if death results, the punishment will be raised from five years imprisonment to life imprisonment (s. 245, Kuwait Criminal Law, 1960). Finally, if a defendant attacks a ship at sea to steal the ship or its contents, the punishment will be life imprisonment, but if death results, the punishment will be the death penalty (s. 245, Kuwait Criminal Law, 1960).

Although punishment in previous cases reached similar results as those for murder, those cases are not considered for the application of the felony-murder rule as murder always requires the intent to kill according to the traditional view. The application of the quasi-felony-murder rules under Kuwaiti law is only an exception in certain circumstances. These cases are not applied to other felonies like rape, battery, and kidnapping.

Conclusion

The comparative study of *mens rea* in Kuwait and the United States has revealed the intricate and multifaceted role that a defendant's mental state plays in the criminal justice systems of these two countries. This study dealt with the effect of the *mens rea* element on the concept of the crime of murder and demonstrated that this effect could expand the concept of the crime of murder. Considering recent statistics of murder in Kuwait and the continuous increase in the homicide rate, and considering the philosophy of deterrence in Kuwaiti law, which has been around for nearly 60 years, legislative amendments are necessary. Studies have shown that one of the most important reasons for the high rate of murders is the lack of adequate criminal penalties. The Kuwaiti legislature must draw from the experience of the US legislature by broadening the scope of the concept of murder through the adoption of a broader understanding of *mens rea*. The scope of murder under American law is much broader and more effective than that under Kuwaiti law because *mens rea*, the felony-murder rule, and degrees of murder allow broader interpretations of all elements constituting murder. The Kuwaiti legislature should take steps to counter increasing crime rates and reconsider the definitions of offenses in the process. The proposed amendment should seek to expand the scope of *mens rea*. The law should be extended to encompass recklessness, intent to inflict serious bodily injury, and death from resisting arrest provisions as they exist under US law.

Other factors that may contribute to the high rate of murders cannot be neglected, such as the proliferation of weapons, violent discourses spread through social media, electronic games that contribute toward normalizing a culture of violence, weak family control, poor morals, divorce, and lack of young people's engagement in useful activities. We hope that future research will complement the findings of this study and help identify integrated solutions to address rising murder rates. This study serves as a stepping stone for future research and discussions surrounding the impact of *mens rea* in the realm of criminal law, not only in Kuwait and the United States but on a global scale.

Notes:

- i. The Kuwaiti Constitution determines the source of criminal law. Article (32) states that “[n]o crime and no penalty may be established except under law.” Under criminal law, rules concerning offenses and punishments should be enacted by the legislature. Executive orders also serve as a source of criminal law and are classified into two types: (1) statutes that regulate traffic, and (2) policing orders that regulate public safety and health. A criminal statute punishes whoever violates the second type of order with a fine of USD 300. The Kuwaiti criminal system depends on two groups of statutes. The first contains both the Criminal Act and the Criminal Procedure Act. The second contains supplementary criminal laws like the Juvenile Act, the Drug Act, the Public Funds Act, the Traffic Act, and the Ministers Trial Act (a 73, Kuwait Constitution; s. 16 Kuwait Criminal Law 135 repeated (1960). The Kuwaiti Supreme Court has ruled that Islamic Shariah is not a mandatory source of criminal law unless the legislature adopts its provisions. See s 63, Kuwaiti Criminal Court 1994 (June 6, 1994).
- ii. The supreme legal document in Kuwait is the Constitution, which was issued and promulgated by the Amir (the King) of Kuwait on November 1, 1960. The Kuwaiti Constitution is divided into 5 parts and has 183 articles. It declares that “[t]he system of Government is based on the principle of separation of powers functioning in cooperation with each other by the constitution's provisions. No way has those powers relinquished all or part of its competence specified in this Constitution.” The powers are the legislature, executive, and judiciary. The Constitution confers power on these units and defines the nature of the relationship among them. The legislative branch is an elected assembly comprising 50 members. The Amir establishes the executive, which appoints the Prime Minister, who then chooses his ministers. The Amir appoints the members of the judiciary. At the top of the judiciary is the Supreme Court, followed by two levels of

the trial court, namely the Court of Appeals (second-degree trial court) and the trial court (first-degree trial court). The trial courts are organized across several circuits. The Constitutional Court, a special court, settles certain cases, such as the validity of both statutes or executive orders and the election of legislative members. Sources of law are not determined by the Constitution, except for religion. Article (2) states that “the Islamic Shariah [path] should be a main source of legislation.” Some statutes, like the Civil Act of 1980 (Act concerning contracts, torts, and gifts), declare that “the rules provided in this code should be applied first. If those rules do not face the underlying issue, the customary rule should be applied. If the customary rules do not face the underlying issue, the judge should apply Islamic Shariah.” However, it is well-known that the sources of legislation are the Constitution, statutes, and executive orders. There is no common law in the Kuwaiti legal system, and the Court's decisions are not sources of law (See a 50 and 95, Kuwait Constitution; see also s. 67, Kuwait Criminal Law, 1980).

- iii. Possessing weapons without a license is punishable by up to five years' imprisonment (s. 13, Kuwait Weapons Law, 1991).
- iv. The US government operates on a multi-tiered structure comprising a federal and state system. The former has three branches: legislative, executive, and judiciary. Congress, the legislative branch, creates laws. The president and his administration, which comprise the executive, enforce the laws. The judiciary, of which the highest institution is the US Supreme Court, interprets the laws. The state system has the same branches, which perform the same functions as those at the federal level. The US Constitution controls the relations between both systems. There are several sources of law in the US. In the hierarchy, they are: (1) the Constitution, (2) statutes and treatises, (3) court rules, and (4) administrative agency rules and regulations. See Shapo et al., 2003, p. 3; see also Sloan, 2003, p. 2.
- v. US criminal law was derived from English law. After the US was founded as a separate nation, US courts amended English laws to meet their local needs. English law was originally made common law. Later, the perspective on who should enact laws changed, wherein a branch representing the people (legislature) was designated to make laws. Most state legislatures enacted criminal statutes to supplant common law rules. These statutes differed in terms of how to deal with common law provisions. Some statutes abolished common-law rules, while other statutes, such as those enacted in Michigan, considered a violation of common law rules to be a felony or misdemeanor. Statutes voided common law, but common law has

continued to play a role. It assists courts in the interpretation of statutes when the legislative intent is vague. Common law completes statutory provisions when there is a deficiency. Criminal and common law are sources of criminal law in the US. In 1962, the American Law Institute issued the Model Penal Code (MPC), which includes general rules governing crimes and punishments, because there were differences among state statutes, which created unfairness. Although this proposed code is not law, some states have adopted some of its provisions. Other states have resorted to the MPC to interpret their statutes. Therefore, the MPC is considered a source of criminal law in the US. The power to render conduct as criminal is subject to constitutional limitations. The first 10 amendments to the US Constitution included the Bill of Rights, which poses the most common limitations in criminalizing conduct. For example, the Eighth Amendment requires that punishment should not be cruel and unusual. Another example is the prohibition of *ex post facto* laws, meaning that the application of new rules must not be retroactive. The Constitution is also a source of US criminal law (Lafave, 2000, p. 71; Dressler, 2001, p. 27).

- vi. Recklessness has a different meaning under Kuwaiti law than under American law. In Kuwaiti law, recklessness is not related to the degree of fault, but rather to the extent to which damages resulting from a behavior are expected.
- vii. *Ibid.* at 518.

Cases

- i. *Bantum v. State*, 1952 Del. LEXIS 88 (January 9, 1952).
- ii. *Bishop v. People*, 1968 Colo. LEXIS 811 (April 15, 1968).
- iii. *Carter v. U.S.*, 1955 U.S. App. LEXIS 3964 (May 19, 1955).
- iv. *Champan v. State*, 1996 Ga. LEXIS 53 (February 5, 1996).
- v. *Commonwealth v. Kelly*, 1939 Pa. LEXIS 714 (January 27, 1939).
- vi. *Commonwealth v. Marshall*, 1926 Pa. LEXIS 389 (December 6, 1926).
- vii. *Commonwealth v. Waddy*, 1972 Pa. LEXIS 527 (April 20, 1971).
- viii. *Donehy & Prather v. Commonwealth*, 1916 Ky. LEXIS 84 (May 31, 1961).
- ix. *Flanders v. Meachum*, 1994 U.S. App. LEXIS 436 (January 10, 1994).
- x. *Knotts v. State*, 1995 Ala. Crim. App. LEXIS 229 (June 16, 1995).
- xi. *Lee v. U.S.*, 1997 D.C. App. LEXIS 193 (August 14, 1997).

- xii. *Nesbitt v. Hopkins*, 1995 U.S. Dist. LEXIS 17856 (January 6, 1995).
- xiii. *Noel v. State*, 1998 Fla. App. LEXIS 422 (March 5, 1998).
- xiv. *Ortiz v. Dubois*, 1994 U.S. App. LEXIS 5478 (March 24, 1999).
- xv. *Owens v. State*, 1993 Ark. LEXIS 378 (June 21, 1993).
- xvi. *People v. Alvarez*, 1996 Cal. LEXIS 6514 (December 5, 1996).
- xvii. *People v. Greenberger*, 1997 Cal. App. LEXIS 795 (February 10, 1997).
- xviii. *People v. Motas*, 1994 N.Y. LEXIS 164 (February 22, 1994).
- xix. *People v. Phillips*, 1966 Cal. LEXIS 288 (May 23, 1966).
- xx. *People v. Thongvilay*, 1998 Cal. App. LEXIS 202 (March 12, 1998).
- xxi. *Regland v. Hundley*, 1996 U.S. App. LEXIS 4879 (March 20, 1996).
- xxii. *Rodriguez v. State*, 1997 Tex. App. LEXIS 3543 (July 3, 1997).
- xxiii. *State v. Lacy*, 1996 Ariz. LEXIS 129 (December 31, 1996).
- xxiv. *State v. Liggins*, 1996 Iowa sup. LEXIS 466 (December 18, 1996).
- xxv. *State v. Lowery*, 1982 Fla. LEXIS 2532 (October 5, 1982).
- xxvi. *State v. Miller*, 1971 Ariz. App. LEXIS 873 (February 22, 1971).
- xxvii. *State v. Mims*, 1998 Kan. LEXIS 83 (April 17, 1998).
- xxviii. *State v. Mora*, 1997 N.M. LEXIS 464 (November 17, 1997).
- xxix. *State v. Ortega*, 1991 N.M. LEXIS 331 (September 3, 1991).
- xxx. *State v. Peou*, 1998 Minn. LEXIS 285 (May 21, 1998).
- xxxi. *State v. Perry*, 1976 Ariz. App. LEXIS 424 (April 14, 1976).
- xxxii. *State v. Register*, 1983 N.Y. Lexis 3436 (November 29, 1983).
- xxxiii. *State v. Russell*, 1993 Minn. LEXIS 457 (July 16, 1993).
- xxxiv. *State v. Smallwood*, 1998 Kan. LEXIS 60 (March 6, 1998).
- xxxv. *State v. Stewart*, 1995 R.I. LEXIS 201 (August 11, 1995).
- xxxvi. *State v. Weisengoff*, 1919 W. Va. LEXIS 140 (December 5, 1919).
- xxxvii. *U.S. v. Kayarath*, 1997 U.S. Dist. LEXIS 6602 (April 11, 1997).
- xxxviii. *Washington v. Williams*, 1971 Wash. App. Lexis (May 3, 1971).

References

- Al-Aifan, Meshari & Bouarki, Husain. (2020). *Crimes of assault on people and money*. Kuwait: Kuwait University Publications
- al-Dhafiri, Fayez. 2013. *General principles in the Kuwaiti penal code*. Kuwait: Kuwait University Publications.
- Al-Mutairi, Saad. (2002). *Explaining misdemeanor crimes in Kuwaiti law*. Kuwait: Kuwait University Publications.
- Al-Nuweibit, Mubarak. (2011). *Explaining the general principles of Kuwait's penal code*. Kuwait: Kuwait University Publications.
- Al-Rajhi, Bader. 2020. *Explaining the Kuwaiti penal code*. Kuwait: Al Alam Publishing Publisher.
- Al-Shanawi, Samer. (1988). *General theory of crime and punishment in the Kuwaiti penal code*. Kuwait: Publications of the Police Academy.
- Amer, Muhammed. (1989). *Penal code*. Jordan: University Publishing Publisher.
- Dressler, Joshua. (2001). *Understanding criminal law*. Newark, NJ: Matthew Bender & Company.
- Elliott, Catherine, and Frances Quinn. (2016). *Criminal Law*. London: Pearson Education.
- Fadell, Nasserallah. (n.d.). *Principles of the general section*. Kuwait: Kuwait University Publications.
- Ghannam, Muhammed, & al-Kandari, Faisal. (2006). *Explaining the Kuwaiti Penal Code*. Kuwait: Kuwait University Publications
- Hendy, John, and Hutchinson, Odette. (2015). *Criminal Law*. Oxfordshire: Routledge.
- Houmd, Abdulwhab. (1983). *Kuwaiti criminal law*. Kuwait: Kuwait University Publications
- Housnee, Mahmoud Najeeb. (1998). *Criminal law*. Egypt: Arab Renaissance Publisher.
- LaFave, Wayne R., and Austin Wakeman Scott. (2000). *Criminal law*. Minnesota: West Group.
- Latif, Muhammed. (2015). *General theory of crime and criminal responsibility in the Kuwaiti penal code*. Kuwait: Kuwait University Publications.
- Martin, Jacqueline. (2014). *Criminal law*. Oxfordshire: Routledge.
- Namour, Muhammed. (2002). *Explaining the penal code*. Jordan: International Scientific Publisher.
- Obeid, Raouf. (1979). *Principles of the general section of penal legislation*. Egypt: Arab Thought Publishing Publisher.
- Qashshoush, H. (2010). *Explanation of the penal code*. Egypt: Arab Renaissance Publisher.

- Reports, published in Al-Anba Newspaper, dated (April 20, 2022).
- Reports, published in Al-Anba Newspaper, dated on (August 18, 2021).
- Reports, published in Al-Watan Newspaper, dated on (April 11, 2014).
- Reports, published in Qabas Newspaper, dated on (Feb. 1, 2021).
- Reports, published in Qabas Newspaper, dated on (March 11, 2022).
- Robinson, Paul., and Cahill, Michael. (2011). *Criminal law*. Massachusetts: Aspen Publishing.
- Salem, Adolmohumen. (1993). *Explaining the Kuwaiti penal code*. Kuwait: Kuwait University Publications.
- Shapo, Helene S., Walter, Marilyn, and Fajans, Elizabeth . (2003). *Writing and analysis in the law*. Foundation Press.
- Sloan, Amy. (2018). *Basic legal research: Tools and strategies*. Wolters Kluwer.
- Tharwat, Jalal. (n.d.). *Theory of probability intent in Egyptian law*. Egypt: Knowledge Facility.
- Walker, A. (2010). The new common law: Courts, culture, and the localization of the model penal code. *Hastings Law Journal*, 62, 1633.