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## DISCUSSION

### THE CONSTITUTIONAL COURT OF JORDAN AND ITS RELATION TO ORDINARY COURTS

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**Abstract:** *The principle of the supremacy of the Constitution is universal adopted by most international constitutions, including the Jordanian constitution. The latter requires a certain legal mechanism to protect it which is conducted by overseeing the constitutionality of laws. Ordinary courts controlled the constitutionality of laws under Jordan's 1952 Constitution, but they were only a no-action oversight. This was the case until the Constitutional Court was established on 6th October 2012 to oversee the constitutionality of the laws and regulations and to interpret the provisions of the Constitution. The relationship between ordinary courts and the control over the constitutionality of the laws has not been severed, as the Constitution and the Constitutional Court Law have maintained this relationship. The latter begins with the case court referring any plea of unconstitutionality to the Court of Cassation, which in turn refers it to the Constitutional Court if it deems that the plea is serious and fulfills its formal and objective conditions. Consequently, the ordinary judiciary (ordinary courts) remained the necessary link between the person who has an interest in the substantive case and the Constitutional Court, which does not accept any direct appeal except from official bodies exclusively specified by the constitution and the law, namely the Senate, Parliament and Council of Ministers. This calls for the adoption of a new mechanism that allows individuals to have direct access to the Constitutional Court in order to protect their constitutional rights.*

**Keywords:** *Constitutional Court Law, constitutional court, ordinary courts, Jordan*

## INTRODUCTION

The supremacy of the constitution is a universal constitutional principle adopted by the countries where the rule of law prevails, even though it is not stipulated in most contemporary constitutions. The Jordanian constitutional system is similar to the comparative constitutional system in its adoption of this principle. The system provides adequate legal protection to the constitution of Jordan, especially those provisions related to the principle of the separation of powers, and those related to the rights and freedoms of Jordanians. Control over the constitutionality of laws is an important method of protecting the constitution and has guaranteed the supremacy of Jordanian adjudication as adopted in its different courts, called the Ordinary Courts, for more than half century.

In 2012, the Constitutional Court of Jordan was established to control the constitutionality of the applicable laws and regulations, and interpret the provisions of the constitution. This was an important qualitative transfer in the development of the constitutional jurisdiction of Jordan. The Constitutional Court of Jordan, however, still maintains a relationship between with the ordinary courts, although in a special and limited manner. In this article, we shed light on the Constitutional Court and its relationship to the ordinary courts in Jordan.

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The Constitutional Court of Jordan is a result of constitutional amendments made during the reign of His Majesty King Abdullah II Ibn Al Hussein. In October, 2011, the official Gazette published a special chapter of the Jordanian Constitution, Chapter Five (Articles 58–61), entitled ‘The Constitutional Court’. This court was positioned directly below the executive power of His Majesty the King and his ministers.<sup>1</sup> This constitutional arrangement is an appreciation of the nature, structure, importance, and role of the Constitutional Court, whose duty is to protect the constitution and control the legislative and executive powers in their legislative work. For example, the Court protects the constitution and what follows from it, such as guaranteeing the fundamental rights and freedoms of citizens;<sup>2</sup> it also defends the principle of the separation and distribution of the powers which provide security, stability and development in a modern civil state system. This system can be described as a governmental, parliamentary, monarchic and hereditary constitutional system, in which the constitution and law prevail as desired by His Majesty King Abdullah II. This wish was explained by His Majesty in the sixth royal discussion paper.<sup>3</sup>

The Jordanian constitution can be seen as crowning the crucial amendments to the comprehensive reform adopted by His Majesty, who was keen to establish the Constitutional Court as an independent judicial body. Having at least nine members, including the President of the Court, these appointees of the King must meet certain special conditions. The constitution defines and clarifies these conditions to ensure that the Constitutional Court has highly experienced and well qualified members. In this way, it can practise its main role of protecting the constitution’s specifications, oversight of the constitutionality of laws and regulations, and interpretation of the provisions of the constitution.<sup>4</sup>

Control of constitutionality is achieved through both direct appeal, granted to the Council of Ministers, Senate, and House of Representatives, and indirect appeal, which provides the right to challenge unconstitutionality granted to any party in a pending case before any ordinary court. In this case, if the given unconstitutionality is serious, the ordinary court refers the matter to the Constitutional Court, which decides whether to refer it to the Court of Cassation.<sup>5</sup>

Through the Constitutional Court, the interpretation of the provisions of the constitution was assigned for the first time in Jordan’s history to an independent judicial body. Prior to this, there was the special chamber at the beginning of the “Emara”, and the Kingdom was under the Basic Law of the East of Jordan 1928 and the Constitution of the Hashemite Kingdom of Jordan 1946. The constitution texts of 1952 were interpreted by the High Council until the establishment of the Constitutional Court based on Chapter 5

<sup>1</sup> For more information, see NASRAWIN, L.: The Constitutional Amendments of 2011 in Jordan. Their Impacts on the Public Authorities in Jordan. *Dirast. Sharia'a and Law* 40(1) 2013.

<sup>2</sup> The Rights and Duties of Jordanians, Chapter Two, The Constitution of Jordan 1952 and its Amendments.

<sup>3</sup> Legislative power is vested in the parliament and the King; executive power is vested in the King, who exercises it through his ministers; and, judicial power is exercised by the courts.

<sup>4</sup> Article 4 of the Law of the Constitutional Court: “The Court shall have the following responsibilities: A) To oversee the constitutionality of the applicable laws and regulation; B) To interpret the provisions of the constitution.”

<sup>5</sup> There is no direct individual access to the council of court. The Senate, the House of Representatives, and the Council of Ministers has the right to direct access to the Constitutional Court.

mentioned earlier.<sup>6</sup> Constitutional Court Law 15 of 2012 became effective on 6 October, 2012, through which the Constitutional Court then took responsibility for interpreting the provisions of the constitution, if requested by the Council of Ministers, or by a decision of the majority of the National Assembly. The decision on interpretation became effective after being published in the official Gazette. Since 2012, the Constitutional Court has represented a prominent constitutional monument, and also constitutes a new era in the democratic process as well as being a strong and effective asset to protect Jordanian rights and duties.

The importance of the role of the Constitutional Court in protecting the constitution, guaranteeing the principle of the separation of powers, and ensuring the rights of Jordanians lies in its final binding decisions for all authorities and citizens, and through its authenticity, “which has a direct effect from the date of issuing the judgment, unless the court sets another date for its enforcement”<sup>7</sup>. If a text in a law or regulation is deemed unconstitutional, that text shall be void from the date of the judgment, or by another date identified by the court, except for a penal provision that prescribes a punishment. In this case, the provision shall be enforced retroactively and shall cease the execution of the provisions which have rendered a conviction, on the basis of that text; these provisions then end their penal effect.<sup>8</sup>

To ensure that the judgments of the Constitutional Court are implemented and that all authorities and persons are committed to implement them, the court sends a copy of the judgment as soon as it is issued to the President of the Senate, the President of the House of Representatives, the Prime Minister, and the President of the Judicial Council. The judgments are published in the official Gazette within fifteen days from the date of issue, but the decisions of the court in interpreting the texts of the constitution are only **effective after their publication in the official Gazette**.

The Constitutional Court has since issued dozens of judgments, in which it is biased towards the constitution. It decides on the unconstitutionality of different provisions contained in certain laws and regulations in force regarding a defect, whether this defect is in the jurisdiction, from a cause, or a deviation.<sup>9</sup> Its general framework is the constitution’s texts and its specific reason is the violation of the rights and freedoms of Jordanians, as set forth in Chapter II of the Constitution under the title “Rights and Duties of Jordanians”. The Constitutional Court affirms in its judgments the protection of the rights of equality, personal liberty, litigation, personal property, sanctity of the public domain, and to establish trade unions, as well as the principle of the separation of powers and other rights.

The Court also publishes many decisions interpreting constitutional provisions and judgments that protect the texts of the constitution and its role, whereby the Constitu-

<sup>6</sup> The High Council is composed of the President of the Senate and eight other members, three of whom are appointed by the senate from its members by ballot, and five from the judges of the highest ordinary court in the order of seniority. Article 122 of the Constitution of Jordan.

<sup>7</sup> Article (15/b). The law of the constitutional court of Jordan no.25/2012.

<sup>8</sup> HAURIU, A., GIQUEL, J. *Droit constitutionnel et institutions politiques*. Montchrestien. Paris 1985, p. 926. KAN, S., BIAGI, F. *Direct individual access to the Constitutional Court*. Max Planck Foundation. Amman, June 19, 2019.

<sup>9</sup> Article 16 from the Law of the Constitutional Court 15, 2012.

tional Court cares for the legislation and provisions. These do not affect the essence of the abovementioned rights or their basicity. The Constitutional Court has realized over the last eight years the importance of an advanced understanding of those provisions within the constitution's texts which may be inconsistent with the main principles of human rights pertaining to international declarations and conventions.<sup>10</sup> Such principles must remain consistent with the principles and values of a free and tolerant Jordanian society, the aspirations of the Hashemite leadership, and the role the Constitutional Court must play at the national, regional and international levels.

For this reason, the Constitutional Court has participated in many conferences and seminars with Arab and international courts and councils, and held different conferences and seminars in Jordan in cooperation with international specialized institutions, to develop constitutional jurisdictions and promote international humanitarian legal awareness and the rule of law. These include the Max Planck Foundation for International Peace and the Rule of Law, the German Foundation (IRZ), the Konrad Adenauer Foundation, the Venice Commission European Council, and the Union of Courts and Arab Councils. The court exchanged the most up-to-date information on the forms, organization and functioning of comparative constitutional judiciary, and the most prominent jurisprudential and applied theories which may contribute to the formation of the jurisprudence of the constitutional judge, and the interpretation of constitutional texts within a national framework based on the public interest.<sup>11</sup>

## 1. THE CONSTITUTIONAL JURISDICTION IN THE MENA

The constitutional jurisdiction in the Middle East and North Africa have different forms, as some constitutions have adopted constitutional courts, for example Egypt, Jordan, Syria, Bahrain, Kuwait, Palestine, Morocco, Tunis and Qatar; in contrast, some have entrusted the task of constitutional control to higher courts, such as the UAE, Iraq, Yemen and Libya. Others still have established constitutional councils, as can be found in France, such as Algeria, Lebanon and Mauritania. Besides the different names of these bodies that control the constitutionality of laws and regulations, there is also a difference in the specification, form and relationship between the constitutional courts, councils, and ordinary courts.<sup>12</sup>

## 2. THE THREE TYPES OF ORDINARY COURT IN JORDAN

The three types of ordinary court in Jordan are: civil or regular courts, religious courts, and special courts.<sup>13</sup> These courts form the judicial power mentioned in Chapter Seven of

<sup>10</sup> KLUG, H., South Africa from Constitutional Promise to Social Transformation. In: Jeffrey Goldsworthy. *Interpreting Constitutions*. New York, 2006, p. 248.

<sup>11</sup> SHERR, K. Modes and mechanisms of constitutional interpretation, 2012 Max Planck Foundation Foundation for Peace and the Rule of Law, Amman; BURDEEU, G. *Manual de droit constitutionnel et institutions politiques*. L. G.D.L Paris, 1984, p. 84.

<sup>12</sup> KHAN, S., Direct individual access to the constitutional court (lecture) Max Planck Foundation for Peace and the Rule of Law. Amman, June 19, 2019.

<sup>13</sup> The Constitution of Jordan (1952) and its Amendments. Article 99.

the Constitution. The Constitutional Court, as mentioned in Chapter 5, has a legal personality and enjoys financial and administrative independence. In this capacity, it may own movable and immovable assets and make all such legal dispositions as required to perform its functions.<sup>14</sup> At the beginning of the second half of the twentieth century, the Jordanian jurisdiction rejected an extension of its control over the constitutionality of laws and regulations. This approach was presented by the Jerusalem Court of Appeal in its decision (312/1953), which stated that “Therefore, the legality of these laws may not be prejudiced as long as they are issued by the Parliament and ratified by His Majesty the King. We are not a constitutional court to discuss the constitutionality of these laws.”

The regular judiciary did not remain in position for long. In 1958, the Court of Cassation monitored the constitutionality of laws, and abstained from implementing a law contrary to the constitution, stating that “The Constitution is the source of the authorities’ power, and their competences, legislation is entitled to legislative authority and to executive authority in certain cases [...] Article 162 of the Regulations of Public Servants is contrary to the Constitution (unconstitutional). It is not permitted to rely on it (74/1958).” The High Court of Justice adopted the same approach and decided in 1967 that “The Provisional laws must not violate the Constitution, and so the condition mentioned in paragraph (c) will not be applied” (75/67). We can say of the constitution and the law of the Constitutional Court that the independence of the latter as an independent judicial body does not mean that there is no relationship between the Constitutional Court and other courts that represent the judiciary. Also, there is a direct relationship between the Constitutional Court and other entities as exclusively defined by the constitution.<sup>15</sup> In this regard, Article 60 provides that, “The following entities —for limitation — shall have the right to directly challenge at the Constitutional Court the constitutionality of the applicable laws and regulations of: a) the Senate, b) the House of Representatives and c) the Council of Ministers. In addition to these defined entities, the Court of Cassation can directly refer a case of unconstitutionality before the court when it considers a case pending before it.<sup>16</sup>

In contrast to the above, most arguments on the unconstitutionality of decisions and provisions reach the Constitutional Court indirectly when the unconstitutionality of a law or regulation applicable to a given case is before a court, whether a regular, religious or a special court. Article 60(2) of the constitution states, “In the case viewed by courts, any of the parties of the case may raise the issue of the unconstitutionality, [and] the court shall, if it finds that the plea is serious, refer it to a court specified by the law —Court of Cassation —for the purpose of the determination of its referral to the Constitutional Court.” Indeed, several demands appear from time to time concerning the adoption of the single referral to encourage both the judge and the parties of the case to challenge and raise the issue of unconstitutionality for the purposes of enhancing constitutional legitimacy.<sup>17</sup>

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<sup>14</sup> The Constitution of Jordan. Article 58.

<sup>15</sup> Nasrawin, *supra* note 1, p.11.

<sup>16</sup> The Court of Cassation is the highest regular court in the judicial system of Jordan.

<sup>17</sup> Direct individual access to the Constitutional Court is a popular demand, but both of the demands need a constitutional amendment.

## CONCLUSION

In sum, the relationship of the Constitutional Court to the ordinary courts is an indirect one, except in the case of the Court of Cassation. The indirect relationship refers to the first referral submitted to the Court of Cassation by the ordinary courts, which initially assess the unconstitutionality, and then decide whether to refer the case. The system of referral is described in the Jordanian constitutional system as ‘double referral’. A general description of the control of constitutionality in the Jordanian constitution system is one of indirect access in the relationship between ordinary courts and the Constitutional Court through the Court of Cassation. Thus, we cannot say that the constitutional judicial system applies direct access except in those cases, clarified previously, when such access is granted to entities and not to individuals. Direct individual access to the Constitutional Court is inapplicable and an indirect challenge concerning unconstitutionality is now the most widely applied.<sup>18</sup> The Court of Cassation is the only court which refers cases to the Constitutional Court and its final decision is binding. If the decision of the Court of Cassation is not to refer the case, the attempt ends and the appeal stops. If the Court of Cassation initially accepts the unconstitutionality, it refers the case to the Constitutional Court, which makes the final ruling. The judgment of the Constitutional Court is always final and binding on all authorities and individuals, and enforceable with immediate effect, unless the judgment itself is determined at another date.<sup>19</sup>

## Recommendations

- 1) Adopt a single referral system which enables the Ordinary Court to refer issues of unconstitutionality directly to the Constitutional Court without proceeding through the Court of Cassation.
- 2) Enable the subject judge (the Ordinary Court) to confront the unconstitutionality alone, without requiring that the unconstitutionality is raised by a party.
- 3) Further investigate direct individual access to the Constitutional Court and its relevance.
- 4) Make constitutional amendments to apply these recommendations, and permit the Jordanian legislator to amend the law of the Constitutional Court 15 (2012).
- 5) Finally, it should be noted that constitutional amendments are not a negative event, but rather a reflection of developments in social, economic, and cultural concepts. They are, as scholars have named them, “living constitutionalism.”<sup>20</sup>

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<sup>18</sup> The Constitutional Court of Jordan has received many challenges concerning unconstitutionality, but none was direct challenge. For a comparative study, see: Wilson, James: *American Institutions and Policies*. Health Company, New York, 1983, p.392.

<sup>19</sup> For a comparative study of the High Court of Justice, see KEIR, D., LAWSON, F., BENTLEY, D., *Cases in Constitutional Law*. Sixth Edition. E.L.B.S Oxford University Press, 1979, pp. 229 and 496.

<sup>20</sup> MAGGS, G. E., SMITH, P. J. *Constitutional Law. A Contemporary Approach*. GW University, p. 21.