



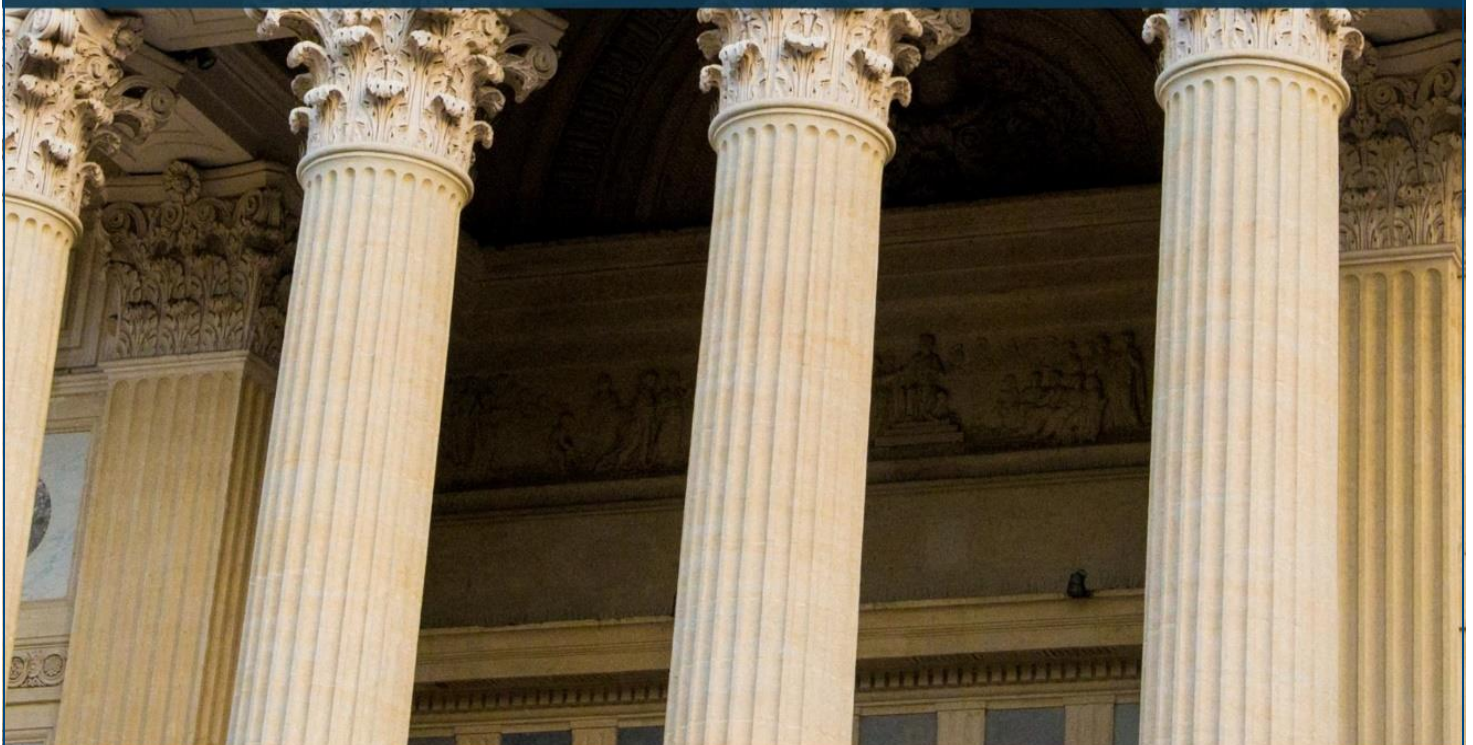
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# **THE CONSTITUTIONAL COURT OF JORDAN: EVALUATING 10 YEARS OF SERVICE & FUTURE EXPECTATIONS**

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## The Constitutional Court of Jordan: Evaluating 10 Years of Service & Future Expectations

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## 1. Introduction

This paper aims to identify the role of the Constitutional Court of Jordan over almost ten years since its establishment (2012 – 2021) with relation to its contribution to preserve the principle of the rule of law and to protect the fundamental rights and freedoms. The Constitution is written, and represents the social contract signed by the ruler from one side and the people from the other side through their elected representatives. The basis of the Jordanian legal system is the supremacy of the Constitution over laws issued by the legislative authority and regulations issued by the executive authority.

As a result of the superiority of the Constitution, law-makers must take into consideration the constitutional rules in all legislations enacted, and if it is proven that any text in a statute contravenes a provision in the Constitution, then it should be declared unconstitutional.

Since its establishment in 2012, the Constitutional Court has issued several judgments which have had a positive impact on the process of overseeing laws against the Constitution and developing the legislative process in Jordan, especially with regard to the fundamental principles for constitutional rights and freedoms.

The Constitutional Court has also contributed through its power to interpret the provisions of the Constitution to clarify the statutory rules set in various national legislation. The most important interpretation decisions are: not allowing pensions salaries to MPs and Members of the Senate (upper house) since they're not deemed to be 'public officers, and determining the legal status of international agreements in the Jordanian legal system as being higher than domestic laws.

## 2. Establishing a Constitutional Court in Jordan

The establishment of the Constitutional Court was a part of the amendments made to the Jordanian Constitution in 2011, with the aim of creating an independent judicial body with the specific task to settle disputes related to the unconstitutionality of laws and regulations in force, in addition to the power of interpreting the provisions of the Constitution.<sup>1</sup>

The provisions related to the Constitutional Court were inserted in Chapter (5) of the Jordanian Constitution. Chapter (4) deals with the Executive Authority and Chapter (6) is devoted to the role of the legislative authority. Consequently, the inclusion of the Constitutional Court's

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<sup>1</sup> See Laith Nasrawin, "The Impact of the Constitutional Amendments of 2011 on the Public Authorities in Jordan" published in DIRASAT, an International Refereed Research Journal Published by the Deanship of Academic Research, Volume 40, Shari'a and Law Sciences, Number 1, May 2013, p 234-235.

provisions in Chapter (5) to mediate the executive and legislative authorities serves to indicate the relationship between these two authorities and the Constitutional Court.

This relationship has been clearly demonstrated by the fact that the right to directly appeal the unconstitutionality of laws and regulations has been given to the Council of Ministers, the Senate and House of Representatives, and these bodies also have the right to request the Constitutional Court to interpret any text of the Constitution.<sup>2</sup>

The important role of the Constitutional Court lies in overseeing the compatibility of the provisions of laws and regulations with the Constitution, so that if it is proven that a provision in a law or a regulation contradicts the Constitution, it can declare those provisions or the law unconstitutional. This decision is binding to all authorities in the state, including the legislative authority,<sup>3</sup> which should then initiate a process to amend the law or regulation or issue a new law or regulation in accordance with the decision of the Constitutional Court.

In this way, the Constitutional Court can provide an effective guarantee for the protection of the constitutional rights and freedoms of individuals through its rulings. The court, from its establishment, provides an additional barrier for attempts of lawmakers to legislate in a way that might breach the rights and fundamental freedoms of individuals. Some of the most important rights it can protect include the right to litigation at two degrees/levels of courts, the principle of equality between Jordanians before the law, and the principle of the application of legal rules with immediate and direct effect.

### **3. Structure of the Constitutional Court**

The rules relating to the composition of the Jordanian Constitutional Court, its internal proceedings and the way it assumes its judicial work aim to promote a high level of protection for individuals' fundamental human rights. According to Article 58 of the Constitution, the court is composed of nine members at least, inclusive of the president, to be appointed by the King through a Royal Decree for a non-renewable term of six years. This term works as an important safeguard to ensure the independence of members of the court, which, in its turn, positively reflects on the way they undertake their constitutional duties of protecting individuals' human rights.<sup>4</sup>

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<sup>2</sup> Article (60/1) of the Constitution of Jordan.

<sup>3</sup> Article (59/1) of the Constitution of Jordan.

<sup>4</sup> Y. Al-Jamal, Y, "Constitutional Adjudication in Egypt", Cairo: Dar Alnahda Alarabieh, 2000.

It could be argued that any possibility of renewing terms of members of a constitutional court could open doors to the potential exploitation of powers by judges seeking reappointment. This could ultimately pose a risk to the judicial independence of the court.

Each judge of the Constitutional Court must meet certain criteria, namely: 1) being a Jordanian national and not holding any other citizenship; 2) having reached 50 years of age; 3) having either served as a judge in the Court of Cassation or the High Court of Justice (replaced later by the High Administrative Court); 4) being a university law faculty with professorial rank; or 5) having worked as a lawyer in private practice for at least 15 years.<sup>5</sup> However, one of the constitutional judges must be a specialist who meets the eligibility criteria prescribed for members of the Senate.

This dissimilarity in the backgrounds of judges appointed to the Constitutional Court works positively to advance the process of issuing judgments examining the constitutionality of laws and regulations in power, and to ease public concern about the judicial entity empowered to consider claims of unconstitutionality of a law affecting the principal rights of human beings.<sup>6</sup>

However, there are still loopholes in the decision-making process for selecting members of the Constitutional Court in that there are no clear procedural provisions in the law of the court regarding the nomination process, or to any potential role for elected representatives in that regard. Also, the law in question is silent as to any systematic efforts made to ensure that women are represented amongst the pool of nominees and in the structure of the court. The first female judge was appointed to the court in 2020.

Added to the safeguards given for constitutional judges to preserve their independence during office, they enjoy immunity for all actions and decisions taken in their official capacity. Judges of the court cannot be prosecuted with respect to any criminal complaint during the period of their membership of the court, or for any criminal complaint relating to the duties and activities entrusted to them in accordance with the provisions of the Constitution or because of or arising therefrom, except with the authorization of the General Board of the Court.

Although members of the Constitutional Court are appointed for a fixed term of six years, a member's service shall cease on certain circumstances including: death, resignation, a Royal Decree upon the recommendation of six other members in case of forfeiture of any of the conditions of membership, or upon the General Board granting leave to prosecute a member.

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<sup>5</sup> Article (61) of the Constitution of Jordan.

<sup>6</sup> N. Al-Khateeb, "Al-Baseet in the Jordanian Constitutional System", Amman, Dar Althaqafa, 2014.

Also, a judge is removed from office in case of ill health that prevents him doing his job, including a loss of civil capacity.

To ensure integrity and transparency, judges of the court are brought within the jurisdiction of the Illicit Enrichment Law of 2014, which prohibits engagement in any extrajudicial activities that might have an improper impact or reflect adversely on the judge's impartiality and the way they conduct judicial review. Prohibited activities are wide enough to include, for example, performing services for other governmental bodies, occupying a position in either the public or private sector, or being a member of a political party.

In addition, judges of the court may not be members of the board of directors or board of managers of any company, or chairmen or members of a board of directors or board of trustees of any public or private establishment, or engage in any business on behalf of any entity of whatever capacity.

Furthermore, the way the court undertakes its judicial work and the decision-making process of revising laws and regulations regarding the Constitution also advances the perception of independence of the Court, so that no other governmental authority in the state can intervene in the way the Court conducts its business, either administratively or judicially. The law of the Court clearly provides that the Court shall have a legal personality and enjoy financial and administrative independence, and that in such capacity, it may own movable and immovable assets and make all such legal dispositions as are required to perform its functions.<sup>7</sup>

#### **4. Proceedings before the Constitutional Court**

For the sake of ensuring a high standard of effectiveness in the work of the Constitutional Court, and to avoid stressing the judges with ill-founded claims of unconstitutionality, access to the Court was strictly drawn through two main avenues: political and judicial. Political access is through the constitutional right of the House of Representatives, the Senate, and the Council of Ministers to directly submit challenges against certain provisions in the law or the regulation in effect that it contravenes the Constitution, and to request the Court to determine its constitutionality.

Regarding judicial access to the Constitutional Court, the Law allows any of the parties to a case pending before the courts, to put forward the defense of unconstitutionality of any law or regulation that is applicable to the substance of the case.<sup>8</sup> If the Court considering the case

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<sup>7</sup> Article (3) of the Constitutional Court Law of 2012.

<sup>8</sup> Article (11) of the Constitutional Court Law of 2012.

finds that the law or regulation against which the defense of unconstitutionality has been raised is applicable to the substance of the case and that the defense of unconstitutionality is substantive and serious, it shall suspend consideration of the case and refer the defense to the Court of Cassation for the purposes of deciding on the issue of its referral to the Constitutional Court.

The Court of Cassation makes a final determination on whether the unconstitutionality claim should reach the Constitutional Court. For this purpose, it shall convene with a panel of a minimum of three members and shall issue its decision within 30 days from the date the case reaches it from the lower-level court. However, if the constitutionality challenge is put before the Court of Cassation or the High Administrative Court for the first time, the respective court must immediately decide on the issue of referring the challenge to the Constitutional Court.

Arguments have been made against this so called multi-referral system in Jordan, contending that denying individuals the right to file constitutional challenges directly with the Constitutional Court compromises their right to free access to the court.<sup>9</sup> It was also submitted that direct access to judicial review would provide individuals and groups with more opportunities to submit challenges of unconstitutionality, which would then allow the Constitutional Court to fill any gaps in the existing legal system that would otherwise leave — without remedy — those affected by alleged unconstitutional legislation.

The counter argument is that any direct access to the Constitutional Court would overburden the court and restrict its efficiency, given that the newly-established court would certainly struggle with limited resources at the beginning. Also, the filtering system of unconstitutional claims in Jordan is in line with international best practices that give constitutional courts the right to have a broad discretion to dispose of complaints according to clearly stated criteria like those deployed elsewhere. In Germany, for instance, the constitutional complaint may not be lodged until all remedies have been exhausted, however, a decision might be made immediately on a complaint of unconstitutionality before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant pursuant to Article 90.2 of the Law on the Federal Constitutional Court.

In France, access to the French Constitutional Council is restricted to raising the question of unconstitutionality within an existing case in another court, and to applying a test of

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<sup>9</sup> M. Hammouri, "Rights and freedoms between political whims & constitutional requisites", Amman, Dar Wa'el, 2010.

seriousness to complaints of unconstitutionality.<sup>10</sup> In Egypt, a litigant has the right to file a claim directly with the Supreme Constitutional Court when the ordinary court adjudicating his or her case has determined that the constitutional matter is serious.<sup>11</sup>

However, the multi-referral system of challenges to the Constitutional Court in Jordan raises concerns as whether ordinary judges can refer a case to the Cassation Court without being prompted by a litigant, and this is still to be brought up by sitting judges.

Also, it is worth noting that legal systems which base judicial review on a multi-court referral model are usually responsible for developing clear judicial criteria for vetting constitutional claims, so that complainants can decide in advance on the merit of their submissions. This can mainly be done by requiring courts involved in the referral process to issue well-reasoned decisions involving constitutionality matters, and to make them available in the public domain through publication.

In 2021, the Royal Committee for the Modernization of Political Systems listed amendments to the Constitution. Intended to make the referral system of defenses of unconstitutionality a point that the law in question would regulate, not as it stands today that the mechanism is provided clearly in the Constitution. These amendments were recently approved by Parliament and ratified by H.M. the King. As such, law-makers are now able to ease the way challenges of unconstitutionality reach the Constitutional Court.

## 5. Judgments of the Constitutional Court

Judgments of the Constitutional Court of Jordan are final, binding on all authorities and the people, and enforceable immediately, unless otherwise specified. If the court rules that a law or regulation in force is unconstitutional, it shall be deemed void from the date the judgment is issued.

Although the law of the court explicitly provides that laws and regulations, or selected provisions of laws and regulations, that are rendered unconstitutional are deemed null and void, it does not specify a mechanism for referring such laws to Parliament for amendment, nor does it provide a time frame for the authority concerned to amend the law or regulation that was found in violation of the Constitution.

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<sup>10</sup> M. Tushnet, & Fleiner, "Routledge handbook of Constitutional Law", Abingdon, Routledge Press. 2013.

<sup>11</sup> N. Kamel, "Judicial scrutiny on constitutionality of laws "Constitutional Adjudication", Cairo, Dar Alnahda, 1993.



The Constitutional Court is mandated to publish its decisions in the Official Gazette within 15 days of the date of their issuance. If the decision responds to a request for an interpretation of a constitutional provision, it enters into “force upon publication” in the Official Gazette. All decisions should be well-reasoned in order to provide much-needed guidance to governmental institutions and other courts about what the constitution and applicable laws require in practice. Dissenting opinions are also published along with the judgment in the Official Gazette, although this practice is not mandated by the law.

## 6. Evaluating the impact of the Constitutional Court since 2012

Since its establishment, the Constitutional Court has laid down many legislative principles related to perseverance of the rule of law, the maintenance of the independence of the judiciary and the protection of fundamental rights and freedoms.<sup>12</sup> The most important of which are:

### A. The Principle of Judges’ independence

In 2018, an appeal was filed against the unconstitutionality of Article (15) of the Judicial Independence Law No. (29) of 2014, which gives the Judicial Council the right, based on the recommendation of its president, to decide to refer any judge who has served a period of no less than 20 years to retirement, and to consignment (early retirement) if he has completed a service of no less than 15 years, or if he has not completed the period of service required to be referred to consignment (early retirement) or retirement.

The Constitutional Court, in its decision No. (2) of 2018,<sup>13</sup> ruled that the part related to “*the right of the Judicial Council to terminate the services of any judge who has not completed the period required to refer him to consignment (early retirement) or retirement,*” was unconstitutional on the basis that it violates the provision of Article (97) of the Constitution which considers that judges are independent and that they are subject to no authority but the law.

The Court also considered that:

*“The termination of the services of any judge who did not reach the age of retirement or consignment (early retirement) must be based on a legitimate and justified order, after he*

<sup>12</sup> See Laith Nasrawin, “Protecting Human Rights through Constitutional Adjudication – Jordan as a Case Study” published in Digest of Middle East Studies Journal, Volume No. (25), Number (2), 2016, pp 264-284.

<sup>13</sup> This judgment is published on page (2722) of the Official Gazette No (5514) issued on 10/5/2018.

*is enabled to exercise the right to defend himself, and to hold otherwise would be affect the judge's performance of the duties of his judicial position".*

The Constitutional Court expanded on the reasons for the unconstitutionality of the such actions, confirming that:

*"Terminating a judge's services before the age of retirement or consignment (early retirement) entails a disguised punishment, and that it contradicts the approach adopted by the Judicial Independence Law in determining the disciplinary liability of the judge in the event that he commits any behavioral violation during exercise of his duties, and the prescribed penalties for these violations".*

## **B. The Principle of Equality before the Law**

The Constitutional Court issued several judicial provisions in which it declared legal provisions unconstitutional on the basis that they violate the principle of equality among Jordanians, as stated in Article (6/1) of the Constitution.

In Case No. (4) of 2014, the unconstitutionality of Paragraph (b) of Article (14) of the Jordanian News Agency Staff Regulation No. (17) for the year 2010 was appealed on the ground that it discriminates between Jordanians in the formula provided for calculating their retirement pension. The Court accepted the challenge and declared the relevant article unconstitutional on the basis that:

*"It involved an unacceptable distinction between two categories of employees for whom the civil retirement pension eligibility criteria were completed, the first category are the journalists who are percentage is subject to 65% of their basic salaries owed for the purposes of retirement, and the second category are employees who are not journalists and subject to the Civil Retirement Law and whose pensions are calculated on the basis of their full basic salary, even though both categories of employees are covered by Civil Retirement Law No. 34 of 1959. Article (19/a) of which is based on the entire basic salary as a basis for calculating the retirement pension".<sup>14</sup>*

In its interpretation of the authority of the law maker to regulate the exercise of rights and freedoms, the Constitutional Court ruled that:

*"It is established in principle that the legislator has authority in the field of organizing constitutional rights, and that this power is discretionary unless the constitution limits its*

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<sup>14</sup> This judgment is published on page (5486) of the Official Gazette No (5301) issued on 3/9/2014.

*exercise to controls that limit its release, but it is not permissible for him to violate the rights that stipulated in the constitution and with the equal protection of all rights guaranteed by the constitution, in order to achieve peace and social security".*

### C. The Principle of Litigation on Two Degrees

The Constitutional Court has enshrined the principle of challenging judicial verdicts to higher courts in many of its decisions, as one of the most important constitutional rights and freedoms, and ruled that the provisions of laws that deprive one of the parties to the lawsuit of their right to appeal the judicial decision issued by the Jordanian courts were unconstitutional.

In its judgment issued in Case No. (1) of 2013, the Constitutional Court ruled that the provision in the Landlords and Tenants Act No. (22) of 2011 is unconstitutional, which states that it is not permissible to appeal the judicial decision issued to re-estimate the amount of rent to be paid. In its ruling, the Constitutional Court declared that:

*"The right to litigation is a constitutional principle, a genuine one that must be organized in a way that ensures its protection and does not derogate from it, by granting it to litigants on two ranks, and saying otherwise is considered a violation of the essence of the constitutional protection established for fundamental rights and freedoms".<sup>15</sup>*

The Constitutional Court has reaffirmed the necessity of determining the principle of two-degree litigation in Case No. (2) of 2013, through its declaration of the unconstitutionality of Article (51) of the Jordanian Arbitration Law No. (31) of 2001 that prohibits a convicted person from appealing the decision of the Court of Appeal, in case of its decision to nullify the arbitration award. The Constitutional Court considered that:

*"That provision clearly violates the right of the individual to present his case to a higher court, and that it implies a grave violation of the Article (6/1) of the constitution that establishes the principle of equality among Jordanians, which is the basic pillar of other constitutional rights and freedoms".<sup>16</sup>*

In Case No. (7) of 2013 regarding the inadmissibility of appeal the decision of the Trademark Registrar to refuse to delete the registration of a trademark, the Constitutional Court ruled that:

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<sup>15</sup> This judgment is published on page (1407) of the Official Gazette No (5213) issued on 7/3/2013.

<sup>16</sup> This judgment is published on page (1761) of the Official Gazette No (5217) issued on 3/4/2013.

*"Article (11/c) of the Trademark Law No.(9) of 2006 is unconstitutional on the basis of that the right to appeal the trademark registrar's decision must be extended to cover the case of the decision to delete the trademark and the decision to refuse to delete the trademark, given that the right to litigate is one of the basic rights of the parties in the lawsuit, and this right is decided in the event of the cancellation the trademark without the refusal of delisting the trademark contains unjustified discrimination between litigants in form of violation the provisions of Article (6) of the Constitution".<sup>17</sup>*

#### **D. The Principle of Enforcing Legal Rule with Immediate Effect.**

Among the important constitutional principles decided by the Constitutional Court in the field of protection of fundamental rights and freedoms is the principle that the legal rule is enforced with immediate effect - as a general rule - and that it does not apply retroactively.

A challenge was presented to the Constitutional Court regarding the unconstitutionality of the regulation amending the Tax System on Sales, No. (97) of 2016, on the basis that this regulation had been published in the Official Gazette issued on 01/08/2016, but required the implementation of its provisions as of 21/06/2016, which was earlier than the date of its publication in the Official Gazette.

In its decision No. (6) of 2017, the Constitutional Court ruled that the part related to the retroactive effect of the newly implemented system was unconstitutional, based on the principle of the validity of the legal rule that has a direct immediate effect. This was in the context of Article (93) of the Constitution, which states that *"The law will come into effect when it is declared by the King and 30 days have passed since its publication in the official newspaper, unless a special provision is made in the law, provided that it takes effect from another date".<sup>18</sup>*

The Constitutional Court concluded that:

*"The exception in enforcement of a legal rule from another date than the date of its publication in the official newspaper is limited only to legislation of the degree of laws issued by the legislative authority only, and does not extend to include regulations issued by the executive authority, which originally restricts the legal rule to take effect from the date of its publication in the official newspaper".*

<sup>17</sup> This judgment is published on page (5258) of the Official Gazette No (5257) issued on 24/11/2013.

<sup>18</sup> This judgment is published on page (6296) of the Official Gazette No (5484) issued on 3/10/2017.

## The Absence of a Legal Obligation to amend the Law

The main problem with regard to the role of the Constitutional Court in developing the legislative process in Jordan remains that although the decisions issued by it, which include the unconstitutionality of any legal provision, are considered binding on all authorities in the state, the Constitutional Court Law did not include any legal provision requiring the legislative and executive authorities to act upon the ruling on unconstitutionality, in particular by requiring them to amend legislation that was found unconstitutional or to issue new legislation.

This is unlike the case in many comparative legal systems and laws, which oblige the competent authorities to implement the Constitutional Court's decision by amending the legislation that has been declared unconstitutional. For example, in Palestine, the Constitutional Court Law states:

*"When deciding that any law, decree, regulation, system, or decision is partially or totally unconstitutional, the legislative authority or the competent authority must amend that law, decree, regulation, system or decision in accordance with the provisions of the fundamental law and law".<sup>19</sup>*

A similar provision was also mentioned in the Kuwaiti Constitutional Court's law, which states:

*"If the Constitutional Court decides that a law, decree, or regulation is unconstitutional, or a list of administrative regulations is unlawful because it violates an enforceable law, the competent authorities must take the necessary measures to correct these irregularities, and the settlement of their effects for the past".<sup>20</sup>*

The judicial decisions issued regarding the unconstitutionality of provisions in various Jordanian laws have not been legally reversed by amending the relevant laws; rather, the legislative organs usually wait until any major amendments to the provisions of that law or for the issuance of a new law for the purposes of reversing the decision of the Constitutional Court.<sup>21</sup>

The provisions of the Trade Names Law and the Jordanian News Agency Staff Regulations that were held to be unconstitutional are still in place and have not been amended yet. It is

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<sup>19</sup> Article (25) of the Law on the Constitutional Court of Palestine No (3) of 2006.

<sup>20</sup> Article (6) of the Kuwaiti Law on Constitutional Court No (14) of 1973.

<sup>21</sup> The part of Article (15) of the Judicial Independence Law relating to the termination of the services of a judge before retirement or consignment (early retirement), which was declared unconstitutional in 2018, was later omitted from the law in the amendments of 2019.

therefore incumbent upon judges to know and abstain from applying these provisions, since they have not amended or issued revised versions of these laws and regulations.

This approach, to not amend the law and to rely on the judge's knowledge that the provision to be applied is unconstitutional, contradicts basic principles of drafting legislations, which requires that any legal provision determined to be unconstitutional is eliminated, by amending or repealing the provisions of those laws and regulations. Therefore, there is an urgent need to amend the Constitutional Court Law in favor of imposing a legal obligation on the competent authorities to take the necessary legislative measures to implement the ruling of the unconstitutionality of any legal text, by repealing and amending the relevant provisions of the relevant law or regulation.

## **7. Interpretation of Provisions of the Constitution**

The significant role of the Constitutional Court in developing the legislative process in Jordan and enhancing the rule of law over the past ten years has extended through its interpretative decisions on the provisions of the Constitution. The importance of interpretation stems from the determination of the true will of the legislator; thus, the interpretative decision issued by the court has the same effect as a constitutional provision and is indistinguishable from it.

In this context, the Constitutional Court has issued many interpretative decisions that contributed to improving national legislation and eliminating ambiguity. Many of these were related to constitutional problems that have arisen, and have contributed to strengthening the system of constitutional rights and freedoms. The most important of these are:

### **A. Determining the Legal Status of MPs & Senates**

In 2014, the King refused to ratify the draft law amending the Civil Retirement Law that would give members of the Senate and the House of Representatives pensions for their working years in the legislative authority. In light of this, many questions arose about the extent to which members of Parliament deserve pension salaries, so the Constitutional Court was requested to interpret the provisions related to the formation of the two chambers of Parliament and their carrying out their duties in accordance with the Jordanian Constitution.

The Constitutional Court ruled in its interpretative decision No. (2) of 2014 that:

*"The conditions of the public officer represented by appointment for an indefinite period in a public utility and the necessity of being devoted to government work do not apply to*

*representatives and senators. The representatives are elected by the people, while the senators, even if they are appointed by the King, are appointed for a specific period of time, which is four years.*

*Likewise, both the representatives and the senators do not work in a public utility that provides public service, and are not dedicated to their representative work, as they exercise additional tasks and jobs in addition to their membership in the legislative authority. Consequently, they do not meet the conditions of a public officer for the purposes of obtaining any pension salaries".<sup>22</sup>*

This interpretive decision was positively reflected in the improvement of the legislative process in Jordan. The Civil Retirement Law was later amended in 2018 and the ruling of the Constitutional Court was enshrined in Article (7) of the law, which deems membership in parliament as outside of the definition of civil service for the purposes of civil retirement.<sup>23</sup>

## **B. Determining the Status of International Treaties in the Jordanian Legal System**

In its interpretative decision No. (1) of 2020, the Constitutional Court interpreted Article (33) of the Constitution regarding the place of international treaties in the Jordanian legal system. The Court defined the treaty and the agreement as one of the acts of sovereignty that states conclude among themselves, and that Parliament may not issue any law that conflicts with a provision of a treaty or an agreement that was ratified by Jordanian accordance with the Constitution.<sup>24</sup>

The importance of this interpretative decision stems from the fact that it has brought an end to the legal debate in Jordan about the status of the international treaty in the Jordanian legal system. The Constitution did not include any provision that defined the status of an international treaty as regards its hierarchy compared to national laws. The judicial decisions issued by the Court of Cassation have always been influential as it is the highest court in the Jordanian judicial system. Its jurisprudence established that international treaties are superior to national laws in Jordan.

In the Case No. 4677/2014, the Court of Cassation ruled that:

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<sup>22</sup> This judgment is published on page (6775) of the Official Gazette No (5314) issued on 1/12/2014.

<sup>23</sup> See Laith Nasrawin, "The Application of the Civil Retirement Law on Members of Parliament and Ministers in Jordan" published in the Jordanian Journal of Law & Political Sciences – Publisher Mu'tah University – Deanship of Academic Research (DAR) Volume 8, Number 4, 2016, pp 81-120.

<sup>24</sup> This judgment is published on page (2153) of the Official Gazette No (5640) issued on 3/5/2020.

*"The provision contained in an international agreement is the first priority to apply from the domestic laws, since the agreement is superior to the law".<sup>25</sup>*

Also, in the case No. 3726 of 2014, the Court of Cassation ruled that:<sup>26</sup>

*"Judicial jurisprudence has established that the agreements are of a higher order than the law and are more likely to be applied in the event that their provisions conflict with the provisions of the domestic law".*

In the case No. 1486/2011, the Court ruled that:<sup>27</sup>

*"The judiciary and jurisprudence have settled that the provisions of the agreement are one of the rules of international law, as they are the highest order and the first in application of the rules of domestic law".*

But the problem with relying on the decisions of the Court of Cassation, to determine the status of international treaties in the Jordanian legal system, was that these judicial precedents are merely indicative and a secondary source of law in Jordan. Also, the Court of Cassation has the right to revoke any of its previous jurisprudence. The Law on the Formation of Ordinary Courts stipulates that the Court of Cassation shall convene by at least five judges in its regular session if one of its bodies decides to revoke a principle established in a previous judgment.<sup>28</sup> Therefore, once the interpretative decision was issued by the Constitutional Court regarding the supremacy of the international treaty ratified by Parliament on national law, there became a constant and binding constitutional principle that can be relied on to the effect that the ratified international treaty is higher than national law, and that ordinary laws may not contradict an international treaty that has been approved by the Parliament.

### **C. Devoting the Right to Establish Unions**

A constitutional question arose in 2013 about the right of Islamic imams and preachers working in the Ministry of Awqaf and Islamic Affairs to establish their own union even though they are public officials. The Constitutional Court has addressed the interpretation of Article (16/2) of the Constitution concerning the right of Jordanians to form associations and unions, and ruled in its interpretative decision No. (6) of 2013 that:

*"Employees in any ministry, department, body or institution have the right to establish their own trade union. Even if they are public employees, the fact that this right stated in the*

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<sup>25</sup> Decision of the Court of Cassation No 4677/2014 issued on 22/3/2015.

<sup>26</sup> Decision of the Court of Cassation No 3726/2014 issued on 9/3/2015.

<sup>27</sup> Decision of the Court of Cassation No 1486/2011 issued on 26/12/2011.

<sup>28</sup> Article (9) of the Law of the Formation of Ordinary Courts No (17) of 2001 and its amendments.



*previous constitutional article was absolute and comprehensive, and did not differentiate between public employees and other Jordanians".*

The Constitutional Court based its decision on international conventions that support Freedom of Association, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Convention No. (87) on Freedom of Association and Protection of the right to organize associations, and Convention No. (89) on the Right to Organize and Collective Bargaining. All these agreements guarantee the right of public officials to establish unions to defend their interests.

## **8. Future Role of the Constitutional Court: What is expected from the Constitutional Judicial Review?**

The establishment of the Constitutional Court was welcomed by the Jordanian legal community with relative optimism, in the hope that it would serve as an effective judicial tool to protect human rights, enhance access to justice, and advance the rule of law. It was set up as a response to public demands, with powers to invalidate laws and regulations that contravene the Constitution and violate fundamental rights and freedoms.

Today, the Jordanian legal community is concerned that the constitutional review process is unnecessarily cumbersome, that many provisions of the Constitutional Court Law are vague and ambiguous, and that the lack of direct access to the court makes it difficult for individuals and civil society to use constitutional judicial review in an effective and productive manner.

The ability of the Constitutional Court to develop a progressive and human rights-oriented jurisprudence depends on many factors, including the extent to which judges feel independent in deciding constitutional matters, the degree to which ordinary judges and lawyers understand the constitutional process, and the level of public knowledge of and trust in the court and the justice system at large.

More public awareness about the Constitutional Court and the possibility of raising constitutional challenges in Jordanian courts is needed. Also, the capacity of Jordanian lawyers to develop persuasive unconstitutionality arguments and, where possible, pursue strategic constitutional litigation should be built in order to assist the court in protecting human rights through constitutional adjudication.

On an international level, constitutional courts have an important role to play, as independent judicial bodies tasked with overseeing laws and regulations, as well as scrutinizing

governmental resolutions against the Constitution. Constitutional courts are in better contact with both parties involved (states and individuals) than any other national bodies, so are best placed to strike a balance between individual and community rights.<sup>29</sup>

However, the methods of overturning unconstitutional legislation can sometimes leave the public feeling less than reassured in regard to the preservation of their human rights. As mentioned, an improvement on the work mechanism of the Court is needed, so as it becomes more permissible to individuals, and that its jurisdiction is revised in favour of extending its powers to review the constitutionality of international treaties signed and ratified by Jordan.

Constitutional courts should also be able to determine that a law benefits both the state and individuals together, and that the state consists of more than simply individuals. The individual and the state should mutually serve each other. Constitutional courts can legitimately recognize that laws which restrict individuals' rights attempt to protect national security and state stability, provided that these laws do not influence the essence of constitutional rights or affect their fundamentals.

Undoubtedly, survival of the state is in the interest of individuals, as this allows them to enjoy their constitutional rights. Therefore, restrictions imposed by laws in exceptional situations should not be objected to, if their goal is the protection of the state's existence, and these limitations should be brought under the scrutiny of the Constitutional Court.

Furthermore, the role of constitutional judicial review should be reconsidered in the future so as to serve as a solution to any coordination problem involving the separation of powers and multi-level governance. Constitutional judicial review should also be asserted as a key reason to guarantee judicial independence, which is clearly stated in Articles (27) & (97) of the Constitution.

It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, and the judges shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, or threats or interferences, direct or indirect, from any quarter or for any reason.

As far as the contributions of constitutional courts towards the contemporary challenges and the recently growing risks to humanity, it is beyond doubt that terrorism and extremism are nowadays affecting the lives of ordinary individuals, as well as state peace and security.

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<sup>29</sup> K. Dalacoura, "Islam, liberalism and human rights", London, UK: I.B. Tauris. 2007.

However, the scope of constitutional judicial review remains traditional, strictly striking down legislation for being unconstitutional, without thoughts of extending its remit to include scrutinizing the public policy of government and the way the state is administered, as laid down in national statutes, for the sake of reconciling the protection of the rights and freedoms of individuals, and state security and stability.

Thus, the philosophy of constitutional judicial review should be reconsidered, so the traditional role of constitutional courts is advanced in a way that enables the courts to further protect individuals' fundamental human rights. Constitutional courts must also react positively to the significant changes in the scope and nature of relationships that govern people in the state and public authorities, as a response to the contemporary economic, social and political circumstances, nationally and internationally.<sup>30</sup>

A further role for constitutional courts is to encounter contemporary and universal threats caused by the use of modern technology, and for which the state has issued more restrictive laws to face these challenges. These new types of trespasses on fundamental rights and liberties are causing serious concerns to the world nowadays which were never known to the drafters of old constitutions and to the founders of the principle of constitutional judicial review, and although these risks are more visible and take place on a regular basis, the constitutional courts so far have failed to confront them.<sup>31</sup> They have retained their old tradition of merely overseeing the constitutionality of laws and regulations against provisions of the constitutions, without showing any active response to the increasing threats from which the people in the world are suffering, both in their judgments of unconstitutionality of laws issued to deal with them, as well as in scrutinizing governmental decisions enforcing unjustifiable limitations on the exercise of human rights based on such threats.

Even those newly-established constitutional courts, in countries which have suffered terrorist attacks and public uprising, have failed to react positively to such events, and to promote new ways of undertaking judicial review in favor of the rights of individuals. They have also fallen short of increasing their parliamentary oversight of all sorts of actions and decisions issued by government officials in ordinary and exceptional times. Despite calling for the principle of the rule of law, there are still certain classes of official decisions directly affecting people's human rights that remain immune from judicial scrutiny by constitutional courts on the grounds of national security and public order. These are called sovereign acts, such as the acts of declaring

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<sup>30</sup> C. Mendes, "Constitutional Courts and Deliberative Democracy", Oxford: Oxford University Press, 2013.

<sup>31</sup> V. Ramraj & W. Hor, "Global - Anti-terrorism law and policy", Cambridge University Press, 2012.

war and making peace, which are immune from any sort of judicial review on the ground that they practiced solely by the Head of the State.<sup>32</sup>

Finally, judicial review should provide a valuable means for advancing human rights and enhancing access to justice on a national level. Its scope should be widened, depending on how constitutional adjudication is structured in a given country, to include not only the power to nullify or amend laws and regulations in the event they are ruled to be incompatible with individual rights and freedoms enshrined in constitutions and international treaties, but also to monitor acts and decisions by the state authorities that can have severe implications on the protection system of human rights, such as the declaration of war, and cases of emergency.

In this regard, constitutionality should be seen as a mechanism of political relations and powers as well as legal counterweights and guarantees by which the self-interest of power has to be limited.<sup>33</sup> It should not be treated statically because it can change; therefore, we can speak about constitutionality and the Constitution as a unique principle which finds complete expression in the written constitution.

## 9. Jordan Constitution Court after the 2021 amendments

As mentioned above, the provisions related to the mechanism of challenging laws to the Constitutional Court were revised in the Constitution in favor of abolishing the multi-referral system. As such, the law of the Court should now be brought under revision in order to define the new best ways for dealing with submissions of unconstitutionality.

One proposal is to give ordinary courts the power to refer challenges submitted by parties to a case directly to the Constitutional Court. The judge concerned would decide on the merit and seriousness of the submission, and to refer the case directly to the Constitutional Court.

Another proposal is to give sitting judges the right to examine the laws they apply against the Constitution without the need of any claim made by the parties. If it appeals to them that the provision/law in question contravenes the Constitution, the judge should be authorized to suspend the proceedings of the court, and to refer the matter to the Constitutional Court for its consideration.

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<sup>32</sup> H. Tozer, "Jean-Jacques Rousseau – The Social Contract" Wordsworth Editions Limited. UK, 1998, p 127.

<sup>33</sup> G. Van der Schyff, "Judicial review of legislation: A comparative study of the United Kingdom, the Netherlands and South Africa", New York, NY: Springer Science & Business Media, 2010, p 8.

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