

JORDANIAN CONSTITUTIONAL COURT

TOWARD A DEMOCRATIC, EFFECTIVE AND ACCESSIBLE

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INTRODUCTION

This paper argues in favor of the reform of the Jordanian Constitutional Court (hereinafter JCC) in order to make it more democratic, effective, and accessible. The JCC is one of the most recent constitutional courts in the Arab region¹ and was established in 2012.² It was introduced to enhance the role of the law and legal transparency.³ However, the new JCC faces many challenges that call for its reform. Legal reform has always been a continuous process in every nation, and across history.⁴ This paper is a comparative methodology to provide a comprehensive understanding of the proposed reform.

1. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, 1 January 1952, amend in 2011, art. 59/1. *See also*, Law No. 15 of 2012 (Constitutional Court Law), 6 June 2013, art. 15/A (Jordan).
2. Issam Saliba, Jordan: Constitutional Law Court Newly Established in Jordan, GLOBAL LEGAL MONITOR, LIBRARY OF CONGRESS, (Dec. 3, 2012), <http://www.loc.gov/law/foreign-news/article/jordan-constitutional-law-court-newly-established-in-jordan/>.
3. Alnswr: Alt'adilat al-dusturiat Iidafat muhima fi 'amaliat al'iislah alsiyasii wa-taeziz aldiymuqratia, Petra (Jul. 7, 2017), http://petra.gov.jo/Public_News/Nws_NewsDetails.aspx?Site_Id=2&lang=1&NewsID=164113&CatID=13.
4. Anne Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1828 (1994-1995), *See also*, Scott Grinsell, *Caste and Problem of Social Reform in Indian Equality Law*, 35 YALE J. INT'L L. 199, 218 (2010).



The JCC reform explores three dimensions: philosophical (democratic), substantive (effective), and procedural (accessible) amendments. Firstly, the JCC lacks a clear legal philosophy. The unconventional role of the JCC in a monarchical regime requires the adoption of unprecedented philosophy. Secondly, substantive reform enhances the effectiveness of the JCC. Expanding the JCC jurisdictions safeguards the individuals' rights. Thirdly, procedural amendment enhances the accessibility of the JCC. It ensures sole and ultimate jurisdiction of the JCC over a constitutional dispute.

I. PHILOSOPHICAL AMENDMENT: DEMOCRATIC PROCESS

The King of Jordan is taking concrete steps towards becoming a constitutional monarch.⁵ Establishing the JCC is one such step.⁶ However, giving the JCC the right to strike down any unconstitutional law or regulation, similarly to the recent Constitutional Court of the Kingdom of Morocco,⁷ imposes two challenges. These challenges are the JCC's legitimacy and checks and balances.⁸

The first challenge relates to the JCC's legitimacy in a monarchical regime. In most democratic monarchical systems, courts are able to declare certain laws as unconstitutional. However, courts are not authorized to strike down these laws. In the United Kingdom, courts can issue a non-binding declaration of unconstitutionality.⁹ This means

5. Layth Kamal Nsrawin, Athar al-ta'edilat al-dusturia li-'am 2011 'ealaa al-sultat al-'amat fi al'urdun, http://www.parliament.gov.sy/SD08/msf/1435494620_.pdf.
6. Constitutional Overview, HASHEMITE KINGDOM OF JORDAN, CONSTITUTIONAL COURT, (2017), <http://www.cco.gov.jo/en-us/About-the-Court/Constitutional-Overview>.
7. CONSTITUTION OF KINGDOM OF MOROCCO, *supra* note 1, art. 130.
8. *Id.*
9. David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT'J CONST. L. 183, 200 (2009).

that the law is unconstitutional, yet still valid.¹⁰ In the Kingdom of the Netherlands, the 2008 Constitution forbids courts from reviewing laws and treaties.¹¹ In the Kingdom of Egypt (1923-1953), courts were not permitted to tackle the constitutionality of any law until 1926. In its attempt in doing so, the court declared that it would not apply unconstitutional law. Yet, it was unable to strike it down.¹² Hence, the competencies of the JCC are unconventional and sensitive in monarchical regimes.

The JCC's right to render any unconstitutional law invalid represents the philosophical idea of a constitutional court in a republican sitting, as seen in the US,¹³ Brazil,¹⁴ Tunisia,¹⁵ and Egypt,¹⁶ but not in monarchies. Moreover, the republican system of a constitutional court offers profound and rich venues, such as the case of the JCC reform, as depicted in later sections. Hence, tackling philosophical challenges, especially those of checks and balances, is achieved by adopting republican regime solutions.

The second challenge lies in the lack of checks and balances between the King, the JCC, and the Parliament. The JCC's appointment process rests solely with the King,¹⁷ which can compromise the entire democratic process in Jordan.¹⁸ Before the 2011 Constitutional Amendments,

10. *Id.*
11. CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS, 20 October 2008, art. 120.
12. 'an al-Mahkamah, lamha tarikhayah, Supreme Constitutional Court, Egypt, (2014).
13. *Marbury v. Madison*, 5 U.S. 137, 138 (1803).
14. CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, October 5, 1988, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994, art. 102.
15. CONSTITUTION OF THE TUNISIA REPUBLIC, 26 Jan. 2014 art. 118.
16. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014.
17. Constitutional Court Law, art. 5/A.
18. *See generally*, Tom Ginsburg & Nuno Garoupa, *Building Reputation in Constitutional Courts, Political and Judicial Audiences*, 28 ARIZ. J. INT'L & COMP. L. 539, 547 (2011).

article 93 gave members of Parliament, who are elected by the public,¹⁹ the right to challenge the King's decision in the event of his refusal to ratification any new law.²⁰ In 2011, constitutional amendments gave the JCC's judges the right to nullify any unconstitutional law,²¹ while it did not give any authority to the Parliament over the JCC.²² This amendment, theoretically, gives a privilege to the King over the Parliament. If the King opposes any law, he may use the JCC to strike down the law, as he is the sole source of JCC legitimacy.²³ Therefore, hypothetically the JCC can be used against the public will.

The solution to checks and balances lies in adopting a democratic appointment process, being the core of democratic court system. In the US, the President has the right to choose federal judges, while the Congress has the right to confirm the choice.²⁴ Moreover, the Congress has the sole right to impeach judges,²⁵ who hold offices "during good behavior."²⁶ The split in the authority of appointment and impeachment, between the president and the Congress, ensures a democratic government. In Germany, both Houses of Parliament elect the Federal Constitutional Court judges.²⁷ This increases confidence in the judges when they decide to strike-down parliamentary laws.²⁸ Hence, adopting a republican solution helps to overcome any philosophical challenges.

19. CONSTITUTION OF KINGDOM OF MOROCCO, *supra note* 1, art. 93.

20. *Id.* art. 67/1.

21. *Id.* at art. 15/B.

22. *Id.* art. 5/A.

23. *Id.* art. 15/A.

24. U.S. Const. art. II, § 2, cl. 2.

25. U.S. Const. art. I, § 2, cl. 5.

26. U.S. Const. art. III, § 1.

27. Federal Constitutional Court Act in the version of 11 August 1993 (Federal Law Gazette I p. 1473) last amended by Article 8 of the Regulation of 31 August 2015 (Federal Law Gazette I p. 1474)", Part 1, §5.

28. Mary Volcansek, *Judicial Elections and American Exceptionalism: A Comparative Perspective*, 60 DEPAUL L. REV. 805, 809 (2010-2011), *See also*, Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies*, 53 COLUM. J. TRANSNAT'L. 285, 307 (2014-2015).

II. SUBSTANTIVE AMENDMENT: EFFECTIVE COMPETENCIES

The JCC needs to increase its competencies for effective constitutional protection.²⁹ The JCC law limits the court competencies to only two issues, which are constitutional supervision over laws,³⁰ and interpretation of the constitution.³¹ This paper, however, recommends adding two new competencies, namely the preventive control of constitutionality and conflict of jurisdictions.

Firstly, the JCC law shall include both preventive control of constitutionality and successive control of constitutionality. Currently, the law limits the JCC's role to successive control of constitutionality only.³² This form of constitutional supervision starts after the promulgation of the law.³³ However, introducing preventive control of constitutionality will extend the constitutional protection to earlier stages.³⁴ This saves the legal system from dire consequences of unconstitutionality.³⁵ The French *Conseil Constitutionnel* has the ultimate authority to decide the constitutionality of any law before its promulgation.³⁶ This process, on the one hand, gives laws a constitutional legitimacy.³⁷ On the other

29. Mohamed Malham, Qaraeat Fi-Qanun Almahkamh Al-Dostoriah al'urduniya, http://www.alraicenter.com/User_Site/Site/View_Article.aspx?type=2&ID=454.
30. CONSTITUTION OF THE NETHERLANDS, *supra* note 11, art. 4.
31. *Id.* art. 17 (limiting the court interpretation authority of constitutional text to only on the request of the cabinet or decision from one the legislative houses.).
32. Constitutional Court Law 15/2012, art. 2.
33. Ali Essa Yaqibie, Al-raqabah a'a Dustorihat al-Qawanun fi Franca, http://www.tqmag.net/body.asp?field=news_arabic&id=2161&page_namper=p3.
34. Samuel Bray, *Preventive Adjudication*, 77 U. CHI. REV. 1275, 1281 (2010).
35. Charles Manga Fombad, *The New Cameroonian Constitutional Council in a Comparative Perspective: Progress or Retrogression*, 42 J. AFR. L. 172, 180-181, (1998).
36. CONSTITUTION OF THE FRENCH REPUBLIC, 4 October 1958, amended in 23 July 2008, art. 61.
37. Federico Fabbrini, Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation, [273](http://cad-

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hand, it sustains the status of successive control of constitutionality, which gives a constitutional guarantee in case of any unconstitutional application of a certain law.³⁸ The Tunisian Constitutional Court is responsible for reviewing the laws before they are submitted to the President, or in the event of a constitutional amendment.³⁹

Secondly, the JCC has to take responsibility for the conflict of jurisdiction among different legal institutions. The Jordanian legal system is pluralistic,⁴⁰ where both religious and civil systems function simultaneously.⁴¹ The conflict of jurisdictions between different courts shall be assigned to the constitutional court.⁴² In Egypt, the Supreme Constitutional Court is the competent court in jurisdiction disputes, such as the dispute between the State Council and the ordinary courts.⁴³ In Spain, the Constitutional Court has authority on conflict of jurisdiction between “the State and the Self-governing Communities, or between the Self-governing Communities themselves.”⁴⁴

mus.eui.eu/bitstream/handle/1814/20483/Fabbrini_GLJ_Kelsen%20in%20Paris.pdf.

38. Maja Nastic, *The Preventative Control of Constitutionality: Comparative Practices and Possible Application Pursuant to the Serbian Constitution*, 56 COLLECTION PAPERS FAC. L. NIS 153, 172-173 (2010), See also, Stuart Woolman, *Between Norms and Facts: The Constitutional Courts Commitment to Pluralism in South Africa's Radically Heterogeneous Public School*, 18 POTCHEFSTROOM ELEC. L. J. 2079, 2080 (2015), Christa Rautenbach, *Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law*, <http://commission-on-legal-pluralism.com/volumes/60/rautenbach-art.pdf>.
39. CONSTITUTION OF THE TUNISIA REPUBLIC, *supra* note 9, art. 120/2.
40. The Reform of Judiciaries in the Wake of the Arab Spring, <http://www.ref-world.org/pdfid/515009ac2.pdf>.
41. *Id.*
42. James Casey, *the Spanish Constitutional Court*, 25-27 IRISH JURIS (N.S) 26, 28, (1990-92).
43. CONSTITUTION OF KINGDOM OF MOROCCO, *supra* note 20, art. 192.
44. CONSTITUTION OF THE KINGDOM OF SPAIN, 6 December 1978, art. 161.

III. PROCEDURAL AMENDMENT: ACCESSIBLE COURT

Two major procedural amendments are required to establish an accessible JCC. Firstly, the Court of Cassation's (CoC) constitutional role shall be abolished from the JCC law. In 2012, the constitutional competence was split between the CoC and the newly established JCC.⁴⁵ However, the JCC law, instead of making a full constitutional jurisdiction,⁴⁶ has given the CoC the ultimate authority to refer cases.⁴⁷ This situation not only contradicts the basic goal for establishing the JCC but also does not stand its ground in comparative law. In Egypt, the constitutional competency was a prerogative of the CoC until 1979.⁴⁸ Nonetheless, once the Supreme Constitutional Court was established, the CoC was disconnected from constitutional affairs. Currently, citizens can resort to the SCC directly after a referral from the first court.⁴⁹ Hence, the new JCC law is not only considered an extra burden on constitutional litigation but also contradicts the aim of establishing an independent constitutional court.

Moreover, the authority of case referral has to be decentralized. Any judge must have the right to transfer a constitutional claim directly to the JCC. In Germany, all courts have the right to review the constitutionality of certain laws.⁵⁰ The Federal Constitutional Court has the ultimate right to strike down any unconstitutional law that was referred to it by the lower courts.⁵¹ The same applies to Egypt.⁵² Therefore, decentralized referral authority would help in abolishing the

45. CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, *supra* note 1.

46. *supra* note 26, art. 11

47. *Id.*

48. *Id.*

49. GABER GAD NASSAR AND NABILAH ABDEL HALIM KAMEL, AL-WAJIZ FI-AL-QANUN AL-DUSTURIE, 167 (Dar al_nahdah Al'arabayah 2006).

50. Federal Constitutional Court, GERMAN COURT, <https://www.britannica.com/topic/Federal-Constitutional-Court>.

51. The Reform, *supra* note 40.

52. Supreme Constitutional Court Law no 48/1979, art. 29/B.

procedural role of the CoC.

Secondly, a commissioner's office or legal clerkship positions must be introduced to ease the burdens of JCC procedures. Abolishing the role of the CoC will not only ease the adjudication process but will also open doors for a wave of cases transferred from lower courts directly to the JCC. The role of the commissioner or the law clerk is to prepare cases, and write unbinding constitutional opinions to the JCC.⁵³ This system of the commissioner's office is adopted in various countries, including Egypt.⁵⁴ Some countries replace the commissioner system with that of a clerkship, as seen in cases of the US,⁵⁵ and Germany.⁵⁶ Within this system, the law clerk, who is sometimes a law student or a lawyer, can help the judge in preparing cases, and writing up the judgment.⁵⁷ Introducing these two positions would therefore significantly decrease litigation time.

CONCLUSION

The establishment of the JCC is undoubtedly a major step in the legal reform process in Jordan. Despite this, this paper advocates three major reforms of the JCC. Firstly, the paper introduces the adoption of a republican philosophy of the constitutional court in monarchies. The status of the JCC mandates a republican approach to issues like checks and balances. Secondly, the JCC needs to have effective competencies, in order to be able to meet the expectation of the Jordanian people. This will be achieved through increasing its competencies. Finally, the

53. See, William Nelson, Harvery Rishikof, Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation*, 62 VAND. L. REV. 1747, 1748 (2009).

54. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, *supra* note 16, art.193/2.

55. Laura Krugman Ray, *The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg*, 115 PENN. ST. L. REV.. 83, 83 -85(2010-2011).

56. Luiz Muniz Arguelles, and Migdalia Fraticelli Torres, *Selection and Training of Judges in Spain, France, West Germany and England*, 8 B.C. INT'L & COMP. L. REV. 1, 37 (1995).

57. *Id.*

previous reforms will not be feasible unless the JCC can adopt better procedures that ensure its accessibility for the public.