

The Impact of the Formation and the Jurisdiction of the Constitutional Court (CC) on the Essential Rights and Freedoms in the Light of the 1952 Jordanian Constitution and its Amendments

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Abstract

Judicature, generally, and constitutional judicature, specifically, are considered a guardian over the freedoms of the public and the rights of individuals in all countries of the world. From that basis, the Jordanian constitutional legislator founded an independent constitutional court that coincides with the constitutional amendments applied in 01/10/2011 and it specified the method of forming this court and determined its competences and jurisdictions. The formation and the extent of the court's jurisdiction are known to affect the essential rights and freedoms in one way or the other, especially when the Executive Authority solely appoints members of this court, which does not coincide with the independence of the judicial system. This is further shown when we compare how the Constitutional Court is formed in Jordan as appose to other countries. The result is that the Jordanian constitutional legislator does not benefit in any way from other countries' experiences while specifying the formation method of the Constitutional Court. Regarding the jurisdictions of the court, the amended Jordanian constitution has specified the court with jurisdictions of overseeing and monitoring the constitutionality of applicable laws and regulations as well as interpreting constitutional provisions while oversight. Oversight takes place in two methods; the first is the direct approach, which is exclusive to the House of Representatives, the House of Senates and the Cabinet. The second is the indirect approach, where one part of litigation demands the court not to enforce a regulation that is in breach of the constitution (defence of non constitutionality) in the pending case before the court. The court then, refers the defence to the court of Cassation which then considers its referral to the Constitutional Court (CC) to determine the constitutionality of the regulation.

Giving ordinary courts the authority to accept or overrule a defence, based on the validity of the defence takes away from the exclusivity of the CC to oversee constitutionality, therefore, jeopardizing essential rights and freedoms of individuals.

Introduction

The constitution is the number one collateral to realize a legal state regime which is founded by the constitution in the first place. And the constitution must not be contradicted by any law or regulation. The constitution formed and founded each of the public authorities and determined their jurisdictions. And all of the authorities are subject to the constitution which determined how they are formed.

The 1952 constitution went through modifications and amendments following the developments in Jordan and the Jordanian community. The most important amendments are the ones that became applicable since 01/10/2011 and they had several forms; some amendments added new regulations that were not present before, like the regulations in the second chapter in the constitution which were concerned with rights (maternity, aging and patent right). Other amendments were partial to present provisions, such as those concerning legislature judiciary and the executive authority and promoting the separation of authorities and promoting the independence of judicature functionally, physically and integrally.

Founding the Constitutional Court (CC) and determining its jurisdictions and nature is probably the most important outcome of these amendments.

In this paper, being exclusive to the CC, we will look into the impact of the formation and jurisdiction of the court on the essential rights and freedoms through observing the main objective from establishing all sorts of courts; which is to protect the public interest in general, and the individual rights and freedoms in particular. And to prevent the abuse of power by those who posses and practice it.

But we can't help but notice, through observing constitutional provisions regarding the Constitutional Court, that its members are appointed by the king. The king, being the head of the executive authority, is the thereby immune to any liability and that means the complete domination of the executive authority on selecting and appointing members of the CC. therefore, contradicting the concept of judicature independence and separation from the executive authority and the legislature. Especially when the constitution stresses the fact that judges answer only to law in order to rule between individuals, themselves, and the government in a way that makes individuals feel safe and protected when it comes to their rights and freedoms.

If the executive authority handles the formation of the Constitutional Court solely, it will reflect badly

on the court's ability to practice its jurisdictions in favor of the dominator, especially when the jurisdiction is to oversee and monitor the constitutionality of applicable laws and regulations. And that is considered a blatant violation of people's rights and freedoms, mostly because the constitution also granted the right to challenge the constitutionality (directly submit a non constitutionality of regulation application) exclusively to the House of Representatives, the House of Senates and the Cabinet. As for indirect challenge of constitutionality (defence of non constitutionality litigation), the defence litigation is controlled by the specified court (the court which is considering the pending case). Giving the, above mentioned court, the right to determine the validity and seriousness of the defence (of non constitutionality). This means, denying one party of the prosecution from resorting, directly, to the Constitutional Court to determine the constitutionality of the relevant regulation.

Through the abovementioned, we will divide this study, entitled "the impact of the formation and the jurisdiction of the Constitutional Court CC on the essential rights and freedoms in the light of the 1952 Jordanian constitution and its amendments", into two separate topics. The first will discuss the impact of the formation of the members of the CC on the essential rights and freedoms. The second topic will discuss the CC's jurisdiction of overseeing the constitutionality of applicable laws and regulations and its impact on the essential rights and freedoms.

1. First topic: the impact of the formation of the members of the CC on the essential rights and freedoms

The Constitutional Court is the same as any other court that is founded based on a particular law according to article 100 of the constitution. Therefore, the Jordanian legislator organized, through the CC establishment law no. 12 of 2012, the formation of this court concerning the mechanism of appointing and deposition of court members.

In the first matter, we will demonstrate the method of appointing Constitutional Court members. And we will discuss the effectivity and impact of the formation of the CC on essential rights and freedoms.

1.1. Appointing members of the CC

Paragraph one of article 58 of the constitution of Jordan states that "a constitutional court shall be established by a law. The headquarters of which shall be in the capital; shall be considered a separate judicial body..." We can see from this statement that the Jordanian legislator has realistically and undoubtedly created an independent Constitutional Court with independent constitutional jurisdictions that would not fall in with any other court.

But if we look closely at this statement, we will notice the contradiction between the first half and the second half. How could the constitutional legislator mention the establishment of a constitutional court in the first half and then describe the court as a "separate judicial body" in the second half. Because if the legislator is stating the establishment of a legitimate court, it is a given that this court would be independent and there is no need to identify it as a separate judicial body, because that would be its nature in the first place.

The same article stated the following part: "and shall be composed of nine members at the least, inclusive of the president, to be appointed by the king." This provision explained the minimum number of court members which should be no less than nine members, as stated in the Constitutional Court law no.15 of 2012; "on entry into force of the provisions of this law, he shall appoint nine members, including the president, to the court." This means when this law is in force, nine members are appointed and that is the minimum determined by the constitutional legislator according to article 58. Therefore, the constitution did not determine a specific number of court members, leaving that to be determined by its designated law.

This task should have been the responsibility of the constitutional legislator instead of the ordinary legislator which could affect opinions of the court to match the government's opinions and decisions to increase or decrease the number of members. And the Jordanian legislator should have benefited from other countries' experiences concerning this matter.

In addition to this, the statement did not explain the method to ensure the continuing of this court, particularly if the constitutional duration of this court expires. But as we go through articles of the CC law, we could see that the Jordanian legislator has come up with the solution to ensure the continuity of the court according to article 5/A/2 of the CC law 2012 which states: "he shall appoint three members to the court every two years from the date of the appointment of the members provided for in section one of this paragraph." This means if the constitutional legislator did not state what would ensure the continuity of this court; the Jordanian legislator has founded a legal position for new members to be appointed every two years, therefore, ensuring the continuity of the court.

When examining article 58/1 of the constitution which states: "a constitutional court shall be established –by a law- the headquarters of which shall be in the capital; shall be considered as an independent and separate judicial body and shall be composed of nine members at least inclusive of the president to be appointed by the king." We could see a blatant violation of judicature independence which is considered a base to organize connections with different state authorities. Judicature independence is based on the fact that there is no meddling or interference by the rest of the authorities in judicial matters. Making it as an independent

constitutional authority that is separate from the remaining authorities. An independent judge means that he has a power free of any interference by the executive authority or the legislature authority.

If we compare judicature independence as a principle with what was stated in article 58/1 we could see the obvious contradiction between the first half and the second half. The first half discusses establishing an independent constitutional court. But the second half shows this blatant contradiction of the judicature independence principle. How could we have independence when the members of the court are all directly assigned by the executive authority? Keeping in mind that judicature independence and singularity can be based upon, according to article 100 of the constitution which was mentioned beforehand. Whereas, the statement coincided with the constitutional view in article 27 of the constitution which considered the judicature an independent authority that is separate from the remaining two authorities.

It is safe to say that the Jordanian constitution aimed to establish an independent judicial authority. But the applicable laws of the judicial arrangement were not concordant with this constitutional view and the constitutional provisions even contradicted each other when stating independence at times and violating independence at other times. Therefore, the constitutional legislator should have considered the legal aspect rather than the political aspect when forming this court in order to maintain its independence as a judicial body.

On the other hand, article 58/1 of the constitution explains that the members of this court are not judges in the real sense which indicates the possibility of appointing court members who are not judges according to article 61/1 of the constitution which states that a member of the CC shall be who served as a judge in the Cassation Court and the High Court of Justice, professors of law in universities who hold the rank of professors, lawyers who spent a period of no less than fifteen years in the practice of law or members of the House of Senates to whom the membership conditions apply.

If members of the House of Senates, who met the membership conditions, are appointed to this court, it does not concord with the consideration of this court as an independent judicial body. Because it means that current ministers and prime ministers would be members of this court. Therefore, using members of the executive authority to form this court whereas, the constitutional legislature did not determine the number of judges and non judges in the court and only stated who could be entitled to these positions.

We can observe that the ordinary legislator has determined, according to the article 6/B of the Constitutional Court law, that: "one of the court members shall be a specialist to whom the conditions of membership apply, provided he has reached the age of fifty." Therefore, current ministers and Prime Minister have are entitled to be members of the court. This contradicts article 58/1 of the constitution which states the establishment of an independent Constitutional Court. Especially in the light of the possibility of appointing the current Prime Minister and ministers as court members, particularly if they are appointed court president. This also contradicts article 5/C of the CC law which states: "a member may not be appointed, seconded or assigned to work for any entity during the course of his membership at the court." So, if current ministers and Prime Minister could occupy a position in the CC, will they step down from their original positions in order to work in the court? If yes, then there is no issue in that. If no, it creates a great dilemma. Whereas, the court would be a combination of judges, ministers and the prime minister and political elements which will reflect poorly on court decisions judges and political views of the government will collide and disagreements will arise between court members especially when they are influenced by anti-government political movements.

When examining article 61/B of the constitution and article 5/C of the CC law on one hand and the legitimacy and the legislation hierarchy, we can see the unconstitutionality of article 5/C of the Constitutional Court law, for it contradicts article 61/B of the constitution. And after examining article 61/A of the constitution we can see that it contradicts judicature independence and it contradicts authority separation further to a great extent.

With this in mind, is it thinkable to have court with non judges as members? And why would the constitutional legislator establish a court with members who are not judges?

Keeping the Constitutional Court's formation as it is currently forms a legal dilemma from one hand and a political dilemma from the other hand. And keeping this formation of members allows the executive authority to bring in political elements to the court formation and not have it exclusive to judges. This could lead to partisan movements within the formation of the court particularly when discussing the constitutionality of certain legislation. It will also lead to having the executive authority practice ultimate influence to affect and control over court decisions to constantly work in the favor of the executive authority.

We are not denying the fact that some countries have political elements in their constitutional court, but it seems that the Jordanian constitutional legislator did not benefit from other countries' experiences when forming this court. Whereas, it did not establish an independent Constitutional Court with equal political and legal aspects like the French Constitutional Council.

The French legislator demonstrated, in article 56 of the constitution of France 1958, the formation mechanism of the Constitutional Council which was formed according to two types of members, the first being members by law for life and they consist of former living presidents of the republic. The second type consists of

nine members assigned equally by the president of the republic, the president of the National Assembly and the president of the Senate. Each president appoints three members and these assignments do not have to be approved by anyone else.

The French legislator stated that the membership duration is for nine years and it is not renewable. And then the legislator stated that one third of the members are renewable for three years. But the legislator prevented assigning members after the formation of the council is completed the first time to allow new assigning every three years later on. And this is a transitional ruling from one generation to the next one to ensure no vacancies in the council, whereas, assigning new members prevents the council from missing its representatives and guarantees the continuity of the council as well as giving the proper education for new members.

The Spanish Constitutional Court seems to have been influenced by the French formation where the Spanish Constitutional Court consists of twelve members where the Congress of Deputies assigns four members, the Senate assigns four members, the Judiciary assigns two members and the government assigns two members. The Spanish legislator prevented assigning members after the court formation is completed the first time to allow the appointment of new members every three years later on. This is considered a transitional ruling from one generation to another to ensure no vacancies in the Constitutional Court. Whereas, assigning new members prevents the court from missing its representatives and guarantees the continuity of the court as well as providing the proper education for new members.

The case in the Egyptian Supreme Constitutional Court is different from the Spanish Court and the French Council. The constitution of Egypt stated that the Supreme Constitutional Court consists of constant members who cannot be displaced. It also stated that the court includes a president and a sufficient number of members, (article 193 of the Egyptian constitution 2015). After the General Assembly selects one of three deputies up for presidency, the president of the republic assigns the court president, (article 193 of the Egyptian constitution 2015).

If the president of the republic solely appoints the president and members of the court, can the president, being the sole appointer, deposition the president and members of the court? The answer to that question is no; because the court president and members cannot be displaced or transferred, (article 193 of the constitution of Egypt 2015). Thus, the president of the republic can only assign and not deposition them. This will reflect positively on the members and their feat and will realize their independence and neutrality, which will also prevent them from being influenced by any state authority whether legislature, executive or judicature. However, that statement is only faulted for not specifying the number of members.

After demonstrating some countries' experiences in forming the constitutional court, what are the Jordanian legislator views on these experiences? The Jordanian constitutional legislator has determined the number of members to nine members for non renewable six years according to article 58/1 of the Jordanian constitution. This means that the constitutional legislator did not mention reappointing the members. However, the CC law, in article 5/A/2, stated: "he shall (the king) appoint three members to the court every two years from the date of appointment of the members provided for in section one of this paragraph." This means a constant increase in court members; when forming the court, the number of members is nine. After two years they will be twelve members, after four years the members will be fifteen and after six years they will be eighteen members. But this number will drop in half after the ruling duration of the first formation of members expires, whereas, nine members, who were appointed the first time, will finish their course. But will the executive authority appoint nine new members to have eighteen members? If yes, the executive authority would terminate the ruling of two members and assign two new members according to article 5/A/2.

As we can see, the Jordanian legislation of this provision was not fit. Whereas, having that many members in the court formation is uncalled for, as well as the fact that the legislator did not explain the limit for court resolutions and decisions.

1.2. Second matter: the effectivity and impact of the formation of the CC on the essential rights and freedoms

We demonstrated, in the first matter, how the members of the Constitutional Court in Jordan are assigned in comparison with some other countries. This study showed the contradiction in the Jordanian constitutional legislation, especially when we showed the formation method in the French Constitutional Council, the Spanish Constitutional Court and the Egyptian Supreme Constitutional Court. We found that the Jordanian legislator did not benefit from the compared constitutions' experiences. We also found that each country had its own way to form the constitutional court in order to coincide with the nature of this court. This could reflect in a good way or a bad way on the essential rights and freedoms. We will attempt to examine the impact of the court formation on essential rights and freedoms using the constitutions in comparison.

We found, after viewing the formation method of the French Constitutional Council; that this council consists of two types of members; the first of which are former presidents of the republic and they are assigned accordingly by the constitution. These members are inactive and their presence is not functional. The second

type consists of members who are officially appointed on equal terms and they are nine members appointed by three people; the president of the republic appoints three members, the president of the General Assembly appoints three members after consulting with members of the GA and the president of the Senate appoints three members after consulting with members of the Senate.

The French legislator prevented vacancies in the council, when the constitutional course expires, by renewing one third of the members every three years. Whereas, the president of the republic and presidents of the General Assembly and the Senate appoint one member each to guarantee that the council is not missing members and continues its work on one hand and to give proper education for new members, thus, the continuity of the council.

A quick glance at the formation method in the French Constitutional Council explains the multiplicity in co-appointing members of the council equally in a way that would prevent monopoly in appointing members or doing so in an unjust way, and the end result would be preventing any influence on court members and their work which leads to independence and neutrality that are crucial for their role in monitoring and oversight to protect essential rights and freedoms.

Observing the Spanish Constitutional Court, we find that this court consists of twelve members appointed by the three state authorities. The Congress of Deputies assigns four members, the Senate assigns four members, the Judiciary (the General Council of Judicature) assigns two members and the government assigns two members. The head of the state in Spain, which is the king, does not have appointing jurisdiction, where the king of Spain does not practice actual authorities.

The Spanish constitutional legislator has prevented vacancies in the court, when the constitutional course expires, by renewing one third of the members; whereas, the Senate, The Congress of Deputies, The General Council of the Judiciary and the government each assigns one member to guarantee no vacancies in the court and to continue its work from one hand, and to provide the proper education for new members on the other hand, thus, the continuity of the court's work.

Looking at the formation of the Spanish Constitutional Court, we can also see the multiplicity in assigning Constitutional Court members with no monopoly or misuse of appointing jurisdiction. On the other hand, the Spanish court formation is more evolved than the French Council formation method, whereas, the judiciary has the privilege of appointing members in the Spanish Constitutional Court. The king of Spain does not have the right to assign members for he has no actual authority which enhances the independence of state authorities and the court's work, therefore, no influence on the work of court members which gives the sense of independence and neutrality to perform their legal role in a way that will guarantee essential rights and freedoms. As for the Supreme Constitutional Court in Egypt, the president of Egypt appoints all Supreme Constitutional Court members who cannot be displaced or transferred. Although the president of the republic appoints the president and the members of the court, however he cannot deposition them, therefore the president of the republic can only appoint the president and the members of the court and not transfer or displace them which will reflect positively on the members and will realize their independence and neutrality with having no influence by any state authority (legislature, executive or judicature), thus, this court formation guarantees continuity in the court's work, which means sustainability and long experience for its president members, therefore, an actual guarantee for essential rights and freedoms.

As for the Jordanian constitutional legislator's stance and influence by the formation experiences, the Jordanian legislator has founded a new type of constitutional courts, whereas, in the beginning it started as a constitutional court according to article 58/1 of the constitution, but later on it combined a mixed formation of this court that had legal and political elements. The legislation even managed to incorporate members from the executive authority in the court according to article 61/1/C: "and of the specialists to whom the conditions of membership, in the Senate, apply" meaning that the current ministers and Prime Minister are entitled to be members of the court which reflects badly on the court's work, therefore, jeopardy and negative impact on the essential rights and freedoms.

Concerning the appointment of CC members, we found that the king has sole jurisdiction to appoint all members of the Constitutional Court, which means that the executive authority monopolizes the appointment of all court members and this allows the executive authority to misuse this jurisdiction in an unjust way.

As for the appointment mechanism, it allows the executive authority to assign three members occasionally which could make these members execute government policies and that will lead to the lack of independence in the court and having only one side in control of the appointment. This means influencing the court members and that will lead to the lack of independence and neutrality in the court's work and eventually, jeopardize and violate essential rights and freedoms as expected.

2. Second topic: the CC's jurisdiction of overseeing and monitoring the constitutionality of applicable laws and regulations and its impact on the essential rights and freedoms.

According to article 100 of the constitution: "The types of all courts, their levels, divisions, jurisdictions and the

manner of their administration shall be specified by a special law, provided that such law shall provide for the establishment of an Administrative Jurisdiction in two levels." The Constitutional Court is considered like any other court established by article 100 of the constitution, therefore, the Jordanian constitutional legislator has determined the Constitutional Court's jurisdictions exclusive to: oversight the constitutionality of applicable law and regulations, and interpreting constitutional provisions. Our study will only examine the first jurisdiction; oversight the constitutionality of applicable laws and regulations.

I will divide this topic into two matters; the first will deal with overseeing the constitutionality of applicable laws and regulations as a jurisdiction of the CC. The second matter will deal with the effectivity of the court's jurisdiction to oversee constitutionality and its impact on essential rights and freedoms.

2.1. Matter one: oversight the constitutionality of applicable laws and regulations as a jurisdiction of the CC.

The main objective of establishing this court is to oversee and monitor the constitutionality of applicable laws and regulations, therefore, the Jordanian constitutional legislator has determined and stated this jurisdiction explicitly in the constitution in article 59/1 "the Constitutional Court shall have the competence of oversight on the constitutionality of the applicable laws and regulations and its judgments shall be issued in the name of the king."

The constitution explained in article 60 the methods of filing a constitutionality plea and the people entitled to do so, accordingly, we will divide this matter into two sections; the first will deal with the CC's jurisdiction to oversee the constitutionality of applicable laws and regulations. The second section will discuss the methods to file a constitutionality before the Constitutional Court.

2.1.1. Section one: the CC's jurisdiction to oversight the constitutionality of applicable laws and regulations

Observing article 59/1, we find that the Jordanian legislator has provided the Constitutional Court with the jurisdiction to examine the constitutionality of all applicable laws and regulations according to article 4/A of the CC law no. 12 of 2012 which states: "the court shall have the following responsibilities: A - To oversight the constitutionality of the applicable laws and regulations." And "laws" according to this statement are laws legislated by the legislature, being the prime entity to have this jurisdiction. The Constitutional Court examines the degree of accordance of these laws with the constitution; format wise and subject wise.

Format accordance is to determine whether the legislature is has abided to the legislation procedures stated in the constitution, such as holding proper parliament sessions, whether the law acquires the majority of votes needed to be legislated and how connected he decisions of the king and parliament are, to validate the law.

Subject accordance means how committed the legislator is to the constitution, which means that the legislated laws must be concordant with the constitution. As for the applicable laws, we find that the legislator made laws and regulations equally monitored for constitutionality, whereas, in both cases it is about preventing constitutional contradiction or breach and this is the objective of the Constitutional Court. What is meant by regulations is the competence to regulate abstract and objective rules that are valid to all individuals to whom specific conditions apply. Some of these regulations are independent such as: independent regulations, urgency regulations and delegation regulations. And some regulations are based on a present law like executive regulations, therefore, the CC's jurisdictions include what is to that extent. One the other hand, there are pamphlets and instructions that are handed out by heads of departments but orders and regulations of this kind cannot be considered to be in breach of the constitution because they only aim to guide employees through interpreting standing laws without reaching the public, so it does not fall under the court's jurisdiction.

Article 59/1 of the constitution explains that the constitution provided the CC with the jurisdiction to oversight the constitutionality of applicable laws and regulations. So, does this mean that the constitutional legislator gave the jurisdiction to oversee constitutionality solely to the constitutional court, or included the CC to other courts' oversight jurisdictions? Through viewing judicial provisions on this matter, we can say that Jordanian courts had both negative and positive actions, but this judiciary was unstable and hesitant to rule until the High Court of Justice released the new law no. 12 of 1992, which explicitly stated the oversight over temporary laws. This law also allowed these provisions to examine the constitutionality of regular laws by viewing the administrative decision to challenge the issuance of these laws by examining the validity of the decision, if the law's constitutionality is challenged.

Examining constitutional provisions by the compared constitutions of other countries in this study, we find that most of them granted the oversight jurisdiction exclusively to the constitutional court. This is the case in Egypt, whereas, the Egyptian legislator stated, according to article 192 of the Egyptian constitution 2015, "the Supreme Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations..."

The Kuwaiti legislator also stated in the first article in the Constitutional Court law: "Constitutional Court to be established and solely competent to resolve dispute concerning constitutionality of laws" which

coincides with article 173 of the constitution which determined the Constitutional Court's competence to examine the constitutionality of laws.

After reviewing the provisions of the Jordanian CC law, we did not find any sense of independence in this court while serving its competence to oversee the constitutionality of applicable laws and regulations. Though the constitution gave the Constitutional Court an authentic jurisdiction based on a constitutional provisions, but in article 60/2 which states: "In the case viewed by courts, any of the parties of the case may raise the issue of the non constitutionality; the court shall if it finds that the plea is serious-refer it to the court specified by the law for the purposes of the determination of its referral to the Constitutional Court." The constitution did far more than the Kuwaiti legislator of taking away from central oversight, whereas the Kuwaiti legislator gave the specified court the competence to determine the seriousness of the non constitutionality plea and then refer it to the Constitutional Court. The Jordanian legislator, on the other hand, stated that in the case of non constitutionality plea, if the specified court finds the plea valid, it refers it to the Cassation court to consider referring it to the Constitutionality Court.

Therefore, we find that the Jordanian legislator oversized the matter of examining non constitutionality by referring it to three courts. This makes it difficult to pinpoint the system that is adopted by the Jordanian constitutional legislator, whether being a central or non central system of constitutionality oversight.

A Constitutional Court indicates a central system according to the jurisdiction of this court, but the presence of a central system is doubted when the legislator grants two other courts the competence to determine the seriousness and validity of a non constitutionality plea. If the legislator meant to adopt the central system, this system is incomplete and inefficient for the court's work, in the light of what we discussed about the nature of this court, and that will lead to an ineffective and, accordingly, useless Constitutional Court. However, if the legislator meant to adopt the non central system, after entitling two courts to determine the validity of the plea, there is no use for a constitutional court and it would be sufficient to grant the oversight jurisdiction to the specified court and the Cassation court.

2.1.2. Section two: methods of filing a constitutionality plea before the Constitutional Court

Different constitutions have different ways of organizing a filing of constitutionality plea and determining who is entitled to do so. Some constitution limit this privilege only to public authorities, especially when there is oversight before the release of a law on the matter. And some constitutions entitled this privilege to individuals in addition to public authorities. The latter is done through a direct, legitimate litigation before the specialized court to oversee the constitutionality. Other constitutions grant individuals the right of defence of non constitutionality through an indirect litigation of the pending case before the specified court.

After looking through provisions of the Jordanian constitution and the Constitutional Court law, we find that the Jordanian constitution adopted two methods of filing a constitutionality plea. The first of which is the direct litigation (challenge of constitutionality) by the House of Representatives, the House of Senates and the Cabinet, the second method is an indirect litigation (defence of non constitutionality) by individuals.

2.1.2.1 First: direct litigation (challenge of constitutionality) by the House of Representatives, the House of Senates and the Cabinet

The direct constitutionality litigation is referred to the court, according to article 60 of the constitution and article 9 of the Constitutional Court law no. 12 of 2012, through two ways, the first is by the House of Senates, the House of Representatives and the Cabinet. The aforementioned provisions state that these bodies can challenge the constitutionality of any applicable law or regulation before the Constitutional Court directly through submitting an application signed by the head of each challenging body, according to article 9/B of the CC law: "If one of the bodies specified in paragraph A of this article decides to challenge the constitutionality of a law or regulation, the challenge shall be submitted to the Court by an application signed by the head of the challenging body." A legitimate litigation is; directly submitting a legitimate application by the body that is challenging the constitutionality of an applicable law or regulation. The bodies, according to the constitution, are specifically exclusive to the House of Senates, the House of Representatives and the Cabinet, whereas this litigation is based on the constitutional interests of these bodies, whether political or legal interests.

2.1.2.2. Second: indirect litigation (defence of non constitutionality) by individuals.

An indirect constitutional litigation (defence plea) is referred to the Constitutional Court, according to article 60/2 of the constitution and article 11 of the CC law, by filing a non constitutionality defence related to the pending case before the courts in their different types and instances by any party of the pending case. Through the aforementioned provisions, we can find that any of the parties of a pending case can file a defence of non constitutionality of any law or regulation applied to the specific pending case, according to article 11/A of the CC law which states: "Any of the parties to a case pending before the courts, in their various types and instances, may put forward the defence of unconstitutionality of any law or regulation that is applicable to the substance of the case."

If the court, that is specified to consider the case, finds the defence of non constitutionality of the applicable law or regulation, to the case, serious; the court shall suspend the case and refer the defence to the

Cassation court to consider its referral to the Constitutional Court.

A defence of non constitutionality is referred when an individual challenges the constitutionality of a law or a regulation, however, the challenge must be serious and it must be related to the case. If so, the specified court must accept the defence and refer it to the Cassation court, according to article 11/C/1 of the Constitutional Court law, to consider its referral to the Constitutional Court. In the case of the defence being filed initially in the Cassation court or the Court of Justice, the court decides its referral to the CC directly.

If the specified court decides not to refer the defence to the Cassation court, the case shall be subject to appeal along with the substance of the case.

2.2. Second matter: the effectivity of the CC's jurisdiction to oversee applicable laws and regulations and its impact on the essential rights and freedoms the constitutionality of

After the role of the state became more than a guardian, the state started to interfere in all aspects and it developed a social role which allows it to interfere in the smallest details. And as the economical and social problems grew bigger, we needed more interference from the state, where they increased legislations to put things in order. The individual and ordinary legislations, that realize the social role of the government, also came pouring. However, that great amount of legislations lead to several violations of rights and freedoms of individuals, whereas, these legislations were issued in a haste. Let alone the minor legislations issued by the executive authority as well as the state's interference with people's activities to provide for their growing needs.

Therefore, there has to be a way to guarantee that authorities do not cross their constitutional lines determined by the oversight of the legislations that are issued by the authorities. Considering that it is an effective guarantee to protect essential rights and freedoms from any injustice by executive or legislator authorities when executing their power and to stress the sovereignty of law, which is the backbone of ruling in the country which demands the abidance to law and order according to the constitution to guarantee that the state authorities abide by regulations while legislating laws.

We found, through this study, that the Jordanian constitution 1952 and its amendments has stated the establishment of a Constitutional Court with a jurisdiction of oversight and monitoring the constitutionality of applicable laws and regulations. So, to which extent can we consider this jurisdiction a true and effective guarantee for essential rights and freedoms? Especially when compared to other constitutions of countries.

We found, in the first matter of this paper, that the legislator has determined the jurisdiction of the Constitutional Court to oversee the constitutionality of applicable laws and regulations, but then crippled the practicing of this jurisdiction in provisions of the constitution and the Constitutional Court law in numerous ways, whereas, the legislator did not grant this court the jurisdiction of oversight completely or exclusively and we find that the constitution and the CC law didn't explicitly state the exclusivity of this jurisdiction to the Constitutional Court, let alone that court of all types entitled themselves to the jurisdiction of overseeing the constitutionality of laws and regulations according to previous resolutions through omission oversight. And as for the Supreme Court of Justice's right to consider the referred challenges, according to article 9/A/6 and 7, does it still have this jurisdiction?

On the other hand, we could not find this court independent in considering a constitutionality litigation, whereas, the legislator entitled the specific court to refer the defence, if found valid, to the court determined by law (the Cassation Court) to consider referring it to the Constitutional Court. If this is the case, this jurisdiction is incomplete and ineffective for the Constitutional Court's work. This leads to an inefficient court and therefore, having no need for such court and suffice with giving this jurisdiction to the Cassation court.

As for the effectivity of the method of filing a non constitutionality plea, we found two approaches; the first is the legitimate litigation (direct challenge) which is entitled to the House of Representatives, the House of Senates and the Cabinet. We notice the multiple bodies entitled to file a non constitutionality litigation, some of which is legal and some is political, whereas, the referral by these is a guarantee for rights and freedoms for their expertise in determining constitutionality. However, this guarantee is incomplete because of preventing the parliamentary minority from challenging the constitutionality of applicable laws and regulations. This takes away from guaranteeing essential rights and freedoms of individuals, since this minority opposes the parliamentary majority and adopts different policies than the parliamentary majority.

One jurisdiction of the parliament is to submit law bills, when considering this jurisdiction; we wonder what would make the House of Representatives or the House of Senates challenge the constitutionality of a certain law? And why wouldn't anyone submit a law bill to amend laws that are in breach of the constitution? This way we could maintain rights and freedoms that were violated a non constitutional law. The parliament jurisdictions include authorizing, amending and repealing laws and the direct challenge of non constitutionality of applicable laws and regulations that are in breach of the constitution, this jurisdiction allows the parliament to achieve what it requires. But challenging the constitutionality lies in the hands of the Constitutional Court to decide whether to keep a law to remain applicable, based on its constitutionality, or it decides to repeal the law, within the obvious domination of the executive authority on members of the Constitutional Court.

Because the parliament is originally entitled to authorize, amend and repeal laws and because the House of Representatives is the true representative of people, it is believed that the parliament is entitled to practice its jurisdictions instead of referring them to the court whereas, if the parliament does not practice its jurisdictions, it will lead to having an ineffective parliament and could weaken its efficiency as a guarantee for rights and freedoms.

The second approach is an indirect litigation (defence) by a party of a pending case litigation in a specific court. This approach is considered to be defensive not offensive, which means that whoever finds a law or a litigation contradictory to the constitution and could cause damage if the law is applied, then he shall wait until the specified court holds trial, which he is considered a party of which, to submit a defence of non constitutionality.

However, a judge cannot claim unconstitutionality on his own. Once the court determines the defence serious, it suspends the consideration of the case and refers the defence to the Cassation court which will decide on the referral of the defence to the Constitutional Court.

We find from what was mentioned that courts and individuals cannot directly challenge constitutionality before the Constitutional Court. And that courts themselves cannot even claim unconstitutionality of laws and regulations while considering a case litigation. Courts have the right to oversee constitutionality of applicable laws and regulations within the court itself through omission oversight, being obliged to apply supreme law and exclude laws that are in breach. And in the case of defence of non constitutionality by a party of the litigation, these courts can't refer the defence claim to the Constitutional Court. However, the court must refer the defence to the court appointed by law (Cassation court) to consider referring it to the Constitutional Court.

Through the aforementioned, we see that the Jordanian constitutional legislator has crippled people's right to resort to the Constitutional Court from one hand, and from the other hand it prevented all sorts of courts from claiming a defence of non constitutionality on their own. Therefore, if judiciary itself cannot examine whether a law or a regulation is in breach of the constitution, it contradicts the judiciary's whole line of work as a guardian of rights and freedoms.

After determining the validity and seriousness of the defence, the specified court is obliged refer the defence to the Cassation court which will solely decide if the defence will be referred to the Constitutional Court or not, which means the absolute power of the Cassation court in this matter.

After going through the bodies entitled to challenge the constitutionality of applicable laws and regulations and the methods of referring the challenge, we find that it is not considered a guarantee for essential rights and freedoms of individuals and it is not sufficient to perform its constitutional duties.

Conclusion

In this paper we demonstrated the method of forming and the jurisdictions of the Constitutional Court and its impact on the essential rights and freedoms in the light of the Jordanian constitution 1952 and its amendments. In topic one of this study we, explained the formation of the Constitutional Court in Jordan in comparison with other countries' experiences in forming and organizing a Constitutional Court and we explained where the Jordanian legislator stands on these experiences in matter one. Then we moved on to discuss the effectivity of the Constitutional Court's formation and its impact on the essential rights and freedoms in matter two, where we explained the impact of forming the Constitutional Court on maintaining essential rights and freedoms in comparison with other countries' experiences and how far could we consider it a guarantee for essential rights and freedoms.

In topic two we discussed the Constitutional Court's jurisdiction to oversee the constitutionality of applicable laws and regulations. In matter one; we discussed oversight of the constitutionality of applicable laws and regulations as one of the jurisdictions of the Constitutional Court and we demonstrated the bodies that are entitled to challenge the constitutionality of applicable laws directly and indirectly. In matter two we discussed the effectivity of the Constitutional Court jurisdiction to oversee the constitutionality of applicable laws and regulations and how far we could consider this jurisdiction as a guarantee of essential rights and freedoms.

After we examined, in this paper, the Jordanian Constitutional Court regarding its formation and jurisdiction in comparison with other countries' experiences in constitutional courts to determine whether this court, formation and jurisdiction wise, is considered a guarantee for essential rights and freedoms; we found that the provisions (in the constitution and the CC law), that dealt with organizing the Constitutional Court, are faulty and miss paraphrased on one hand, and on the other hand, we found the lack of independence that this court needs to perform its work in monitoring the constitutionality of applicable laws and regulations. This calls the need to reconsider these constitutional provisions and adjust the Constitutional Court law. On this note, we demonstrate the following results and recommendations that we came up with in this study;

1. The Jordanian constitution did not determine the number of members of the Constitutional Court, and left it to be determined by the Constitutional Court law. The Jordanian constitutional legislator should have

specified the number and the appointing method of court members as did the constitutions in comparison, such as the French Constitutional Council and the Spanish Constitutional Court.

2. If the judiciary's work is based on the separation of authorities and the independence of Judiciary, how could the Constitutional legislator form a Constitutional Court out of members assigned by the executive authority? The Jordanian legislator should have benefited from other countries' experiences, such as Spain and France.

3. It is found that the constitutional legislator has created a mixed formation of Constitutional Court members, whereas, these members are not judges in the real sense and they are formed out of members from the Judicature and the executive authority. And this contradicts the independence of the Constitutional Court as a judicial body.

4. The Jordanian legislator did not benefit from other countries' experiences in the matter of the jurisdiction and the formation method of the Constitutional Court, whereas, the legislator did not establish a Constitutional Court that consists of members from the Judicature to consider it independent such as the case in Egypt. Nor did the legislator establish a court with political and legal aspects like the case in France and Spain.

5. As for the number of Constitutional Court members, we find that the Jordanian legislator has set a different mechanism than the compared constitutions of other countries. And this will reflect badly on the number on the number of court members from time to time on one hand, and on the other hand, the number required for issuing court resolutions will differ occasionally.

6. as for the Constitutional Court's independence in considering the constitutionality of applicable laws and regulations, we found that the constitutional legislator granted this jurisdiction to the Constitutional Court according to article 59/1 of the Jordanian constitution, then the legislator crippled this jurisdiction by referring the constitutionality defence, by parties of pending cases, after determining its validity by the specified court. Mentioning that the specified court does not have the jurisdiction to refer the defence directly to the Constitutional Court but refer it to the Cassation court which has the competence to consider referring the defence to the Constitutional Court. This makes it difficult to determine the system adopted by the Jordanian constitutional legislator, whether a central system or a non central system of oversight of constitutionality.

7. The Jordanian legislator entitled three exclusively specified bodies to directly challenge the constitutionality of applicable laws and regulations. These bodies are the House of Representatives, the House of Senates and the Cabinet, and we find that these bodies don't have an effective influence on challenging the constitutionality of regulations. Therefore, there should be reconsideration on determining the bodies that shall be entitled to challenge the constitutionality of laws by adding parliamentary minorities and granting them the jurisdiction of direct challenge. And giving the Constitutional Court itself the jurisdiction to consider and examine the constitutionality of applicable laws and regulations on its own. As well as granting Judiciary (which is manifested in all sorts of courts) the right of direct referral to the Constitutional Court for challenging the constitutionality of applicable laws and regulations.

8. As for the defence of non constitutionality by parties of the pending litigation, we find that the Jordanian constitutional legislator has crippled individuals' rights to claim this defence, whereas, parties of the litigation cannot challenge the constitutionality of a law or a regulation in breach of the constitution. Courts of all types also cannot challenge the constitutionality of laws and regulations, which is understood from article 60/2 of the constitution. The specified court is entitled to determine the seriousness of the defence and it can decide not to refer it to the Cassation court, and parties of the litigation can only challenge the decision of non referral and challenge the case. But what if the case, before this court, is final and cannot be challenged? How will individuals challenge the decision of non referral? And if the specified court decides to refer the defence to the Cassation court, to consider its referral to the CC, this referral is determined solely by the Cassation court which could decide to refer the defence to the Constitutional Court or not, and this decision is considered final.

9. We have found that the constitutional legislator has determined the jurisdiction of the CC to oversight the constitutionality of applicable laws and regulations. But the constitution and the Constitutional Court law did not explicitly state that the oversight of applicable laws and regulations is exclusive to the Constitutional Court, let alone that courts of different sorts entitled themselves to oversee the constitutionality of laws and regulations according to previous resolutions through omission oversight. Therefore, what is the fate of the Supreme Court of Justice's right to consider the challenges submitted to which, according to article 9/A/6 and 7 of the Supreme law, has it lost this jurisdiction?

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