

The Jordanian Constitutional Court: The Legal Function

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ABSTRACT: Following the early 2011 protests in Jordan, the Jordanian Constitutional Court was created as one of many reforms to the Jordanian regime. The Court was created to help legitimize the government through the guarantee of legislative constitutionality as well as the protection of Jordanians' rights. Despite the Court's intentions, many have questioned the Court's legitimacy and effectiveness due to the regime surrounding it as well as the specifics of the Court itself. This study seeks to analyze the realities of the Court's functions in the Jordanian political sphere and to determine the Court's independence and effectiveness based on a variety of factors. To determine the answers to these questions, this study includes an analysis of literature about comparative judicial review and material culture surrounding the Court combined with the results of interviews with a variety of individuals knowledgeable about or involved with the Constitutional Court. With the Court's young age, such a study is essential in determining the Court's current and future contributions to liberalism in Jordan, and whether democratic institutions can have any substantial effect in less-than-democratic regimes.

KEYWORDS: Law, International Law and Relations, Political Science.

INTRODUCTION

The beginning of 2011 saw many Jordanians, encouraged by the successful protests in Tunisia and Egypt, taking to the streets. On February 1, 2011, His Royal Majesty King Abdullah II unseated the Prime Minister, and directed the newly appointed Prime Minister Marouf al-Bakhit to come up with political and economic reforms in response to the protesters' demands. In April of the same year, a committee was formed to make constitutional revisions, and the committee came up with changes to election laws and 42 amendments to the constitution aimed at addressing the concerns of protesters' and making Jordan a more accountable and just country (Yom 2012).

In September 2011, King Abdullah II issued a decree making major changes in Jordan's political sphere following relatively small, but persistent protests as part of the Arab Spring. The decree included multiple systemic and structural changes to Jordan's governmental system and political regime, ranging from a reformation of the Parliament to major constitutional changes (the majority of these changes came from the committee's suggestions). More specifically, the decree included four new constitutional articles establishing and regulating a Constitutional Court, which was officially created in October 2012. Such a Court had been advocated for many years to decentralize power and ensure accountability in the Jordanian government, and King Abdullah II created the Court to, "safeguard citizens' rights and basic freedoms...and enhance their confidence in the state" (Abdullah 2012).

I became interested in the Court for many reasons, but one of the primary catalysts for this study was the Court's young age. As with any newly established governmental institution, the first few years, or even decades, of existence may be spent solidifying legitimacy and establishing the role that the institution will

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play in relation to the larger political system. Judicial institutions especially have to fight for their place in a political system that has already-existent bodies creating legislation and leading policy initiatives. Such a newly established Court, then, is important to analyze to determine not only the role it will play in the political system, but also the extent to which the Court is willing to exercise its given powers.

Although the establishment of the Constitutional Court was a large step towards decentralization (at least on face value), there are those who contend that the Court was merely set up to quell protesters and that it does not have the will or the power to effectively carry out its duties. The fact that King Abdullah II himself appoints the members of the Court suggests to some that the body was formed to act as a “rubber stamp” that will merely do the King’s bidding (although many constitutional courts in other countries have a similar judge selection process), and the fact that recent controversial cases have been thrown out for procedural reasons without actually being considered has many questioning the Court’s veracity.

From the beginning of my research, I have hypothesized that the Constitutional Court is adequately functioning as a Court, but is still hesitant to make wide-ranging or controversial rulings as to not cause individuals involved in the political sphere to reject the newly formed institution. Additionally, I hypothesize that the current hesitance will continue in the future due to Jordan’s political regime. This hypothesis has come from both historical precedent as well as some examples from the Court’s rulings over the past year. Despite my hypothesis that the Court is hesitant to make too many waves in the Jordanian political sphere, I reject the idea that the Court is merely an extension of the monarchy and is a method of automatic approval for anything the King wishes to become law (although I do contend that the monarchy, along with other parts of the Jordanian Government, exerts implicit influence over the Court in at least some cases).

To analyze my research, I will use Miguel Schor’s ideas about comparative judicial review and its relation to federalism and democracy, and Kim Lane Scheppele’s work on the emergence of democracy through judicial review. Theories such as the Scheppele’s assert that Constitutional Courts have the potential to bring about serious and dramatic political change, but also that certain structural systems must be in place for such change to come about. To test these theories, my research will include interviews with individuals closely involved with the Jordanian judicial sphere, analysis of the Jordanian Constitutional Court’s actions over the past year of its existence, and further analysis of scholarly opinions of both the Jordanian reform process as well as systems of judicial review in general.

For the purposes of this research, I will be using an American definition of the word “government” which is quite different from how Jordanians understand the Arabic equivalent (*hakooma*). In Jordan, the government is solely the collection of appointed Ministers, whereas in this paper, it will be used to refer to the entire official political system (including the Monarchy, Parliament, and Judiciary in addition to the Council of Ministers). I will also be using the term “judicial review” to refer to any practice wherein a judicial body has the authority to reject legislation or portions of legislation due to conflicts with a country’s constitution. Additionally, I will be referring to “bodies of judicial review” to reference the equivalents of the Jordanian Constitutional Court in other countries in general because not all bodies of judicial review are officially called “constitutional courts” (such as France’s Constitutional Council and the United States Supreme Court). Although the word “regime” is often burdened with negative connotations, I will be using its generally accepted political science definition to mean the structures of a country’s government. Additionally, to further aid the reader’s understanding, I have created a graphic Explaining the structure of the Jordanian Constitutional Court as dictated by the constitutional amendments of 2011:



The Jordanian Constitutional Court

The Facts

The following is a breakdown of the structure of the Court, the qualifications and selection for the Court's judges, and the different methods through which cases can be heard by the Court.

Judicial Power

of the Court's rulings are
100% **Final**
 &
Effective Immediately

Location

The Court Must be located in

AMMAN

Judges Must Be...

- Jordanian Citizens
- At Least 50 Years Old
- Referred by Lower House
- Former Judges in High Courts, Lawyers, Professors of Law, or Legal Specialists

4 Ways Cases Get to the Court

- Referred by Council of Ministers
- Referred by Upper House
- Referred by Lower House
- Sent up by lower court

Judges

There are (at least) 9 members: 8 Judges and the President of the Court



Judicial Term

Judges are Appointed for

ONE

Non-Renewable 6-Year Term

Literature Review

Because of the nature of my topic, the academic sources I will be using fall into two categories: those focused on the Middle East and Jordan specifically and the region's judicial history and process of reform, and those focused more broadly on judicial review in general. The sources relating to Jordan are clearly essential as they will allow for specifics and examples to further analyze the Court in its correct context, but the sources about judicial review in general will be essential for the purposes of contextualizing the case of Jordan on the world stage and using comparative theories to predict how the Court will function on the larger political sphere.

To begin with the latter, it is important to look at the purposes of judicial review. Interestingly, the concept itself is quite undemocratic—allowing a small, select group of unelected elites to have a large role in the democratic process and the bestowal to this group of the power to strike down legislation approved by the people's representatives. Because of this reality, there are those, like Ran Hirschl in his book *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, that contend that at times when

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elites feel threatened by the masses' demands, they choose to empower courts rather than more democratic institutions because they believe that courts will better protect their interests (Hirschl 2007). To add to this notion, scholars like Miguel Schor (2007), in his article *Mapping Comparative Judicial Review*, contend that in many contexts, "judicial review was designed to knit the nation together by counterbalancing the pressures exerted by Federalism" (p. 262). In the United States specifically, the fact that power was split between the states and the federal government allowed the Supreme Court to use its powers of judicial review to exert authority over all levels of government, as "courts gain power when authority is divided" (p. 263).

There is another camp in this academic debate, however, and this camp asserts quite the opposite: that judicial review is affected by a bottom-up process. In his book *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Charles Epp (1998) argues that courts themselves take a stronger stance in the protection of constitutional and human rights due to pressures from below, specifically by groups who engage in deliberate and strategic organizing. It seems, then, that the best perspective to take is an Aristotelian middle-of-the-road approach, which partially accepts both approaches, as advocated by Miguel Schor. It seems quite possible that while courts are influenced by the elites, the concerns of the elites are directly related to the voices of the masses, which naturally have to be considered by the courts.

Once a constitutional court is created, however, there are still many possibilities for its functions, be they democratic or superficial. Mark Tushnet distinguishes between "strong-form" and "weak-form" constitutional courts, terms that can be used to mirror the ideas of "activist courts" and "restraintist courts" (Tushnet 2006). A strong-form constitutional court is an institution that feels free to strike down the slightest constitutional offense to ensure that every piece of legislation falls in line with the governing laws of the land, even if what was struck down does not have the potential to harm individual rights. A weak-form court, on the other hand, will only act if the constitutional rights of individuals are actively being harmed by a certain piece of legislation. While this idea may be admirable to many, Tushnet argues that weak-form courts can, "degenerate into parliamentary supremacy" (p. 814) by allowing the parliament to violate the constitution so long as the violations are not major (Tushnet 2003).

Kim Lane Scheppele expands upon Tushnet's ideas of "strong-form" courts in her article, *Democracy by Judiciary*, in which she argues that courts sometimes have the potential to be more democratic than parliaments. This idea goes against a face-value understanding of the democratic process, as members of courts are appointed, while members of parliament are elected, making them one step closer to the will of the people. Scheppele explains, however, that there are examples of courts that are more democratic than elected parliaments and executives, but that such courts must be set up in a liberal democratic context. Further, Scheppele (2001) asserts that, "as long as judges are subordinate to a constitution that itself emphasizes democratic values, the elected branches will be the source of policy and the direction of state" (p. 3). As Jordan is not a democracy (although the Jordanian government does contain many democratic aspects such as an elected parliament and now a constitutional court), it seems like it would be difficult for Scheppele's conditions to be fulfilled to allow for the Court to bring about democracy on its own. Nathan Brown (1998) echoes this sentiment in his article *Judicial Review and the Arab World*, explaining that constitutional courts, "may emerge as strong actors only so long as democracy and political pluralism also operate smoothly" (p. 94). Given Jordan's current political situation and its lack of complete democracy and political pluralism in many respects, it seems that, while the Constitutional Court may continue to develop, it will not emerge as a strong actor in Jordan's political sphere according to Brown's theory. Brown also points out, however, that there are examples of times during which judicial review has been instituted to restrict the will of popular majorities as represented by elected parliaments (Brown 1998).

When considering Jordan's political regime, it is important to realize that it is quite unique. While it cannot be called authoritarian, a monarch with broad powers is present. This brings into question the willingness

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any institution will have to make controversial policies or rulings. According to Peter Solomon (2007), in situations such as Jordan's, "court leaders push all judges to avoid confrontations with the interests of the executive in order to protect the institutional autonomy of the courts" (p. 136).

As for literature about the Middle East in general and specifically about the Jordanian case, there are many differing opinions from scholars both inside and outside of the region. Beginning with historical examples, the Middle East has never been a shining example of strong, democratic constitutional courts, but there have been examples of long-standing, functional courts that have made many decisions to help ensure citizens' rights. There are also plenty of examples, however, of Middle Eastern regimes overriding the powers of democratic institutions such as constitutional courts (Brown 2003) through the creation of "special courts, emergency laws, and revolutionary measures" (p. 6) set up specifically to counteract the work of democratic institutions. Further, "constitutional courts are often brought under executive domination by budgetary control and critical appointment" (p. 6).

The motives for the creation of bodies of judicial review in the region may also differ from what would typically be expected. In Egypt, for instance, the Supreme Constitutional Court was established in 1979 as part of a strategy to convince foreign business firms that the country represented a safe place for investments (Moustafa 2009). The Court allowed the Egyptian government to continue its controversial economic policies by asserting their constitutionality. This instilled more confidence in both the Egyptian people and potential foreign investors, and it elevated Egypt's position on the global economic stage. Importantly, however, the Supreme Constitutional Court served a dual function. While the purpose for its creation regarded foreign investments and confidence in the Egyptian regime, "at the same time, the Court became increasingly active in political cases, defending press freedoms, and assessing the legality of elections and electoral arrangements" (p. 133) (Solomon 2007).

Jordan's history, specifically, has been largely devoid of constitutional courts. Before the constitution was amended in 2011, the articles now related to the Constitutional Court concerned the High Tribunal. The High Tribunal was established primarily to hear impeachment trials for Ministers and, "apply the provisions of the Penal Code in force in respect of offences specified therein" (Jordanian Const. art. 58, pre-2011). Despite this rather limited scope of power, the High Tribunal did at points assert, "a right to judicial review despite the absence of explicit constitutional authorization" (p.89) (Brown 1998). Most notably, the High Tribunal struck down a law restricting the press that was passed by the Council of Ministers during a parliamentary recess. The High Tribunal justified their action by explaining that there was no real emergency, meaning that such an issue should have been dealt with by the Parliament, as they are the representatives of the people. The ruling was respected, but King Hussein publicly denounced it and the Minister of Justice dismissed the judge who wrote the opinion and appointed a new chief judge who pledged intergovernmental cooperation (Brown 1998).

Despite the High Tribunal's occasional foray into judicial review, however, the country was without an official body to declare legislative constitutionality until the Jordanian Constitutional Court's establishment through the recent constitutional amendments. There are those who say, however, that the Constitutional Court was merely created to quell protesters and will not be a forceful actor in the Jordanian political sphere. In his article *Jordan: the Ruse of Reform*, Sean Yom (2013) argues that, "for more than two decades, the regime has responded to protests and petitions for democracy with bouts of controlled liberalization" (p.128), but these slight steps towards liberalization are superficial and only taken to satisfy the people's demands.

Zoltan Barany, (2013) an even harsher critic of the Jordanian regime, writes that King Abdullah II has, "successfully manipulated or controlled political institutions and ethnic communities, pledged to undertake large-scale reform programs that remain unfulfilled, and neutralized the regimes' political opponents by

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selective inclusion” (p. 17), and that the King, “adroitly used as a ruse a mixture of superficial institutional reforms and the promotion of human rights to blunt challenges to [his] domination of the political system” (p. 18).

Both of these accounts of the Jordanian regime are overzealous in their characterizations of Jordan as a whole and the creation of institutions such as the Court. There is no question that the Constitutional Court was created in response to protesters’ demands, but that does not mean that the Court is merely a puppet in the King’s arsenal that will not serve any major democratic purpose. It is, of course, possible that the Court’s role will ended up being largely superficial, but this is by no means a guarantee and the fact that the Court was established to satisfy protesters does not mean that it is not a serious institution.

The answer to this debate, then, is the subject of my research. Answering this question brings us back to the theory posed by Kim Scheppelle and Nathan Brown that Constitutional Courts have the potential to bring about democracy and move in constitutionalist directions—even in an authoritarian context—if certain conditions are met. Because of this theory, it is essential to explore the context which surrounded the creation of the Court and the opinions of those involved with or knowledgeable about the Court regarding freedoms or pressures that are experienced by the Jordanian Constitutional Court.

Methodology

My overall research experience managed to teach me quite a lot about the Jordanian Constitutional Court and the Jordanian political system in general, albeit through often-unintentional methods. My research has consisted of reviewing the scholarly literature related to the Court specifically and to judicial review in general, reviewing newspaper articles and other primary sources such as public correspondence and Court decisions, and interviewing individuals either involved with the Court or those highly knowledgeable about the Court.

I began my research by reading the amended version of the Jordanian Constitution juxtaposed with the pre-2011 version. This allowed me to understand the structure, purpose, and jurisdiction of the Constitutional Court. The knowledge I gained from this research also allowed for me to continually surprise the individuals I interviewed who were (concerningly) impressed that I knew much of anything about the Constitutional Court because the average Jordanian, while many know that the Court exists due to its recent establishment, do not know much else about the judicial body.

As I began to delve into the material culture surrounding the Court, I became discouraged that there was so little material available. There are plenty of newspaper articles, both from Jordanian and international news sources, relating to the Court, but the vast majority of articles merely mention its proposal, existence, or very occasionally a case in front of the Court. One of the Court’s most recent (and arguably most important) cases concerned the alleged unconstitutionality of Jordan’s 2012 election law. This case was thrown out by the Court for procedural reasons, but the only coverage of this “decision” was a mention that the prosecution had not paid the proper court fees. Newspaper articles about the case neglected to mention what the fees were, why the fees were unpaid, or whether the prosecution still had the chance to pay the fees and have the case properly considered. The newspapers also failed to contact individuals from the prosecution (or defense) to inquire as to why the fees were unpaid. All of these journalistic failures bring the legitimacy of the case into question, because it was arguably a case that the government did not want heard due to the possibility of the law being declared unconstitutional and the Islamic Action Front having a good chance of gaining more Parliamentary seats in the subsequent elections (because, had the law been ruled unconstitutional, the parliament would have to be unseated due to their unconstitutional election).

In conjunction with my research into the material culture surrounding the Constitutional Court, I also began to look into scholarly articles and academic theories about constitutional courts and judicial review in

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general. I am fortunate enough to have taken a course on comparative constitutionalism at my university from a scholar of Arab Constitutions. This professor was able to point me in the right direction when it came to finding articles and theories concerning the development of judicial review and international constitutionalism, and his author recommendations allowed me to find even more useful academic works to consider while establishing my theoretical framework. Surprisingly, even some of the more obscure points related to the establishment of bodies of judicial review became relevant as I began my interview process because certain interviewees brought up ideas that had been mentioned in the articles that I analyzed for my literature review.

As I researched for scholarly articles about judicial review in general, I also searched for articles relating to Jordan specifically, and especially the Jordanian Constitutional Court. These articles, however, are not very easy to find, mostly because they largely do not exist. Following the Arab Spring, a whole host of research in the fields of Political Science and International Relations emerged, much of which mentions Jordan because Jordan experienced protests and reforms as part of the larger movement. The vast majority of these articles, however, merely point to Jordan as an example of a more stable Arab Spring experience, or as an example of a monarchy that stayed in power while instituting reforms. On the very rare occasion that a scholar devoted all or most of an article to Jordan, itself, the article analyzed the entire reform process in general, and merely mentioned the Constitutional Court. Because the Constitutional Court was just one of the country's many reforms that came in response to the 2011 protests, because Jordan does not have a very large community of constitutional scholars, and because the Court is so young (barely a year old), the scholarly work devoted specifically to the Court is incredibly limited. While I originally viewed this reality as a problem, it ended up being much more freeing as I conducted my research, because I was not burdened by other researcher's theories and ideas; rather, I was forced to understand the legal landscape on my own and form original hypotheses and conclusions about my topic of study.

At different points throughout my research, I learned that I would be receiving different types of answers from different types of people. Individuals involved in the government or the Court itself were more likely to give standardized, positive answers about the Court. When it came to other interviewees, even if they felt generally positively about the Court, they were more willing to levy certain criticisms because the Court did not act as a method of legitimizing their job. There were also some interviewees who felt very negatively about the Court, specifically from personal experiences dealing with the institution.

To ensure the privacy and protection of the individuals I interviewed, I informed them that their statements would only be used for research purposes, they had the option of pulling out of my research at any time, and that should they wish to remain anonymous, I would honor this request. I also had interviewees sign a consent form to all of these effects (Appendix I).

Findings

Because my research is centered around the effectiveness and democratic nature of the Jordanian Constitutional Court, my findings are based primarily on the interviews that I conducted, combined with press coverage of the Court, other material culture, and the synthesizing of all of these findings with scholarly articles on the subject. The Court's potential effectiveness, or lack thereof, can be analyzed through multiple channels; specifically, it can be analyzed through the different aspects of the Court's setup as well as its constitutional structure and recent functions. I will divide this section into the multiple aspects of the Jordanian Constitutional Court that can provide perspective as to the body's functions and its independence.

Before delving into different specifics about the Court, however, it is important to consider some basic facts from the Court's tenure of just over a year. As part of my research, I was fortunate enough to speak with a senior member of the Court (who declined to be named), who stated that Court is doing very well as a

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judicial institution in terms of productivity. The Judge stated that the infrastructure for the Court took a significant amount of time to establish, and that the Court is still figuring out its boundaries and functions, but despite this, the Court has issued judgments on over 20 cases in its first year of existence. This number is especially impressive when one considers that the High Tribunal, which was the preceding body to the Court, only issued roughly 50 decisions in its tenure of over 80 years (Anonymous, personal communication, December 1, 2013).

Requirements, Appointment, and Terms of Judges

When looking to the effectiveness of a body of judicial review, it is important to look to the institution’s structure as well as the requirements for its members. There are many different structures available for such courts, and the Jordanian Constitutional Court serves as a combination of the many different options. To be a judge on the Court, one must hold only Jordanian citizenship, have been a judge, politician, lawyer, or constitutional specialist for a certain period of time, and must be at least 50 years of age. None of these requirements are particularly problematic at face value, but two of the individuals that I spoke with took issue with at least some of these requirements.

Mohammad Al-Jboor, a Jordanian lawyer, disagreed with the wide range of past experiences that judges could have. Instead, Al-Jboor asserted that judges on the Court should have at least 30 years experience as judges on lower courts, and should hold graduate degrees in the legal field. Al-Jboor explained his desire for these strict requirements as ways to ensure that the Court would not be politicized. By making the Court up of career adjudicators, Al-Jboor believes that the Court’s members would focus solely on issues of constitutionality rather than taking outside political pressures into account when making decisions (M. Al-Jboor, personal communication, November 25, 2013)

Professor George Hazboun, President of the American University of Madaba, and former Dean of the school of law, agreed with Al-Jboor about the problems with some of the court’s members being politicians. Hazboun also took issue with the requirement that judges must hold only Jordanian citizenship. Although this is a rather small issue, Hazboun explained that this requirement was unnecessary and merely served to disqualify certain individuals who may hold dual citizenship who could be of value to the Court (G. Hazboun, personal communication, November 26, 2013).

Another point of contention relies around the term limits for the Court’s judges once they are appointed. The Constitution requires that judges be appointed for one, nonrenewable six-year term. This creates a few possible problems. First, the fact that the terms are nonrenewable means that six years after the Court’s establishment, there will be an entirely new Court because all of the previous judges will be replaced at the same time. Further, “longer tenure assures continuity and consistency” (p.11) in the enforcement of laws (Joseph 2012). This will complicate the political atmosphere because certain cases or unconstitutional laws might stay in place for multiple years because the individuals challenging them want to wait until a new set of judges is in place who may be more receptive to a certain issue. It is possible, however, that more judges will be appointed before the first class’s six years are complete because the Court may consist of more than the minimum nine members, but this option seems unlikely at the moment. The second problem with the term limits is that it makes the position less desirable. In other Courts with life-long appointments, judges are able to stay on the Court as long as they please, which incentivizes skilled lawyers and judges who could make much more money by working in the private sector, to take a less lucrative position because their place in the Court is secure for life. These term limits also open the Court up to outside pressures because judges need to consider their careers after they are off the bench, and may not want to make decisions that would anger certain people who could be helpful in their future career paths. On the other hand, nonrenewable terms eliminate future aspirations of appointment, which works to limit the effects of outside pressures (Joseph 2012).

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Another important facet to analyze is the appointment process for judges, which has the potential to make or break the Court. As previously mentioned, the Constitution of Jordan gives the King full power to appoint judges without any compulsory recommendations or consent from the legislature. Despite this lack of compulsory legislative involvement, King Abdullah II let a four-person council made up of the heads of both houses of Parliament, the Prime Minister, and the Chief of the Judiciary make recommendations which he then relied on to make appointments to the Court (M. Ruhaimi, personal communication, November 19, 2013). This method allows for more checks and balances, but is flawed in two ways. First, it allows political actors to decide the makeup of the Court, which Professor Hazboun feels is problematic. Hazboun asserted that political actors should have no part in the appointment process and that the King should have sole selection power due to his status as an actor slightly removed from daily politics (G. Hazboun, personal communication, November 26, 2013). This assertion was refuted by the member of the Court that I spoke with, however, who stated that constitutional courts should not simply be made up of normal judges; rather, they should consist of individuals with broader perspectives who understand how the government functions so that critiques of laws can be both constitutional and practical. The second issue with the current appointment process is that it only works if the monarch is benevolent. At the moment, the people have a say in the makeup of the Court by proxy of their elected officials, but because this council is not a constitutional requirement, it could be eliminated at any time, and the King could appoint whomever he chose. This reality recalls the theory put forth by both Kim Scheppele and Nathan Brown that bodies of judicial review have the potential to be strong democratic institutions (even in less-than-democratic states) so long as the right governmental conditions are in place. At the moment, at least for appointments, there are some slight democratic conditions in place, but at any time, those conditions could be thrown by the wayside.

Further, because the Constitution allows the Court to have more than the minimum nine judges, the King could easily engage in a “court packing” scheme similar to the one attempted by American President Franklin Delano Roosevelt and eliminate the opinions of the current members of the Court by overpowering them with voices loyal to the crown.

Independence

The Constitutional Court was very clearly designed to be a truly independent body. The Constitution makes clear that all of the Court’s decisions are final and effective immediately. Additionally, the Court’s decisions are issued in the name of the King and cannot be overruled by any higher power. The creators of the Court also sought independence through the term limits of the Court’s members. Despite all of these efforts to ensure independence, however, there are still many questions from a variety of individuals about whether or not the Court is truly independent now, and whether it will be independent in the future.

Despite the need for reform, many individuals from many different groups found problems with the law, and some of those problems consisted of conflicts with the constitution. Because of these potential problems, a case alleging the law’s unconstitutionality was introduced into a lower court, and eventually made its way to the Constitutional Court. This development was widely reported, and it was made clear to the public that, should the Court strike down the law, the current parliament (which was elected in accordance with the law in early 2013) would be dissolved because their election would have been deemed unconstitutional.

With these high stakes set in place, the Constitutional Court took on the case, and then proceeded to throw the case out for procedural reasons, claiming that the prosecution failed to pay the required legal fees (Jordan Times 2013, October 3). Due to these procedural hang-ups, the Court did not actually consider the arguments made in the case (specifically that the law violated articles 6 and 67 of the Constitution, which declare that every Jordanian is equal under the law and dictate the standards for election laws respectively).

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I had the fortune of interviewing Islam Alharhashi, one of the lawyers who challenged the law in front of the Court, who claimed that there were multiple errors in the Court's decision that procedural errors were present. First, Alharhashi explained that there are conflicting laws on the books regarding the need for court costs. A law passed by the Parliament states that there are no court costs for cases heard by the Constitutional Court, but a decree issued by the Council of Ministers contradicts this law, and states that a fee of 250JD must be paid by the prosecution. Despite this contradiction, Alharhashi explained that laws passed by Parliament supersede governmental decrees because the parliamentary laws come straight from the representatives of the people, and because of this, there should be no court fees. Second, however, Alharhashi exclaimed that he went to the Court at the start of the case and asked them if he needed to pay anything given this legal contradiction, and was repeatedly told that no payment was necessary. When the case was thrown out, Alharhashi went back and explained that he would happily pay the 250JD (or even ten times that amount) but was told that the decision had already been made and it was too late to pay the costs (I. Alharhashi, personal communication, November 25, 2013).

Despite the questionable tale I heard from Alharhashi, the member of the Court that I interviewed told me the exact opposite. In contrast to Alharhashi's story, the Judge claimed that the Court's fees were made abundantly clear, and that the specific fees for the Constitutional Court (250JD) are significantly lower than most other courts in the country (which can reach 5000JD), and are simply there to ensure that the Court only hears serious matters. The Judge stated that he was confused by the actions of the lawyers because after the case was dismissed due to their failure to pay legal fees, they did not attempt to rectify this error. According to the judge, the plaintiffs were given additional opportunities to pay the fees and have the case heard again, but refused to do so (Anonymous, personal communication, December 1, 2013). It is presently unclear which account is accurate.

While Alharhashi's tale is merely anecdotal, and his claims were refuted by a member of the Court, every individual knowledgeable about the Court that I spoke with who was not involved with the government expressed the feeling that there was something suspicious about the Court's decision. Professor George Hazboun stated that he felt the Court "sided with stability rather than with legality." The general consensus among those that I spoke with was that the prosecution's supposed failure to pay court costs was merely an excuse so that the Court did not have to deal with such a controversial issue. The reasoning for this could either be that the Court feared angering a variety of parties (for instance, the members of parliament they would be throwing out or the monarchy who was a large proponent of this law), or that the Court felt legitimate pressure from outside forces and made their decision in accordance with the will of others. Whether the "excuse" was preemptive or due to legitimate outside pressures, if either of these possibilities are the case, the independence of the Court is, at times, virtually nonexistent. While it is possible that there were legitimate procedural errors by the prosecution, it seems unlikely that such errors would be grounds for the Court to not even consider a major piece of legislation's constitutionality.

Alharhashi, who claims to have brought the case in front of the Court to demonstrate the Court's ineffectiveness, explained that he very recently filed two more cases about the same law in lower Courts that will hopefully make their way up to the Constitutional Court. When I asked him if he thought there was any chance that the Court would consider the actual arguments of the cases, Alharhashi stated that he thought the Court would just find another excuse to throw the cases out, but that this time he would overpay every possible fee, so the Court would have to be more creative in its methods of dismissing his cases (I. Alharhashi, personal communication, November 25, 2013). Professor Hazboun predicted that the Court would avoid deciding the new cases because the Parliament is currently considering amending the election law themselves, and the Court will defer its judgment to allow the people's representatives to decide the proper law (G. Hazboun, personal communication, November 26, 2013).

All of these assertions were rejected by the member of the Court I spoke with, however, who denied any notion of outside influence upon the Court. The Judge very clearly stated that he could “say with all certainty that we did not receive any pressure from any formal or governmental bodies.” This statement is very important to consider, but it also does cover issues of more informal pressures, which would be far more likely to exist in these situations.

Structural Challenges

When I spoke with the member of the Court, I asked him about the challenges that the Court has faced during its first year of existence, and he explained that the majority of challenges faced by the Court regarded its relationships with the rest of the government as well as the lack of understanding about the Court among the general Jordanian populous. The Judge stated that, if the Court is to continue its progression, it requires a better understanding from the Ministers and the Parliament about the role of the Court. At the moment, the Court is still facing questions from these bodies about what it can and cannot do, as well as what lawyers can argue in front of the Court and other similar specifics. While these issues will hopefully be resolved in time, they are currently hindering the Court’s productivity and effectiveness. The Court faced a specific problem due to a lack of understanding when its ruling that the Laws of Honors and Tenets contained unconstitutional sections, but the individuals rewriting the disputed law according to the Court’s recommendations failed to fulfill the content of the Court’s rulings, but there was no effective mechanism in place to ensure that the Court’s ruling was enforced.

Ulterior Motives

While the primary reason for the creation of a body of judicial review should arguably be to ensure that a country’s laws are constitutional and the country’s citizens’ rights are protected, this is not always the case. There are often other motives for creating such institutions, and these motives may supersede the obvious reasons. If this is the case, and there are other reasons for a body’s creation, that does not necessarily render the institution ineffective, but it does question the body’s ability to independently ensure legislation’s constitutionality if that is not the body’s main purpose.

The Jordanian Constitutional Court already falls into this category because it is widely known (and readily admitted) that the Court was created in response to the Arab Spring protests in Jordan. The Court had been advocated for years, but it was not until there was a threat to the regime that the institution was created. This elevates the possibility that the Court is merely a superficial body, created to quiet the opposition. Whether or not this is true, there is yet another ulterior motive that was considered in the creation of the Court.

An interesting—and largely unexpected—motive for the creation of the court was the potential for increased foreign direct investment. As one of the most stable, and one of the most liberal, countries in the region, Jordan has been increasingly benefitting from the problems in surrounding countries. On a tourism level, Egypt, Syria, and even Lebanon have been largely abandoned by tourists due to security concerns. While Jordan had already been a decently popular tourist destination, the elimination of its neighbors as tourism possibilities has helped to increase Jordan’s standing in a tourism context (Jordan Times, 2012, December 20). In addition to the increased tourism, Jordan has also seen an increase in foreign direct investments because it has proven to be one of the most stable investment possibilities. Potential investors look carefully at a country’s system of government to determine if that country is a worthy destination for their investment. Mefleh Ruhaimi, a former Minister and a Member of Parliament since 1989, explained that potential increases in Foreign Direct Investment were a large consideration in the creation of the Court (M. Ruhaimi, personal communication, November 19, 2013).

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As mentioned earlier, Egypt's Supreme Constitutional Court was established in 1979 as part of a plan to legitimize governmental economic parties and instill increased confidence in the Egyptian government. According to Mr. Ruhaimi this was a shared goal in the creation of the Jordanian Constitutional Court, but unlike the Egyptian case, it was not the main goal. Furthermore, Mr. Ruhaimi stressed that the Court has the potential to increase foreign direct investments specifically because the assurance that, "all laws are constitutional encourages faith in the government." Mr. Ruhaimi was generally very positive about the state of the Court. He recognized that the Court was still finding its bearings, but he was confident that the Court would prove to be an important institution in the legitimization of the government, and that, "it's presence is better than its absence" (M. Ruhaimi, personal communication, November 19, 2013).

Another important thing that Mr. Ruhaimi pointed out was that the Constitutional Court is surely better than its predecessor, the High Tribunal. This is obviously true because the High Tribunal was not constitutionally intended to be a body that held the power of judicial review, but also because, as Mr. Ruhaimi explained, the High Tribunal was a very political body. The High Tribunal was made up of the speaker of the senate, three other senators, and four judges. While the Constitutional Court is made up of some former elected officials, there is no member that is actively part of another governmental branch. This is important because it increases judicial independence, and encourages lesser politicization of issues taken up by the Court; instead, it encourages the Court to solely focus on issues of constitutionality. All of these facets of the government that were improved by the creation of the Constitutional Court made Jordan an increasingly attractive country for foreign investment because the Court appears to add further legitimacy to the government.

Conclusion

With the many theories surrounding bodies of judicial review as well as the wide range of opinions specifically regarding the Jordanian Constitutional Court, there are plenty of factors to consider when answering questions about the Court's effectiveness and judicial independence. Through the findings of my research, there is not one abundantly clear answer to these questions, but there is a general sense that the Court is not completely independent (at the very least in an informal sense), and therefore not completely effective, and will remain that way for the foreseeable future.

It has been established multiple times that the Court was created to satisfy protesters, but it has also been established that this does not mean the Court is simply a façade. Further, the other motives for the creation of the Court (such as the hopes of increased foreign direct investment through the legitimization of the government) do not eliminate the Court's role as a source of democracy. Even in Egypt, where the Supreme Constitutional Court was specifically created for economic reasons, the Court ended up protecting Egyptians' rights, even if this protection was merely a secondary result.

Alharhashi himself has special reason to believe that the Court is not a true body of judicial review because he experienced the Court (allegedly) throwing questions of constitutionality aside in preference of not angering a variety of powerful individuals (or as Professor Hazboun more diplomatically put it, in preference of "stability"). This is certainly a major concern and an important point when looking at the Court with a critical eye, but Alharhashi's case is not the only case that the Court has decided. Though the Court is quite new, it has, in fact, been functioning as a Court, and it has made other decisions that have affected the country's laws in attempts to make them constitutional. Such actions themselves are exactly how the Court should be functioning. Unfortunately, however, this image of the Court functioning as it should has been permanently marred by its decision in Alharhashi's case which, for all intents and purposes, demonstrated that the Court is not willing to make truly controversial decisions.

If this is truly the case, the question becomes "what or who is to blame?" After an analysis of the Court's structure, it is clear that solely the structure is not the only problem with the Court. There are

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unquestionably issues with the Court’s structure as well as the judge requirements and appointment processes, but many of these issues stem from the fact that there seems to be no perfect way to structure and select members for a constitutional court. One can point to the fact that the King appoints the Court’s members with no checks on his appointments as a problem, but this problem has been mitigated by the King himself through the creation of an informal council of (mostly) elected officials to give the King recommendations of individuals to appoint. While this could prove to be a problem in the future should the King choose to be less benevolent, that potential issue can be considered if it occurs. With that potential problem at least temporarily solved, it is not difficult to find other flaws in the Court’s structure such as its term limits for judges, its allowance of former politicians to be members of the court, and the potential for more than nine judges to be appointed to alter the balance of the Court.

All of the flaws mentioned above have to potential to be problematic for the Court, but none of them are the sole reason why the Court is not functioning as a truly independent and democratic institution. This assertion can be easily proven by looking to the examples of South Africa, France, and Germany, as well as many other countries with successful bodies of judicial review. South Africa, France, and Germany are important examples to consider, however, because all three countries have successful, and relatively new, bodies of judicial review (Germany’s Federal Constitutional Court was established in 1951, France’s Constitutional Council was established in 1958, and South Africa’s Constitutional Court was established in 1991). All three of these contemporary institutions have similar requirements to those of the Jordanian Constitutional Court, and all three are successfully functioning.

This evidence harks back to the words of Kim Scheppele and Nathan Brown. While factors such as structure have the potential to influence the effectiveness and independence of the Court, they only seem to do so in more extreme situations. It is the political environment surrounding the Court, then, that is the main factor in determining how the Court functions. As Sheppele and Brown theorized, a constitutional court does have the potential to be democratic in a less-than-democratic regime (Brown 1998) and to even be a source of democracy itself (Scheppele 2001), but for either of these functions to occur, the Court must exist under the correct settings. At least as of now, the settings surrounding the Jordanian Constitutional Court are not hostile towards the Court’s purpose, but they are not completely optimal. The political atmosphere has allowed the Court to function as a judicial body the majority of the time, but it has also allegedly limited the Court’s abilities in controversial situations, which are arguably the times when it is most essential that the Court functions effectively.

Despite the Court’s and Jordan’s current problems, there is still quite a bit of hope for the future. While my research generally confirmed my hypotheses that the Court is functioning, but is still hesitant to engage in large amounts of controversy, there are many potential opportunities for the Court to improve as time goes on. Not only will the young Court continue to mature and find a stronger place in the political sphere, but threads of liberalism will likely also continue to permeate Jordanian society. Whether or not the Court’s independence continues to be threatened, its presence continues to be better than its absence, and will hopefully advance the rights of the Jordanian people along with the constitutionality of the country’s laws.

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