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Constitutional Court Landscape Post-Arab Spring: A Survey of Design

DANE KIRCHOFF-FOSTER*

INTRODUCTION

On December 17, 2010, in Tunisia, a young man named Mohammed Bouazizi set himself on fire in protest of government corruption. This action eventually sparked a nationwide protest movement that became known in Tunisia as the “Jasmine Revolution.”¹ The revolution proved to be the beginning of a massive popular democratic movement throughout the region of the Middle East and North Africa (hereafter MENA), now known as the “Arab Spring.” Major protests in various countries eventually led to the collapse of some Arab regimes, and it prompted a process of constitutional reform in others.² One reform displayed by many countries in the region has been the formation or strengthening of constitutional courts that exercise exclusive jurisdiction over constitutional judicial review.³ The broad question this article seeks to answer is this: How did the Arab Spring change the MENA region’s constitutional court landscape? The article also broaches the narrower question of whether, where, and how the Arab Spring challenged authoritarianism in the region.

This is a case study seeking to survey the landscape of constitutional courts in the MENA region after the Arab Spring. To accomplish this, the case study identifies the traditional functions of constitutional courts, then analyzes the design features present in post-Arab Spring constitutional courts to determine how and to what extent these design features help – or hinder –

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¹ Elie Abouaoun, *Tunisia Timeline: Since the Jasmine Revolution*, United States Institute of Peace (July 12, 2019), <https://www.usip.org/publications/2019/02/tunisia-timeline-jasmine-revolution>.

² Primoz Manfreda, *8 Countries That Had Arab Spring Uprisings*, ThoughtCo. (July 3, 2019), <https://www.thoughtco.com/arab-spring-uprisings-2353039>.

³ Sujit Choudhry and Katherine Glenn Bass, *Constitutional Courts After the Arab Spring: Appointment mechanisms and relative judicial independence* 9 (Center for Constitutional Transitions and International IDEA ed. 2014).

each court in fulfilling its traditional functions. Analysis of design features will focus on (1) which (and how many) constitutional matters the court is empowered to decide (court *jurisdiction*), (2) the processes by which a court is presented a matter upon which it is empowered to decide (court *access*), and (3) the process by which judges are appointed to the court (court *appointment*).

This article proceeds in four sections. Section I is dedicated to this paper's limitations, presented at the beginning to help frame this case study's goals and scope. In Section II, a short and relevant history is presented summarizing the Arab Spring experiences of the following five subject countries: Tunisia, Jordan, Bahrain, Morocco, and Kuwait. The selection of these countries – and the exclusion of other countries – are justified in Section I.

In Section III, six traditional functions of constitutional courts particularly relevant to the MENA region context are identified, explained, and applied to the constitutional court landscape. These six functions are: post-authoritarian legal reform, protection of individual rights, separation of powers, review of elections and electoral laws, political party regulation, and oversight of constitutional amendment procedures. Discussion of each of these six functions is followed by analysis of the court design features of each of the five constitutional courts in light of how and to what extent these courts seem equipped to fulfill each traditional function.

In Section IV, the landscape of constitutional courts is surveyed broadly by comparing each court's unique design. The relative strengths and weaknesses of each constitutional court are judged by how well the design appears to equip the court to fulfill its traditional functions previously identified.

I. LIMITATIONS

This case study contains a few limitations. Firstly, this case study includes the five countries in the MENA region most ripe for analysis, but not necessarily all countries analyzable.

Syria, for example, although it has had a Supreme Constitutional Court since the passage of its 2012 Constitution, has also experienced continuous civil conflict since 2011. Similarly, in Libya, although the Constitutional Chamber of its Supreme Court continued to function through the collapse of the Qaddafi regime, civil conflict continues today in the absence of any universally accepted government. Ongoing political upheaval in these countries naturally disrupts any constitutional reform or court activity such that the effect of court design features on the accomplishment of traditional constitutional court functions is difficult or impossible to ascertain.⁴ Significantly, this case study also excludes from its analysis Egypt's much-studied Supreme Constitutional Court (SCC) because this study counts President al-Sisi's sustained efforts of judicial capture against the SCC as a similarly obscuring variable.⁵

Secondly, lack of access to original legislative documents has rendered this article at times dependent on secondhand analysis from other sources. Lastly, there has been a conspicuous lack of journalistic reporting and academic research into the development of constitutional courts in the MENA region since at least 2014. Recent developments in court design may have been missed simply because no one has been reporting them.

⁴ To illustrate this point: Tunisia has failed to appoint almost any members to its Constitutional Court, which is fairly attributable to faults in the Court's design features (all discussed *infra*). Ongoing civil conflict, however, is an obscuring variable such that a similar failure of appointment in Syria or Libya would be harder to attribute.

⁵ Since the rise of President al-Sisi in July of 2013, the SCC has been made subject to increasing executive control, accomplished in part by changes to its design. This process of judicial capture has been just one aspect of the President's successful efforts to centralize power and silence opposition to his authoritarian government. *See, e.g.*, Human Rights Watch, *Egypt: Constitutional Amendments Entrench Repression* (Apr. 20, 2019), <https://www.hrw.org/news/2019/04/20/egypt-constitutional-amendments-entrench-repression#>; Merrit Kennedy, *Egypt Approves Constitutional Changes That Could Keep Sissi In Office Until 2030*, National Public Radio (Apr. 23, 2019). The goal of this study is to Reforms to the SCC post-Arab Spring have transparently been made in opposition to a liberal constitutional framework, rather than in furtherance of one. It is therefore unhelpful to ask whether

II. MENA REGION COURTS AND THE ARAB SPRING

This section briefly recounts the Arab Spring experiences of each of the five subject countries: Tunisia, Jordan, Bahrain, Morocco, and Kuwait. This section highlights any events of the Arab Spring that precipitated a constitutional response or exercise of constitutional judicial review.

A. *The Arab Spring in Tunisia*

Scholars often call Tunisia “the birthplace of the Arab Spring.”⁶ It is here that the protest movement began, with the self-immolation of local vendor Mohammed Bouazizi in December of 2010, an act committed in response to harassment by local police in Tunisia’s authoritarian regime.⁷ One month later, after Tunisia’s armed forces refused the Tunisian president’s orders to crack down on the protests,⁸ President Zine El Abidine Ben Ali fled the country with his family to Saudi Arabia.⁹ In October of 2011, the first parliamentary elections were held, marking a significant shift from authoritarianism to democracy.¹⁰ Tunisia is the only country in this case study that has transitioned to an entirely new system of government.

The Tunisian Constitutional Court was established on January 27, 2014 with the adoption of Tunisia’s new Constitution.¹¹ This Constitutional Court was meant to replace the country’s Constitutional Council, a body completely appointed by the President that heard cases only by

⁶ Manfreda, ThoughtCo.

⁷ *Id.*

⁸ *Id.*

⁹ Abouaoun, United States Institute of Peace. The President fled on January 14, 2011.

¹⁰ Manfreda, ThoughtCo.

¹¹ Amel Arfaoui, *The Constitutional Design of the Judiciary in Tunisia: Post-Arab Spring*, IACL-AIDC Blog (July 15, 2019) <https://blog-iacl-aidc.org/2019globrev/2019/7/15/the-constitutional-design-of-the-judiciary-in-tunisia-post-arab-spring>.

referral of the President.¹² However, as of January 2021, Tunisia still lacks a functioning Constitutional Court: only one member out of twelve has been appointed to the Court.¹³

B. The Arab Spring in Jordan

On January 14, 2011, as many as 15,000 protesters took to the streets of Jordan to participated in the “Yawm Al-Ghadab” (“Day of Anger,” also translated as “Day of Rage”).¹⁴ However, protesters in Jordan were not united against the regime nor in calling for its abolition; rather, the protesters called for the removal of the prime minister and his cabinet.¹⁵ Jordan’s King Abdullah obliged.¹⁶ Protests continued, but several factors (including a lack of common theme, as well as fear of the violence and chaos experienced by Syria and Egypt) contributed to a slowing of the Arab Spring movement in Jordan.¹⁷

In further response to calls for reform, Jordan’s regime generated a new 2011 Constitution that included provisions for the formation of a constitutional court.¹⁸ On June 6, 2012, accompanying legislation for the Court in the form of Constitutional Court Law No. 5 of 2012 (5/2012) was enacted.¹⁹ King Abdullah appointed all nine members, including the president, to the Court by royal decree.²⁰

¹² Choudhry & Bass, at 17.

¹³ Jihen Jouini, *Tunisia Needs a Constitutional Court as Soon as Possible*, Democracy Speaks (Jan. 5, 2021), <https://www.democracyspeaks.org/blog/tunisia-needs-constitutional-court-soon-possible>; Sinan Hanioglu, *Gridlock hamstrings Tunisian Constitutional Court*, Foreign Brief (July 3, 2020), <https://foreignbrief.com/daily-news/gridlock-hamstrings-tunisian-constitutional-court/>. Tunisia’s Assembly of Representatives elected Rawda Al-Wersigni to the Constitutional Court in 2018.

¹⁴ Curtis R. Ryan, *Five years after Arab uprisings, security trumps reforms in Jordan*, The Washington Post (Mar. 4, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/04/five-years-after-arab-uprisings-security-trumps-reforms-in-jordan/>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Choudhry & Bass, at 17-18.

¹⁹ *Jordan: Constitutional Law Court Newly Established in Jordan*, Library of Congress (Dec. 3, 2012), <http://www.loc.gov/law/foreign-news/article/jordan-constitutional-law-court-newly-established-in-jordan/>.

²⁰ *Id.*

C. The Arab Spring in Bahrain

Anti-government protests in Bahrain began on February 15, 2011.²¹ The opposing forces in the protests reflected preexisting tensions within Bahrain between the majority Shiite population and the Sunni royal family.²² Tens of thousands waged protests despite gunfire from security forces.²³ The situation eventually required the intervention of neighboring countries (led by Saudi Arabia) to keep Bahrain's royal family in power.²⁴

Despite the intervention, the protests still triggered within the Bahraini government a cascade of constitutional reform, including a royal decree reforming the Constitutional Court.²⁵ Bahrain's Constitutional Court was originally established in 2002 by Decree-Law No. 27 of 2002 (Decree-Law 27-2002); the King of Bahrain's subsequent royal decree known as Decree-Law No. 38 of 2012 (Decree-Law 38-2012) changed the positions on the Court, adjusted the term of office for Court members, and gave the Court more financial independence.²⁶ Violent civil unrest and government crackdowns, however, continued in Bahrain.²⁷

D. The Arab Spring in Morocco

On February 20, 2011, thousands of protesters gathered all around Morocco to demand constitutional reform and limits on the King's power.²⁸ In response, King Mohammed VI announced a new draft Constitution in June of 2011 that included a provision to replace the existing Constitutional Council with a Constitutional Court.²⁹ In July, a national referendum on the

²¹ Manfreda, ThoughtCo.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Choudhry & Bass, at 17. The royal decree was issued August 15, 2012.

²⁶ *Bahrain: Royal Decree Amends Provisions on Constitutional Court*, Library of Congress (Aug. 22, 2012), <https://www.loc.gov/law/foreign-news/article/bahrain-royal-decree-amends-provisions-on-constitutional-court/>.

²⁷ Manfreda, ThoughtCo.

²⁸ Manfreda, ThoughtCo.

²⁹ Choudhry & Bass, at 18.

proposed Constitution passed with apparently near-unanimous approval.³⁰ On August 13, 2014, legislation dictating the organization of the Court came into force.³¹ In January of 2018, Draft Organic Law 86.15 was passed through the legislature; this law dictated the terms by which a constitutional case in controversy may reach the Court.³²

E. The Arab Spring in Kuwait

Kuwait has had a Constitutional Court since 1973. The Arab Spring did not ultimately produce any reform in this Court, but the Court was often called upon to exercise its power of constitutional review during this time. Its actions led many to see Kuwait's Constitutional Court as a tool for resisting political change and keeping power centralized in the authoritarian regime.

Arab Spring protests began in Kuwait in the summer of 2011 with calls for the resignation of Prime Minister Sheikh Nasser al-Mohammed Al Sabah, the nephew of Kuwait's Emir.³³ The peak of the tension occurred in November 2011 when the Constitutional Court blocked the parliamentary questioning of the Prime Minister over a corruption scandal involving members of Kuwait's National Assembly.³⁴ In response, about 100 protesters – including members of the National Assembly – stormed and occupied the National Assembly building, calling for the Prime Minister's removal.³⁵ The mounting civil unrest forced the Emir “to give in to street pressure”: the Emir replaced the Prime Minister and dissolved the National Assembly by royal decree.³⁶ Fresh elections were held in February of 2012, which “resulted in an opposition landslide.”³⁷

³⁰ *Id.* According to official results from the Moroccan government, the referendum passed with 98% approval of the public.

³¹ Organic Law No. 066.13 (2014). *Morocco: Remove Obstacles to Access to the Constitutional Court 3* (International Commission of Jurists ed. February 2018).

³² International Commission of Jurists, *supra* note 37 at 3.

³³ Kristian Coates Ulrichsen, *Kuwait: Political crisis at critical juncture*, BBC News (Oct. 23, 2012), <https://www.bbc.com/news/world-middle-east-20026581>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

However, on June 20, 2012, Kuwait’s Constitutional Court prevented this power shift by dissolving the new Assembly and reinstating the previous, declaring the royal decree unconstitutional with little explanation.³⁸ This move by the Court was characterized by opposition leaders as “a coup against the constitution.”³⁹ On the other hand, on September 25, 2012, the Court also rejected the Emir’s request to redraw electoral districts (many considered the redrawing to unfairly advantage the existing authoritarian regime).⁴⁰ This prompted the Emir in October to again dissolve the Assembly⁴¹ and augment electoral law using emergency powers.⁴² The following elections in December 2012 were widely boycotted.⁴³ Despite the Court’s earlier opposition to the Emir’s electoral redistricting plan, it did enforce the Emir’s new electoral law by dissolving the Assembly on June 13, 2013.⁴⁴

III. FUNCTIONS OF CONSTITUTIONAL COURTS

There are several theoretical functions and uses of constitutional courts in academic literature.⁴⁵ In any given political environment, certain constitutional court functions will undoubtedly be more useful than others. In countries with long histories of entrenched authoritarian rule, a few reforms are especially salient to the success of a liberal constitutional framework: the authoritarian regime must be removed and replaced with the new constitutional

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Reuters, *Kuwait Court Dissolves Parliament and Calls Vote that Opposition May Boycott*, The New York Times (June 16, 2013), nytimes.com/2013/06/17/world/middleeast/kuwait-court-dissolves-parliament-and-calls-vote-that-opposition-may-boycott.html.

⁴³ *Kuwait profile – Timeline*, BBC (Apr. 24, 2018), <https://www.bbc.com/news/world-middle-east-14647211>.

⁴⁴ Reuters.

⁴⁵ Choudhry & Bass, at 19-28. The authors list seven and then five theoretical functions and uses of constitutional courts. I have taken the headings and substance of these lists and reduced them to six “functions” of constitutional courts that seem particularly relevant to post-Arab Spring countries.

framework; that constitutional framework must be enforced; and the political institutions must be protected against recapture by authoritarian forces.

This article has identified six theoretical functions of a constitutional court that seem particularly relevant in the post-Arab Spring context: (a) post-authoritarian legal reform; (b) protection of individual rights; (c) separation of powers; (d) review of electoral law and elections; (e) political party regulation; and (f) oversight of constitutional amendment procedures.

Constitutional court functions may find expression in several aspects of court design, including a court's jurisdiction, access to the court, and the court appointment process. However, court functions are perhaps most broadly achieved through a court's jurisdiction. For the purposes of this research, a court's *jurisdiction* over constitutional matters amounts to the sorts of constitutional matters that the court is empowered to decide.

In this section, each of the six constitutional court functions will be expounded upon in its own subsection. An explanatory paragraph for the court function will be followed by mention of the relevant jurisdictional powers held by any of the five subject countries. If applicable, discussion of jurisdiction will be followed by discussion of court *access* – the processes by which a court is presented a matter upon which it is empowered to decide – and court *appointment process* – the process by which judges are appointed to the constitutional court.

A. *Post-Authoritarian Legal Reform*

In political shifts away from authoritarianism, constitutional courts can play an important practical and symbolic role in the restructuring of political society. Practically, constitutional courts are well-positioned to measure existing laws (perhaps passed under more authoritarian regimes) against the requirements of a new Constitution to determine which still “pass muster.”⁴⁶

⁴⁶ Choudhry & Bass, at 26.

Symbolically, a constitutional court (either its formation or its significant reform) can represent a “legal break” with past injustices and repression.⁴⁷

1. Jurisdiction and Post-Authoritarian Legal Reform: Impeachment, States of Emergency, Draft Laws

A few jurisdictional powers relevant to post-authoritarian legal reform are within the explicit jurisdiction of only a couple of constitutional courts studied. Impeachment represents the power to remove an executive for abuse of power or wrongful conduct, and therefore is a direct protection against a return to authoritarianism in the executive. Similarly, power to review or end states of emergency – constitutionally permitted power-shifts designed to temporarily grant broad powers to the executive in times of crisis – helps guard against their arbitrary use. The power to review draft laws as a check on authoritarianism is prospective rather than retrospective: a court with this power can prevent legal regimes tending toward authoritarianism before they are enacted.

a. Impeachment: Tunisia

Tunisia’s Court acts as the final decision-maker in the condemnation of the President in an impeachment process.⁴⁸ The Court may decide to condemn the President only after a two-thirds majority of the legislature has voted to refer the matter.⁴⁹ If the Court condemns the President (also by a two-thirds majority), it then orders the President removed from office.⁵⁰ The Court’s power over the impeachment process is obviously dependent upon prior legislative action, but it doubles as a check on both executive authoritarianism and legislative abuse of impeachment. The power of impeachment also has strong symbolic value.

⁴⁷ *Id.*

⁴⁸ Tunisia Constitution (2014), article 88.

⁴⁹ *Id.*

⁵⁰ *Id.*

b. States of Emergency: Tunisia

Tunisia's Court also has a role to play in ending states of emergency. Thirty days after the President has declared a state of emergency, a group of at least thirty members of the legislature (out of 217)⁵¹ may petition the Constitutional Court for a decision as to whether the exceptional circumstances that warranted the state of emergency continue to exist.⁵² Thus, with some help from the legislature, Tunisia's Court can prevent arbitrary exercise of more authoritarian rule.

c. Draft Laws: Morocco

Jurisdiction to review the constitutionality of draft laws can also bring about post-authoritarian legal reform. Since this jurisdictional power is prospective rather than retrospective, it allows courts to serve as a check on the “creep” of authoritarian tendencies back into the legal framework before it ever happens. However, if a draft law must first be referred to the constitutional court (and therefore not directly or automatically accessible by the court), the court's ability to contribute to post-authoritarian legal reform through this process is severely hampered. The governmental actors from which a return to authoritarianism is feared are the very ones acting as “gatekeepers” for the referral of these draft laws.

Out of the five constitutional courts studied, only Morocco's Constitutional Court is empowered to automatically review the constitutionality of draft laws—specifically, organic laws and Chamber regulations.⁵³ Bahrain's Court may review draft laws only upon referral by the King;⁵⁴ Tunisia's Court may review them only upon referral by the President, Head of

⁵¹ Alarabiya News, *Tunisia begins landmark election race*, <https://english.alarabiya.net/News/africa/2014/10/04/Tunisia-begins-landmark-election-race-> (last visited May 12, 2021).

⁵² Tunisia Const., art. 80.

⁵³ Morocco Constitution (2011), articles 69, 85, 132.

⁵⁴ Bahrain Constitution (2002), article 106.

Government, or 30 members of Tunisia’s Assembly.⁵⁵ Jordan’s and Kuwait’s constitutional provisions and enacting legislation do not explicitly state that their constitutional courts have any power to review draft laws.

2. *Access and Post-Authoritarian Legal Reform: Narrow Jurisdiction, Restricted Access*

Asking the question of jurisdiction naturally leads to the question of *access*: how are constitutional courts presented the constitutional matters they are empowered to decide? This question can be reframed as one of referral or “gatekeeping”: who holds the keys to the constitutional court? The entity that controls access to the constitutional court also controls how much power the court can practically wield.

The problem of access is not limited to the function of post-authoritarian legal reform. Each constitutional matter within the jurisdiction of a particular court has a corresponding procedure of access. However, while restricted access to a court naturally impedes the court’s ability to perform each of its intended functions, it also has the distinct characteristic of preserving the status quo and protecting the potentially repressive political tradition that constitutional courts are so often tasked with disrupting. Every function of a constitutional court is itself a contribution to post-authoritarian legal reform. Restricted court access, therefore, impedes this reform on many levels.

a. *Narrow Jurisdiction*

Court access is impeded when a court’s jurisdiction is narrow – when it has been empowered to act on only a small number of matters. A constitutional court can never hear a matter that it is not empowered to decide. An expansion of jurisdiction means an expansion of access to the court, which means an increase in a court’s ability to operate within its traditional functions, and therefore an increase in the potential for post-authoritarian legal reform.

⁵⁵ Tunisia Const., art. 120.

Out of the five constitutional courts studied, only Morocco's⁵⁶ and Kuwait's⁵⁷ have explicit jurisdiction over elections and electoral laws and over political parties (discussed in more detail *infra*). The constitutional courts of both Morocco⁵⁸ and Tunisia⁵⁹ have jurisdiction over several matters, although Tunisia's Court has no explicit power over election-related matters. Bahrain's jurisdiction is comparatively narrower.⁶⁰ The jurisdictions of the Courts of Jordan⁶¹ and Kuwait⁶² are more vaguely worded, which potentially gives opportunity for greater judicial initiative on the one hand, or greater external restriction on the other.

b. Restricted Access

When a constitutional court frequently depends upon referrals from other actors to consider matters within its own jurisdiction, very few matters have “direct access” to the court. For any given matter within the jurisdiction of the five constitutional courts studied, there is often at least one decision-maker in between that matter and the court. This results in restricted access. In Jordan and Bahrain, no constitutional matter whatsoever has direct access to their Constitutional Courts.

⁵⁶ Morocco Const., art. 61; International Commission of Jurists at 3.

⁵⁷ Law No. 14 of 1973 Establishing the Constitutional Court (Kuwait).

⁵⁸ In addition to elections, electoral law, and political parties, Morocco's court has jurisdiction over the constitutionality of organic laws before their promulgation (Art. 85, 132), the constitutionality of legislative chamber regulations (Art. 69, 132), constitutional amendment procedures (Art. 174), disputes over the constitutionality of laws (Art. 79), draft laws and treaties upon referral (Art. 132, 55), and constitutional cases in controversy (Art. 133).

⁵⁹ Tunisia's Court has jurisdiction over the constitutionality of treaties and rules of procedure (and draft laws upon referral) (Art. 120), constitutional cases in controversy (Art. 120), certain disputes over constitutional power (Art. 101), the constitutionality of constitutional amendments and amendment procedures (Art. 144, 120), impeachment of the President (Art. 88), and ending states of emergency (Art. 80).

⁶⁰ Bahrain's Court has jurisdiction over disputes relating to the constitutionality of laws and regulations, as well as the constitutionality of laws before their promulgation (upon referral) and constitutional cases in controversy. Decree-Law No. 27 of 2002 (Establishing the Constitutional Court), 18 Sept. 2002 (Bahrain).

⁶¹ Jordan Constitution (1952), article 58, § 1 (The Court “shall have the competence of oversight on the constitutionality of the applicable laws and regulations.”). Further, Jordan's Constitutional Court has “the right to interpret provisions of the Constitution” upon request by another political actor (*Id.* at § 2), which essentially puts the scope of the Court's jurisdiction into the hands of the referring actors.

⁶² Kuwait's Law 14/1973 uses very general language to grant Kuwait's Court power to interpret constitutional texts and settle disputes over constitutionality of laws and decrees. Law 14/1973's explicit grant of power to hear appeals relating to the election and membership of National Assembly representatives does not bring much clarity to how far the Kuwaiti Court's jurisdiction reaches in practice.

By contrast, Tunisia’s constitution provides that new proposed constitutional amendments and amendment procedures have direct access to the Court, since the Court must affirm their constitutionality before they go into effect.⁶³ Similarly, newly proposed amendment procedures for Morocco’s constitution have direct access to Morocco’s Constitutional Court, since its Court “controls the regularity of the [constitutional amendment procedure] and proclaims the results.”⁶⁴ Moroccan organic laws and Chamber regulations also go directly to Morocco’s Constitutional Court for review of their constitutionality before their promulgation.⁶⁵ Kuwait’s constitutional complaint system, instituted by Law No. 14 of 1973, creates uniquely direct access to Kuwait’s Constitutional Court for anything considered a “constitutional complaint”⁶⁶—this system will be discussed at more length in the subsection *infra* on protection of individual rights.

B. Protection of Individual Rights

Constitutional courts in democratizing countries face a natural tension between empowering majority rule and protecting individuals and minorities. In a world of majority rule, “courts can provide a forum for individual citizens or minority groups to bring complaints regarding government violations of their constitutionally protected rights.”⁶⁷ The ability of such courts to review cases in controversy, coupled with individual litigants’ access to the courts, helps courts perform the function of protecting individual rights.

1. Jurisdiction and Protection of Individual Rights: Cases in Controversy, Constitutional Complaints

⁶³ Tunisia Const., art. 144, 120.

⁶⁴ Morocco Const., art. 174.

⁶⁵ *Id.* at art. 69, 85, 132.

⁶⁶ Law No. 14 of 1973 (Establishing the Constitutional Court) (Kuwait). *See also* Hirotake Ishiguro, *Utilitizing the Judiciary to Reject the Popular Will?: Legal Mobilization after the Arab Uprising in Kuwait* 7-8 (Institute of Developing Economies ed. 2017).

⁶⁷ Choudhry & Bass, at 21.

Protection of individual rights is jurisdictionally implicated whenever a court is empowered to decide constitutional disputes brought by or on behalf of individuals. For example, constitutional cases in controversy often arise when an individual alleges encroachment by the government or a third party on a constitutionally protected right, and a court's power to decide such cases gives that court power to grant such protection. Any jurisdictional power that allows individuals to be heard by the court is a power that relates to this traditional court function. It also follows that a court's broader *jurisdiction* over matters relating to individuals simultaneously gives individuals greater *access* to these courts, so for the protection of individual rights, these separate elements of court design overlap.

a. Cases in Controversy

Cases in controversy typically reach constitutional courts upon referral from lower courts that have determined that the particular case involves an essential question of constitutionality. This is the basic system for the constitutional courts of Tunisia,⁶⁸ Jordan,⁶⁹ Morocco,⁷⁰ Bahrain,⁷¹ and (less obviously) Kuwait.⁷²

⁶⁸ Tunisia Const., art. 120.

⁶⁹ Law No. 15 of 2012 outlines the process of referral for cases in controversy, which includes referral by the Court of Cassation. Rainer Grote and Tilmann J. Order, *Constitutionalism, Human Rights, and Islam after the Arab Spring* 727-28 (Oxford University Press ed. 2016).

⁷⁰ Morocco Const., art. 133. Morocco's system of referral for cases in controversy also includes referral by the Court of Cassation. *Supra* note 36 at 3.

⁷¹ Decree-Law No. 27 of 2002 (Establishing the Constitutional Court), 18 Sept. 2002, art. 9 (Bahrain). *See also* Bahrain Const., art. 106 ("The law shall guarantee the right of the Government, Consultative Council, the Chamber of Deputies and notable individuals and others to challenge before the Court the constitutionality of laws and statutes.")

⁷² Hirotake Ishiguro, *Utilitizing the Judiciary to Reject the Popular Will?: Legal Mobilization after the Arab Uprising in Kuwait* 7-8 (Institute of Developing Economies ed. 2017).

Two countries – Jordan⁷³ and Morocco⁷⁴ – require referral of constitutional cases in controversy by not just the lower court of first instance, but also the Court of Cassation. A natural impediment to constitutional court action can be expected when an individual asserting his rights must pass through two gatekeepers instead of one. The Court of Cassation acting as gatekeeper is especially problematic because, before the advent of constitutional courts in Jordan and Morocco following the Arab Spring, the Courts of Cassation in these countries held jurisdiction over constitutional matters. There is therefore substantial institutional disincentive for the Courts of Cassation to voluntarily relinquish authority over constitutional cases in controversy to these relatively new constitutional courts.

b. Constitutional Complaints: Kuwait

Kuwait's Constitutional Court has the power to interpret constitutional texts, and to settle disputes that relate to the constitutionality of laws and decrees.⁷⁵ This power, granted by Law No. 14 of 1973, is put in very broad terms. One commentator has helpfully summarized the implementation of the ambiguous language of Law 14/1973 of Kuwait:

There are three ways to submit a constitutional complaint. The first is through the National Assembly (parliament) or the Council of Ministers (cabinet). The second way is through an ordinary court when a trial needs a constitutional judgment. And third, an individual citizen can submit a complaint, which is unique to Kuwait. In this case, a preliminary review board consisting of three judges from the Constitutional Court screens the constitutional complaint submitted by the individual. If it merits examination, it is referred to the Constitutional Court. People submit cases regarding parliamentary elections, such as qualification examinations of candidates and complaints against the result of elections.⁷⁶

⁷³ Pursuant to the Jordan's Law of the Constitution Court, No. 15 of 2012 (15/2012), cases in controversy may only reach the Jordan Court upon referral by a lower court to a Higher Court composed of three judges of the Court of Cassation, which then has discretion to refer the case to the Court. Grote, *supra* note 72.

⁷⁴ Morocco's Organic Law 86.15 requires that lower courts first refer a case to the Cassation Court, which decides whether to refer the case to the Constitutional Court. *Supra* note 36 at 3.

⁷⁵ Law No. 14 of 1973 (Establishing the Constitutional Court) (Kuwait).

⁷⁶ Ishiguro, at 7-8.

Kuwait's Constitutional Court, therefore, is designed with four points of access: referral by the National Assembly; referral by the Council of Ministers; referral of a case by a lower court; and, uniquely, citizens' direct constitutional complaint referred by three of the five members of the Constitutional Court. In comparison to traditional systems regarding cases in controversy, Kuwait's constitutional complaint system removes the barrier of the intermediary court and potentially gives the Kuwaiti Court greater ability to protect individual rights.

C. Separation of Powers

Constitutional courts have the power to make final determinations on the roles and powers of the separate dimensions or branches of government, in order to clear up ambiguity and prevent the usurpation of powers by one political actor from another. Constitutional courts have the authority to declare which powers are constitutionally granted to whom.⁷⁷ It is centrally important as well that constitutional courts themselves be safeguarded from usurpation by other political actors—for that reason, the court appointment process is essential in determining a court's capacity to perform its function of ensuring separation of powers.

1. Jurisdiction and Separation of Powers: Defining Powers

All constitutional courts have jurisdiction over constitutional interpretation. However, clarification and safeguarding of the powers and roles of competing political actors require a mechanism by which to bring constitutional concerns before the court. A constitutional court's jurisdiction over cases in controversy involving constitutional matters can serve as that needed mechanism—it just requires a litigant (a citizen, or sometimes a government actor) to make a constitutional challenge to begin the adjudication process.

⁷⁷ Choudhry & Bass, at 22.

Other than through cases in controversy, a few courts have other possible mechanisms for defining the roles and powers of different political actors. Jordan's Court is granted by constitutional provision "the right to interpret the provisions of the Constitution" upon request by another political actor."⁷⁸ Kuwait's Court has the general power to interpret constitutional texts, granted by its enacting legislation.⁷⁹ Tunisia's constitution includes a much more specific provision: if a dispute arises between the President of the Republic and the Head of Government over the constitutional powers each entity wields, the Court is empowered to settle the dispute.⁸⁰

2. *Court Appointment and Separation of Powers: Executive Model, Multi-Constituency Model, Judicial Council Model*

Judicial independence is key to ensuring separation of powers. In turn, a constitutional court's appointment model (the procedure by which members of the court are initially appointed) has a significant impact on the independence of its members. A well-designed model will prevent any one political actor from dominating the appointment process or from using the process for political gain. A poorly designed model risks at least two negative outcomes. First, a single dominating political actor may use the appointment power to dictate court opinion, and therefore dictate how the constitution is interpreted. Alternatively, an appointment model may require too much political cooperation for the system to accommodate; the result is a stalling of the appointment process such that the constitutional court cannot act as a safeguard against the usurpation of power by and from other political actors.

⁷⁸ Jordan Const. art. 59, § 2.

⁷⁹ Law No. 14 of 1973 (Establishing the Constitutional Court), art. 1 (Kuwait).

⁸⁰ Tunisia Const., art. 101.

For basic models of court appointment processes, several constitutional design options exist.⁸¹ The appointment processes of the five constitutional courts that make up the subject of this article fall into three of these models of design.

a. Executive Model: Jordan and Bahrain

The executive model is the most popular court appointment process in the MENA region. In this model, the executive has significant control over the appointment process, with little or no contribution from other political actors.⁸² Executive models for constitutional court appointments generally receive harsh criticism:

A constitutional court whose judges are selected solely by the executive, without the participation of any other political or civil society actors, stands little chance of being able to act independently. First, the executive will attempt to capture the court by selecting judges believed to be sympathetic to the executive's policies, in order to insulate itself from constitutional accountability. Second, the judges on the court, knowing that they owe their position solely to the executive, will likely be unwilling to issue a ruling that the executive would oppose.⁸³

Nevertheless, the constitutional courts of both Jordan and Bahrain operate under an executive model.^{84 85}

b. Multi-Constituency Model: Tunisia and Morocco

A multi-constituency model is a design that makes court appointments a participatory process between multiple political actors.⁸⁶ These actors can be government actors or civil society

⁸¹ Choudhry & Bass, *supra* note 80, at 10-12. The authors list several models: the legislative supermajority model; the judicial council model; the judiciary-executive model; and the multi-constituency model. In the conclusion, the authors also briefly describe the executive model. *See, e.g., id.* at 97.

⁸² *Id.* at 97.

⁸³ *Id.* at 29.

⁸⁴ Article 58(1) and Article 40(2)(e) of the Jordan Constitution (1952) specifically grant the King of Jordan the power to appoint all nine required members of the Jordan Constitutional Court.

⁸⁵ Article 106 of the Bahrain Constitution (through 2017) dictates that a Constitutional Court comprised of seven members be established by Royal Order. The King of Bahrain used this power to establish the Constitutional Court through Decree-Law No. 27 of 2002 Establishing the Constitutional Court (Decree-Law 27-2002).

⁸⁶ Choudhry & Bass, *supra* note 80, at 12.

actors, and the power that each actor has over appointments may be direct or indirect.⁸⁷ Both Tunisia and Morocco exhibit some form of the multi-constituency model in their respective court appointment processes.

Tunisia's constitution divides power over constitutional court appointments evenly between three branches: the Assembly of the Representatives, the Supreme Judicial Council, and the President each control four appointments.⁸⁸ Legislation also dictates that Assembly appointments must be filled first.⁸⁹ A successful appointment requires at least 145 favorable votes out of 217 members in Parliament (qualifying as a supermajority). This requirement has proven difficult to meet since, as of January 2021, only one member of the Constitutional Court has successfully been appointed.⁹⁰

Morocco splits its appointments between the executive and the legislative dimensions of government. Article 130 dictates that the Constitutional Court be composed of twelve members: six appointed by the King, and six appointed by the legislature. In the two-chamber legislature, three members of the Court are to be appointed by the Chamber of Representatives, and three appointed by the Chamber of Councilors.⁹¹

c. Judicial Council Model: Kuwait

The judicial council model can probably be described as taking the opposite approach of the multi-constituency model. The multi-constituency model attempts to promote separation of

⁸⁷ *Id.*

⁸⁸ Tunisia Const. art. 118; IRI Tunisia Team, *Update on the State of Tunisia's Democracy: Constitutional Court, 2019 State Budget and Electoral Commission*, Democracy Speaks (Apr. 17, 2019).

⁸⁹ IRI Tunisia Team, *supra* note 91. After the Assembly appoints, next four appointments must be filled by the Supreme Judicial Council.

⁹⁰ Hanioglu, *supra* note 18.

⁹¹ Interestingly, legislative nominees must receive at least two-thirds of the votes from participating Chamber members, which makes the Moroccan model an even hybrid between an executive model and a legislative supermajority model. Morocco Const. art. 130.

powers through insulating the appointment process from political manipulation by inviting multiple political actors to participate. In contrast, the judicial council model attempts to promote separation of power by removing the process from any direct political participation. Appointment powers rest with a judicial council, which may consist of members of multiple political branches, and even non-political groups such as bar associations and legal institutions.⁹² As a result, the judicial council model may give opportunity “to involve a wide spectrum of society in the judicial appointment process.”⁹³

Kuwait is the only country studied that follows the judicial council model, and its court appointment process is very involved. The Kuwaiti process will therefore be discussed in greater detail.

According to Article 2 of Law No. 14 Establishing the Constitutional Court (Law 14/1973), Kuwait’s Constitutional Court is composed of five members chosen by the Supreme Judicial Council by secret ballot, then appointed by decree. The Supreme Judicial Council itself is composed of seven members: five senior officials from other judicial bodies, the Attorney General, and the Vice-Minister of Justice.⁹⁴ In determining whether insulation from political actors has actually been achieved in Kuwait’s judicial council model, the appointment process of the five judicial officials comprising the Supreme Judicial Council becomes relevant.

The five senior judicial officials on the Supreme Judicial Council are: the President and Vice-President of the Court of Cassation; the President and Vice-President of the Appeals Court; and the President of the Supreme Court (or “Court of First Instance”).⁹⁵ These officials are

⁹² Choudhry & Bass, at 11.

⁹³ *Id.* at 55.

⁹⁴ Decree-Law No. 23 of 1990 (Concerning the Organization of the Judiciary), art. 16 (Kuwait); Ishiguro, *supra* note 75, at 7.

⁹⁵ *Id.*

appointed by royal decree based on the proposal of the Minister of Justice “after taking the opinion of the Supreme Judicial Council.”⁹⁶ Similarly, the Attorney General is appointed by decree based on the proposal of the Minister of Justice “after consulting the Supreme Judicial Council.”⁹⁷ Both the Minister and Vice-Minister of Justice serve in the executive cabinet. Therefore, the executive ultimately controls appointment to the Judicial Council, which in turn appoints the members of the Constitutional Court. Instead of insulating the constitutional court appointment process from political actors, the Kuwaiti model appears to simply move political participation (specifically, executive control) up one further level of abstraction.⁹⁸

D. Review of Electoral Laws and Elections

“Constitutional courts are often called upon to determine the constitutionality of electoral laws, to play a role in the oversight of elections and to certify electoral results.”⁹⁹ This can be particularly important in countries experiencing transition from authoritarian regimes, where free elections are foreign or where elections have historically been manipulated.

1. Jurisdiction and Review of Electoral Laws and Elections: Morocco, Kuwait

Out of the five countries studied, only Morocco and Kuwait have constitutional courts with jurisdiction that applies to this function. The language of Morocco’s Constitution states that the Court decides “on the regularity of the election of the members of Parliament and of the operations of referendum.”¹⁰⁰ Morocco’s Court has jurisdiction to determine the validity of parliamentary

⁹⁶ *Id.* at art. 20.

⁹⁷ *Id.* at art. 61.

⁹⁸ Choudhry & Bass, *supra* note 80, at 29. Authors describe the Kuwaiti experience in a section about the domination of the executive in judicial appointments.

⁹⁹ Sujit Choudhry and Katherine Glenn Bass, *Constitutional Courts After the Arab Spring: Appointment mechanisms and relative judicial independence* 23 (Center for Constitutional Transitions and International IDEA ed. 2014).

¹⁰⁰ Morocco Const. art. 132, para. 1.

elections and referenda.¹⁰¹ Similarly, Kuwait’s Constitutional Court has the power to hear appeals related to the election of members of the National Assembly.¹⁰²

E. Political Party Regulation

For similar reasons to the function of reviewing elections, constitutional courts may be called upon to guide the formation and regulation of political parties. In the wake of transition, some political parties may be institutionally advantaged (or disadvantaged) because of a close (or broken) relationship with the former authoritarian regime. The former regime therefore may retain much power in the new government, or may be intentionally excluded, by a court’s regulation of political parties.¹⁰³ Constitutional courts have opportunity to make neutral decisions regarding political parties, including decisions on eligibility and membership.

1. Jurisdiction and Political Party Regulation: Morocco, Kuwait

Again, only Morocco and Kuwait have constitutional courts with jurisdiction regarding this function. Morocco’s Court has jurisdiction over the termination of political party membership of a national legislator.¹⁰⁴ Kuwait’s Constitutional Court has the power to hear appeals related to the election of members of the National Assembly or the validity of their membership.¹⁰⁵

F. Oversight of Constitutional Amendment Procedures: Tunisia, Morocco

Constitutional courts can serve as “guardians” of the constitution itself by overseeing the process by which the constitution is amended, to ensure that the proposed changes are consistent with the spirit of the document.¹⁰⁶ This is particularly important if the constitution identifies certain provisions as inviolable, or as more fundamental or essential.

¹⁰¹ *Id.* International Commission of Jurists at 3.

¹⁰² Law No. 14 of 1973 (Establishing the Constitutional Court) (Kuwait).

¹⁰³ Choudhry & Bass, at 24.

¹⁰⁴ Morocco Const. art. 61.

¹⁰⁵ Law No. 14 of 1973 (Establishing the Constitutional Court) (Kuwait).

¹⁰⁶ Choudhry & Bass, at 26.

1. Jurisdiction and Oversight of Constitutional Amendment Procedures: Tunisia, Morocco

Tunisia's Court has jurisdiction over the constitutionality of constitutional amendments¹⁰⁷ and constitutional amendment procedures.¹⁰⁸ Every constitutional amendment and amendment procedure must be determined constitutional by Tunisia's Constitutional Court before it can proceed.¹⁰⁹ Morocco's Court is required to oversee constitutional amendment procedures: "The Constitutional Court controls the regularity of the [constitutional amendment procedure] and proclaims the results."¹¹⁰ If more constitutional courts wield jurisdiction relevant to this function, it is expressed in more ambiguous terms.

IV. CONCLUSION

The pre-existing Court of Bahrain underwent relatively few design changes after the Arab Spring. There is a smaller number of constitutional matters upon which it is empowered to decide, and there are generally more hurdles that must be jumped for those matters to come before the Court. Its appointment process is entirely dominated by the executive. Interestingly, the new Constitutional Court of Jordan born out of the Arab Spring most closely resembles the Bahraini Court: its jurisdiction is small (or simply ambiguous), its access points are controlled by other political actors (including the Court of Cassation), and its appointment process is entirely dominated by the executive.

The Courts of Tunisia and Morocco, also born out of the Arab Spring, have both been designed with broad jurisdictions and participatory court appointment models. They are the only two Courts with the power of oversight over constitutional amendment procedures. Morocco's

¹⁰⁷ Tunisia Const. art. 144.

¹⁰⁸ Tunisia Const. art. 120.

¹⁰⁹ Tunisia Const. art. 144, 120.

¹¹⁰ Morocco Const. art. 174.

Court also has the nearly unique characteristic of having regulatory power over elections and electoral laws as well as political parties. However, Morocco's Court is also dependent on the Court of Cassation for its ability to hear cases in controversy, and the highly participatory nature of Tunisia's court appointment model has had the effect of preventing appointment of judges to the Constitutional Court.

Kuwait's Constitutional Court has defied easy categorization. This older Court is the only constitutional court studied here with a judicial council model of appointment (even though the Kuwaiti Judicial Council is itself controlled by the executive). The Kuwaiti Court's composition and powers are largely determined by enacting legislation, and the enacting legislation has created a system that theoretically makes the Court highly accessible to the public. Kuwait's Court also joins the Court of Morocco as the only other constitutional court studied with regulatory or supervisory power over elections, electoral law, and political parties.

The older constitutional courts of Bahrain and Kuwait have longstanding history and affiliations with authoritarian regimes that make commentators doubtful of their ability or willingness to serve as a democratizing force in the post-Arab Spring MENA region. The newer constitutional courts of Tunisia, Morocco, and Jordan have been variously equipped for the task of contributing to constitutional democracy, but to varying degrees face challenges of jurisdiction, access, and actual appointment.

In summary, the Arab Spring thoroughly challenged some authoritarian regimes and sparked new constitutional experiments in a few countries. In some ways, the constitutional experiments have been radical: entirely new constitutional courts emerged in Tunisia, Jordan, and Morocco (along with entirely new constitutions in Tunisia and Morocco). In others, the experiments have not pulled countries far from the status quo: Tunisia's Court is not functional,

Morocco's is often restricted by other political actors, and Jordan's follows the executive-dominated design of Bahrain while at the same time being restricted by its own Court of Cassation.

Surprisingly little has been reported or can be witnessed about the practical success of these constitutional experiments in turning countries away from authoritarianism, and the history of constitutional courts in the MENA region is still being written. Still, the landscape of constitutional courts in the region, so far as it has been illuminated by this case study, is a fascinating picture: courts the products of years of authoritarian partnership weathering sweeping constitutional change like a storm that will soon pass, while other new courts find themselves planted in inhospitable ground. The apparent success or failure of these courts' designs perhaps can be understood as a litmus test for the extent of liberal constitutional change the MENA region's political climate will allow. Still, there is much more landscape here to survey, much more to understand, and much more to watch unfold.