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**REPORT**

**“The role of the Union of Arab Constitutional Courts and  
Councils in the field of Constitutionalism”**

by

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**A – Establishment and Organization of the Union:**

The Union of Arab Constitutional Courts & Councils was established in the preparatory meeting held in Cairo, Egypt on 25, 26 February 1997 *and its fundamental system was ratified in the meeting held in Algeria on 26 June of the same year* by the founder members; namely the organizations that assume the constitutionality control of Laws and Regulations in the following member states:

1. The Republic of Tunisia.
2. The Democratic and Popular Republic of Algeria.
3. The Republic of Sudan.
4. The State of Palestine.
5. The State of Kuwait.
6. The Republic of Lebanon.
7. The Socialist People's Libyan Arab Jamahiriya (Republic).
8. The Arab Republic of Egypt.
9. The Kingdom of Morocco.
10. The Islamic Republic of Mauritania.
11. The Republic of Yemen.

In 1998 The Kingdom of Jordan joined the Union, followed by the Kingdom of Bahrain in 2003.

The aim of the Union is to establish the concept of the Constitutionalism in the Arab Nation, enhance the role of the constitutionality control of Laws, Decree-Laws and Regulations for protecting the individual rights and public freedoms, facilitate the exchange of experiences and enrich the constitutional knowledge between the specialized in the constitutionality control.

The Union has an independent legal personality and is represented by the president of the Union or by his substitute. The permanent seat of the Union is in Cairo, Egypt.

The presidency of the Union is alternative and for two years for the chief of the members' constitutional courts and councils according to the alphabetical order of their states. The president of the session that follows is the vice president of the Union.

The Union seeks to achieve its aim by many ways such as:

- Organizing and developing cooperation between its members and strengthening relations between them.
- Exchanging ideas, experiences and information in the field of constitutionality control.
- Encouragement of researches and legal studies concerning the constitutionality control in general and specially the protecting of human rights.
- Organizing and developing cooperation between the Union and similar organizations at the other states.
- Participation in international conferences concerning the constitutionality control.

In order to enhance the role played by the Union in the field of Constitutionalism; it undertakes to activate its aim by several practical steps as follows:

- Publishing periodical magazine that include researches, legal constitutional studies and all judgments and decisions issued by the members' constitutional courts and councils.
- Exchanging judgments and decisions rendered by the institutions assuming the constitutionality control.
- Convening conferences and seminars to discuss researches and constitutional studies.
- Exchanging visits among the members' constitutional courts and councils and between the Union and similar institutions or organizations in other states.

- Encouraging writing, translation and publishing in the field of constitutionality control.
- Establishing a legal library in the Union's seat, provided with Arabic, comparative legal publications and bulletins especially those concerning the constitutionality control.

The membership of the Union is open to any Arab court or council competent in the constitutionality control to join the Union. Meanwhile, the constitutional courts and councils in other Arab states may request attending the meetings of the Union as observers without having the right of voting.

The Union consists of the three following devices:

1-The General Assembly which is composed of the constitutional courts and councils; members of the Union.

2- The Council of the Union which is composed of the president of the Union, the vice president and the chiefs of the constitutional courts and councils; members of the Union.

3- The General Secretariat which is the executive device of the Union, managed by the secretary general elected for four years by the General Assembly by the majority of members.

### **B – Achieving Constitutionalism in the member states of the Union :**

In general; the Arab present-day Constitutions provide for the duty of the state to protect all human rights and freedoms that prevail in the modern world. No one can deny that protection of human rights and freedoms presents the subject of today and the future.

One can notice that all of the Arab Constitutions-without any exception thereof- give a paramount attention to protecting the exercise of democracy as a natural and direct way to bring about achievement and protection of all human rights and freedoms.

The common aspects of such exercise include the main features of modern democracy mentioned in the Arab Constitutions as follows:

- The right of every individual to express his opinion and to publicize it verbally or in writing or by other means.
- The freedom of belief and the freedom of practice of religious rites.
- The freedom of criticism.
- The freedom of the press, printing, publication and mass media.
- The freedom of scientific research and literary, artistic and cultural invention.
- The right of citizens to peaceable and unarmed private assembly without the need for prior notice.
- The right of public meetings, processions and gatherings within the limits of law.
- The right of citizens to form societies within the limits prescribed by both the constitution and law, taking into consideration that forming political parties falls within such right, as the political system of many Arab states is a multi-party one.
- The right to create syndicates and unions on a democratic basis.
- The rights of citizens to vote nominate and express their opinions in referendums.
- The right of individuals to address public authorities in writing.

Violations of human rights everywhere will never come to an end, nor do they ever stop the struggle which aims at protecting these rights. Constitutional provisions have nothing to do in this concern unless there is an effective system of constitutionality control over laws, decrees, laws and regulations, in order to give the human rights and freedoms, by exercising strict scrutiny, real effect.

In the member states of the Union of Arab Constitutional Courts and Councils, such constitutionality control that leads to achieve Constitutionalism is brought about by two kinds of institutions:

- 1- Constitutional Courts.
- 2- Constitutional Councils.

The first approach exists in Egypt, Sudan, Palestine, Kuwait, Libya, Yemen, Jordan and Bahrain, while the second one exists in Tunisia, Algeria, Lebanon, Morocco and Mauritania.

Although the two approaches differ from the point of view of procedure to be followed in order to examine the issue of constitutionality, both of them remain similar in following the same strategy and in applying typical criteria to find out whether the attacked provision of a certain law, decree-law or regulation agrees with the principles adopted by the constitution or otherwise. Meanwhile, constitutional control in Arab constitutional system is not typical in all Arab states. Each of Arab constitutional courts and councils deals with its constitutional review questions according to its social, historic, cultural and economic circumstances contained; either explicitly or implicitly, in its constitution.

In case the attacked legislative or regulatory statutes are found in contradiction with one or more of the provisions of the constitution, the institution competent to examine the constitutionality of such statutes, regardless the said institution is being constitutional court or council, shall strike down the examined statutes and declare them unconstitutional.

In fact, each of the constitutional courts and councils; members of the Arab Union (AUCCC) which have the exclusive right of constitutionality review plays the major role in this arena, consequently; presents an effective guarantee of constitutionalism which is deemed the safe heaven of the protection of human rights and the rule of law.

The oldest centralized constitutional judicial review system known in Arabic arena was established in Egypt in 1969; when the Supreme Court was born according to law no. 81 of the year 1969, to be the first window for the establishment of the centralized constitutional judiciary system in Egypt. Afterwards; when the Constitution of 1971 was adopted, the same trend of centralized judicial review was preserved. The Constitution provides in Chapter V for the Supreme Constitutional Court to have the same exclusive jurisdiction over the question of examining the constitutionality of laws, decree-laws and regulations.

Since its establishment, the Supreme Constitutional Court endeavored to preserve what is generally acknowledged as a safe heaven for the effective protection of inalienable human rights because it has played a very important role in the political, economic and social life of Egypt. This role can be explained by a brief discussion of some examples of the principal decisions declared by the Court in order to find out the broad lines of the same in the field of Constitutionalism.

In the case no. 37 of the 11<sup>th</sup> judicial year, on the 6<sup>th</sup> of February, 1993, the Court was to decide the constitutionality or otherwise of Article 123 (Para 2) of the law on criminal procedure which provides that whoever is accused with the crime of libel by way of press or by any other publication has to present before the respective investigator at his first interrogation and within the following five days at most a statement indicating the evidence testifying every fact he ascribes either to a person charged with the duties of a public office or service, or having a public representative assignment, otherwise the production of that evidence shall be inadmissible. The Court struck down the challenged time limit as provided for in the said provision on the grounds that, according to Article 47 of the Constitution, freedom of expression is granted in all domains and the two aspects of this freedom have been expressly mentioned therein, namely; the right of self-criticism and that of constructive criticism, being both

envisaged as paramount for the safety of the national structure. Subsequently, due account has to be given to the fact that survival of freedom of expression depends on securing its breathing space and that the required constitutional protection for its core must not be shaken or waived even upon a finding that the challenged opinions have gone beyond their rational limits. Hence, rendering the popular control on the public services inoperative or burdensome will bring to an end or largely weaken the critical approach in public affairs.

In the case no. 47 of the 3<sup>rd</sup> judicial year, the Court invalidated the challenged statutes of law no. 125 of 1981 which provides for the Termination of the mandate of the elected Council of the Bar Association and the delegation to the Minister of Justice to form a temporarily appointed Council as a substitute for the legitimate one. The Court stated that under Art. 56 of the Constitution, the democratic foundation of syndicates and federations is a right to be guaranteed by law and the same article has also effectuated the principle of democratic syndicalism which is deemed as the corner-stone of other constitutional safeguards that ensure the people's supremacy, secure their participation in the exercise of power and recognize their enjoyment of fundamental rights and freedoms including the freedom of expression and, by inference, the right to choose freely their own representatives in the administration of governmental affairs and the preservation of public interest through elections effected either on the national or the local level. On this ground; the Court struck down the challenged law as it denied the members of the Bar the right to voluntarily choose their leaders acting as their legal representatives in conducting the functions of the Bar.

In other judgment declared on the 7<sup>th</sup> of May, 1988, the Court invalidated Article 40 (sub-Para 7) of law no. 40 of 1977 entitling a designated committee the right to turn down applications submitted to it for the creation of any political party if proven upon sound grounds that any of its founders or leaders had advocated, encouraged, instigated or advanced principles or practiced inconsistent with the treaty of peace between Egypt and Israel. The Court in striking down the said statute noted that the freedom of expression-on which repose all features of democratic regime- has been enshrined by all Egyptian constitutions, including the current one which confers by Article 47-to every individual- the right to express and spread out his personal opinions whether by utterance or print or photography or publication or by any other means within the limits prescribed by law. Such freedom extends to all forms of expression and encompasses all opinions of whatever nature with special emphasis on the exchange of political views besides the constitutional duty of constructive participation in political life. In view of the foregoing, the Court pointed out that the challenged statute which forbids the advocacy or the promotion or the publication of ideas incompatible with the treaty of peace between Egypt and the State of Israel, has unequivocally barred the right to form political parties entitled to all citizens, the impairment of which contradicts Articles 5 and 7 of the Constitution.

In so many other judgments, the Supreme Constitutional Court of Egypt has guaranteed the protection of civil, political, social, economic and cultural rights. The decisions of the Court has covered several aspects of constitutionalism in almost all fields of human rights and freedoms such as the principles of the Sanctity of the Home, Equal Protection, The Right to Private Property, The Right to Vote and to be Elected, The Right of Defense, The Right to Work, The Right to Receive A Pension, The Right to Establish and Join Unions and Syndicates.

In the last joining state to the Union: The Kingdom of Bahrain; the Constitutional Court; which also is the last established one has declared several judgments in which it emphasized the importance of protecting the principles contained in the Constitution as the only way to achieve Constitutionalism.

In the case no. 1/03 of the 1<sup>st</sup> judicial year, on 26<sup>th</sup> of April 2004, the Court was to decide the constitutionality or otherwise of Article 6 (Para 6) of law no. 26 of 1980 concerning the Legal Practice. The petitioner alleges that the attacked provision deprived him, as an applicant for enrollment of advocates in Bar Association, to resort to a higher stage of litigation in spite of the

fact that the laws, in general, adopted the principle of dual tier litigation, and particularly since the same abovementioned Law provided two tiers for complaints against disciplinary decisions, he is entitled to this right. The Court dismissed the case pointed out to the rule that the power of the legislator to regulate rights; including the right to litigate, is discretionary, unless the constitution imposes specific limitations on the exercise of such power, because the essence of this power is the choice by the legislator between the alternatives which relate to the subject matter of regulation and the balance thereof in order to give preponderance to what he considers to be the most favorable to the interests of society and the nearest to securing the weightiest of those interests. There is no contradiction between the deep-rooted constitutional right of litigation and the legislative regulation thereof, provided that the legislator does not use regulation as a means to ban the right or nullify it. Because of this; the legislator, in securing the right of litigation does not confine himself to specific forms that represent fixed and unalterable patterns. He may choose, for the enforcement of this right, forms and procedures which are, in his objective view, more suitable to the nature of the dispute that a court is charged with adjudicating upon without breach of the main guarantees thereof which secure the enjoyment of rights according to definite rules which are fair in themselves. The Constitution of The Kingdom of Bahrain made the principle of equality on of the foundations of society which are guaranteed by the State. This principle is regarded as a means of establishing equal protection, without discrimination, between similar legal positions. Consequently; the law would be within the ambit of discretionary power of the legislator whenever it differentiates between legal situations or positions or persons who are not in fact united as between themselves, so long as such differentiation was on objective bases seeking undisputedly legitimate aims and maintaining the unity of the legal rule in dealing with persons whose circumstances were similar within the prerequisite of those aims. If it is true that the attacked provision is inconsistent with the trend of multistage litigation in the other enactments in the Kingdom of Bahrain, as alleged by the petitioner, the allegation is no more than a criticism of the inconsistency of the said provision with a prevailing trend in legislation. Such inconsistency is not, in itself, a constitutional defect. The test of constitutionality or otherwise If a legislative text is whether it is consistent or otherwise with the provisions of the Constitution which this Court is charged with preserving and protecting. In view of the foregoing, the Court stated that as the attacked provision was intended to expedite the decision of the dispute between the applicant for enrollment in the roll of advocates and the decision to refuse the application, on objective bases and without affecting the equality between applicants for enrollment who are within the framework of the same legal position, particularly since the attacked provision aimed for the legitimate interest of saving of time and avoidance of waste of effort in looking into the complaint which involves mere ascertainment of satisfaction of the conditions of enrollment in the general roll of advocates without impinging on the right of litigation, affecting the independence of the Judicial Authority or nullifying the principles of equality and equal opportunities of persons of similar circumstances.

In the case no. 2/03 of the 1<sup>st</sup> judicial year, on 27 of December 2004, the Constitutional Court of Bahrain adopted some other important principles as follows:

- The purpose of the constitutional legitimacy (*Constitutionalism*) which is monitored by the Court is to ensure the conformity of legislative texts with the Constitution. This legitimacy is on the apex of the legal structure of the State. It is a facet of the submission of the State to the rule of law.
- No Court or body entrusted with judicial adjudication over disputes is to apply a legislative text that is necessary for the adjudication on the dispute if it appears to it that the text is contrary to the Constitution. If it suspects the existence of such contrariety it must resolve the doubt by referring the matter to the Constitutional Court which has sole competence on the question of constitutionality to adjudicate upon the matter or it must enable the litigant who genuinely pleaded unconstitutionality to put his case before the Constitutional Court by allowing him the right to institute his suit within the period specified by Article 18 of the Constitutional Court Law.

- All courts, in principle, must stick to the order of referral or the permission to institute the constitutional suit; otherwise the courts would be in contravention of Article 106 of the Constitution and Article 16 of the Constitutional Court Law which conferred on the Constitutional Court sole competence of judicial review of the constitutionality of laws and regulations.
- Direct personal interest relates to the party who raised the constitutional question not to the question itself as viewed in abstraction. Consequently; litigation by persons other than those to whom the text caused direct injury, either imminent or already happened, will not be entertained. The damage alleged must always be other than mere contravention of the text of the Constitution.
- The rejection by the Constitutional Court of the formal objections does not constitute a bar to raising any substantive objections to any of the texts of the three legislative Decrees objected against.

Nevertheless, in all other Arab States; either members of the Union of Arab Constitutional Courts and Councils or otherwise, their constitutions as abovementioned contain and admit the protection of human rights and freedoms, which is the leading way to achieve democracy and to highlight the rule of law.

Accordingly, the Constitutional Courts and Councils; members of the Union, endeavored to preserve the effective protection of inalienable human rights. Hereinafter, we can find out examples of the principal decisions declared by these Constitutional institutions in order to find out the trend followed by them in the current subject matter of Constitutionalism.

In the decision no. 01/02 on 3 April 2002, the Constitutional Council of Algeria examined the Draft Law submitted by the President of the Republic to modify the constitution by adding a new provision to Article (3) of the constitution aiming at considering "the Tamazight" as a national language in addition to the Arabic one which is considered the national and formal language of Algeria. The Constitutional Council declared that the submitted Draft Law agrees with the general principles that govern the Algerian Community and adopted by the Preface of the constitution. Such principles which are considered the corner-stone of the main components of the national entity; acknowledge "the Amazighi", whose language is the Tamazight, to be side by side with "the Orooba" whose language is the Arabic. Hence; the Constitutional Council decided that the said Draft Law does not contravene the main principles of the constitution.

In other decision: no. 13/02 on 16 November 2002, the Constitutional Council of Algeria was to decide the constitutionality or otherwise of the Draft Organic Law concerning the Judiciary. The Constitutional Council struck down the said Draft Law on the grounds that Article 180 of the Constitution provides that any change or modification of laws concerning subjects falling within the domain of Organic Laws should be postponed until the competent constitutional institutions provided for in the constitution be established. On the other hand; Article 157 of the Constitution provides that constitution of the Judiciary Supreme Council, its mission and powers should be organized by a separate Organic Law. Hence; the Constitutional Council invalidated the sub mentioned Draft Organic Law concerning the Judiciary on the basis that it contradicts with the procedures implied by the constitution as the said Draft Organic Law has been modified before the aforementioned competent constitutional institutions be established, as well as the legislative authority has accumulated the two sub mentioned Draft Organic Laws in one Draft Law; while the constitution organizes the two subject matters of both Laws separately, which means that it adopts a strict distribution of the field of each Organic Law.

In the case no.8/2000 on 10 December 2000, the Constitutional Court of Sudan was to examine the constitutional petition against the Public Elections Authority aiming at freezing its present and future activities concerning the Presidential and Parliamentary Elections. The Constitutional Court dismissed the case on the ground that the petitioners did not build their allegations on any constitutional base, but they were just aiming at showing off; as founding

their petition on mere theoretical ground on saying that the absence of the National Assembly (the Parliament), as result of Sudanese Revolution, should automatically imply the nonexistence of the Public Elections Authority, while Revolution does not mean abolishing state constitutional authorities or institutions, but rather; substituting the absent authority by another existing one in assuming its constitutional responsibilities.

In the case no. 1/2003 on 30 October 2003, the Constitutional Court of Palestine was to decide the constitutionality or otherwise of Decision no. 120/1997 issued by the President of the National Palestinian Authority modifying Law no. 11/1996 of Bar Association. The Constitutional Court dismissed the case on the ground that the petitioner failed to prove any unfavorable legal effect on his side, as litigation by persons other than those to whom the attacked legal provision caused direct injury will not be entertained.

In the interpretation petition no. 9/2001 on 30 January 2002, the Constitutional Court of Kuwait was requested by means of the Cabinet decision to interpret Article 145 of the Constitution in light of Articles 97 & 179 of the same, in order to indicate if the State Budget Laws, promulgated and put into effect after the beginning of the Financial Year, is deemed retroactive and, as such, implies the agreement of the majority of all members consisting the National Assembly (the Parliament) in accordance with Article 179 of the Constitution. The Constitutional Court decided that the State Budget Law is a formal one which does not contain any legal objective rules, so; it has not any retroactive effect. Accordingly, as the Court stated, putting the said Law into effect just implies the absolute majority of the members who attend the voting session of the National Assembly.

In the decision no. 1/2005 on 6 August 2005, the Constitutional Council of Lebanon was to decide the constitutionality or otherwise of Law no.679 of 19 July 2005 concerning postponement of reviews by the Constitutional Council. The latter invalidated the said Law on the ground that it is unclear, baseless and partly inapplicable as the present constitution of the Council is still a proper one until all substitutes are elected or nominated and after taking the oath of them all together, in accordance with the constitutional principle of Continuity of Public Authorities.

In the case no. 1/1919, the Supreme Court (Chamber of Constitutional Judiciary) of Libya invalidated Article 65 of Law no. 20/1968 concerning the Libyan University, on the ground that the attacked provision contradicts Article 30 of the Constitutional Declaration of Libya; as it deprived the petitioner to resort to any tribunal in order to annul or to suspend the execution of decisions issued by the university authorities on its students affairs, as the said constitutional provision secures the Right of Litigation to any individual in accordance with Law.

In the decision no. 583/04 on 11 August 2004, the Constitutional Council of Morocco struck down Article 11 of the Organic Law no. 63/00 on the ground that it contravenes the constitutional principle of Independence of Judiciary, as the said Article contains a baseless exception from adherence to Accusation Procedure, in favor of the President of the Supreme Court and the President of the Investigation Commission, while both of them practice the same judicial job compared with that of their colleagues who abide by the said Procedure.

In other decision: no. 586/04 on 12 August 2004, the Constitutional Council of Morocco was to decide the constitutionality or otherwise of Para (1) of Article 2 of the Law no. 17-01 concerns Parliamentary Immunity annulations which provides that in case of criminal accusation of any deputy; the General Agent of the King shall notify the accused deputy orally by the subject matter before he receives the deputy statement which he can not abstain to declare. The Constitutional Council struck down the last phrase: " .... which he can not abstain to declare" as part of the said Para, on the grounds that it contravenes the constitutional principles of both of Freedom of Expression and Innocence Presumption.



In the decision no. 007/EM on 21 July 1993, the Constitutional Council of Mauritania examined some provisions of the Law of Judiciary. In this decision, the Constitutional Council adopted several important principles as follows:

- Nomination of some judges by a decision of the Minister of Justice, after consultancy with the President of the Supreme Court, contravenes the constitutional principle of Independence of Judiciary, even though that nomination has been an interim and a time-limited one.
- Moving judges by a decree, upon submission of a justified report by the Minister of Justice, denies the constitutional principle of Independence of Judiciary.
- Obstructing any judge from being nominated to an electoral position ignores the constitutional principle of Equality to Access the Public Jobs and Positions.
- Preventing judges from attacking the decisions of the Judiciary Supreme Council contradicts with both constitutional principles of Independence of Judiciary and Right of Litigation.
- The appointment of two judges by the President of the Supreme Court as members of the Judiciary Supreme Council emerges imbalance in the constitution of the said Council; as these two members should be appointed by the Judiciary itself in accordance with the constitutional requisites. On the other hand, the appointment of two other members by the Senate Bureau and the National Assembly Bureau contravene the constitutional principle of Separation of Authorities

In the case no. 2/2000, on 2 October 2001, the Supreme Court of Yemen (the Constitutional Chamber) was to decide the constitutionality or otherwise of Para (B) of Article 78 of Law no. 31 of 1991 concerning Income Tax which provides that both of Tax Department and Tax Payer may attack the decisions, issued by the competent Tax Committee, in the tribunal of income tax litigations, in condition that the petition made by the Tax Payer would not be formally deemed acceptable unless the petitioner has paid 50% of the objected tax value. The Supreme Court invalidated the attacked provision on the ground that it put obstacles in the way to attain justice by the Tax Payer; which contravenes the Right of Litigation, nevertheless denies the constitutional principle of Equal Protection as it discriminate between litigants in exercising their constitutional right to resort to their natural judge.

Last but not least, it is very important to refer to some parts of speech by his Excellency the Secretary of Venice Commission in the Inaugural Ceremony of opening the Constitutional Court of Bahrain:

*The Venice Commission promotes the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. In fact they are not European values but truly universal ones. While each country is different and follows a different path at a different speed, these common goals apply to all of them. In the pursuit of these common goals, we can rely on a source, which is an accumulated wealth of legal reasoning: the judge-made law of our constitutions, that is to say, the jurisprudence of constitutional courts. Differ as it may from one country to another, this great corpus of judicial decisions does not fail to highlight the salient trends of modern democracy. In fact, the critical questions under review by constitutional and supreme courts often seem to arise at the same time, across national boundaries. The reason is that they reflect some of the current pressing needs of society and they have to be answered and accommodated by the judge who makes the constitution work in the ordering of social life. In transforming the constitution into a "living" law for society, constitutional justice, with a clearly established role in the institutional setting, is fundamental.*

*The purpose of our co-operation with constitutional courts is therefore to promote 'cross-fertilization' between the courts. In their exchange, constitutional judges can find common ground and draw inspiration from each other, thus furthering democracy.*

*We have seen that democracy is not a static state of affairs. It cannot be ticked off once it has been achieved; democracy is a continuously moving process. Democracy has to be conceived, reflected upon, tried, retried and constantly improved. Democracy needs a sound framework. This framework is the country's constitution, which provides for human rights, the state's democratic institutions and their interrelation. In those countries where a constitution court has been established, this important institution plays a key role in safeguarding democracy, human rights and the rule of law.*

*Constitutional review varies from country to country and this is a positive element. Each country has its historic and cultural background and deals with its own problems accordingly. What is important though, is that the basic standards of democracy are adhered to.*

Thank you and may God bless you.