



**3rd Congress of the World Conference on Constitutional Justice
'Constitutional Justice and Social Integration'**

28 September – 1 October 2014
Seoul, Republic of Korea

Reply to the questionnaire

Constitutional Court of Bahrain

COMPLETION OF THE THIRD WORLD CONFERENCE QUESTIONNAIRE ON CONSTITUTIONAL JUSTICE

A- Overview of the court

- Introduction:

A constitutional court was established in the Kingdom of Bahrain pursuant to the 2002 amended constitution and the ensuing decree Law No. 27/2002. It became operative on 2003. Thus the constitution identified the body that is entrusted with constitutional supervision of the laws and regulations. It is an independent court not a constitutional council. It is a separate court not a court circuit.

(A) 1 Basic Texts

Article 106 of the constitution of the kingdom of Bahrain provides that:

"A constitutional court shall be established. It shall be composed of a president and six members. They shall be appointed by Royal Order for a period to be specified by the law. The competence of the court shall be supervision of the constitutionality of Laws and regulations. The law shall set the principles that secure the members of the court against removal, set out the court procedures and grant the government, consultative council, the council of deputies and those concerned the right to challenge the constitutionality of laws and regulations before the court.

A ruling before this court that a text in a law a regulation is unconstitutional shall have immediate effect unless the court specifies a subsequent date. Thus convictions under such a text shall abate.

The king may refer to the court any draft law to verify its compatibility with the constitution. The court's decision shall bind all State organs as well as everyone else".

The constitution is outstanding because it adopted both world systems by providing the constitutional court with prior and subsequent supervision of the constitutionality of laws – None the less. It confined prior oversight to a court rather than a constitutional council.

The constitutional court Establishment Act (Degree Law No. 27/2002 amended by Degree Law No. 38/2012) consists of three chapters as follows:

(A) 2 composition, procedures and organization.

a- Composition

According to the constitution the court is composed of a president and six members appointed by Royal Order. for a period of five years according to the current law. The period is renewable for one time. The court justices are immune from dismissal. Section 4 of the Court Establishment Act provides that a member of the court shall be a holder of a law degree and experienced in legal affairs for a period of not less than fifteen years.

b- Organization

b- Section 6 of the Act provides that the court shall have a general assembly composed of all its members. It shall be competent to deal with organizational and internal affairs and all matters concerning its members. The court has a secretariat general.

c- Procedure

Section 18 of the law provided that:

“Disputes over the constitutionality of laws and regulations shall be submitted in the following manner:

a- At the request of the prime minister, the president of the consultative council or the president of the council of representatives.

b- Where it appears to any court hearing a case that a text in any law or regulation, necessary for the decision of the dispute, is unconstitutional, that court shall adjourn the case and transfer the record, to the constitutional court free of charge to resolve the constitutional question.

c- If a party pleads nonconstitutionality of a text in a law or regulation and it appears to the court that the plea is genuine it shall adjourn the hearing of the case and fix a period, not exceeding one month, for him to institute a suit before the constitutional court. The plea shall abate if the suit was not instituted within the fixed period.

The procedures are detailed in sections 19 to 27 of the law.

(A) 3 Competence and powers

According to section 16 of the Establishment Act "The Court shall have sole competence to adjudicate on disputes over the constitutionality of laws and regulations".

Section 17 of the Act restricted prior constitutional oversight of Laws and regulations to the case of royal transfer. It provided that "The King may transfer to the Court any draft law for a ruling on its compatibility with the constitution".

The court decides all secondary matters in accordance with section 29 and all disputes relating to the execution of its judgments pursuant to section 32.

(A) 4 Nature and effect of the rulings:

Section 30 of the Establishment Act provides that:

"Judgments and rulings of the courts shall be final and non-appealable".

Section 31 laid down the extent of the mandatory power of the court's rulings. It stated that "Judgments and rulings of the constitutional court on constitutional issues shall be binding on all State authorities as well as everyone else – They shall be published in the official gazette within fifteen days from the date of pronouncement.

A ruling by the court that a text in a law or regulation is unconstitutional shall have immediate effect. The text shall be inoperative as from the day after publication unless the court specifies a subsequent date. Where the court's ruling of nonconstitutionality pertains to a penal text any conviction under that text shall abate. The secretary general shall forthwith notify the public prosecutor for implementation."

(b) Social Integration

B-1-1 What challenges did the court meet, e.g. in the field of asylum, taxation or social security Laws?

The constitutional court started operation recently. There was no right of asylum dispute in its docket. Section 1 of the constitution forbids extradition of political refugees. Cases in other fields are:

1- Taxes and rates: In cs/3/03 – first year – The court held that "The contested 1987 decision of the central municipal authority which amended the rates schedule was ultra vires because it had overstepped the maximum fixed under Act No. 50/1951. That had been a violation of the current constitutional procedural state of affairs. Thus it is a nullity and therefore unconstitutional.

2- Protection of private property

2(1)- In c/s/2/05 – third year the court ruled Decree law No 8/1970 concerning acquisition of land for the public good unconstitutional because it failed to define the instances of public good, thus it violated Article 9 (c) of the amended constitution which required defining the circumstances which justify expropriation of real estate by the executive authority for public good, process and fair compensation.

Section 1 of the Decree law did not define the instances of public good when it stated that the goal of the expropriation was the benefit of the expropriator because the intention was to secure the requirements of public welfare schemes.

2-2- In c/s/1/06 – fourth – year the court stated that constitutional protection of the right of property under Article 9 (c) of the constitution is for the property irrespective of the nationality of the owner.

It follows that the protection of the right of property is not restricted to Bahrainis because the principle of the right of action under Article 20 (f) of the constitution is couched in such broad terms as to include foreigners. Thus foreigners as well as Bahrainis are entitled to challenge the constitutionality of the texts that impinge on the protection.

3- Contract

In c/s/2/07 – fifth year – the court stated that” This court has always held that it is Decree No. 9/1970 and not the general rent provisions of the Civil Law which governed renewal of temporary agreements. Thus provisions of the Decree superseded the rules of renewal of rent of premises in previous rent control laws”.

B-1-2 How were matters of social integration or conflict transformed into legal issues?

Some of the constitutional court rulings on taxes, rates, protection of the right of private property and renewal of tenancies show that such subjects which might impact on social integration or conflict could turn into judicial conflict. They were heard by the competent courts and transferred to the constitutional court which ruled upon them strictly according to the provisions of the constitution.

B-1-3 Are there indications of increase of cases involving legal matters concerning social integration? If so what issues were prevalent in your court and what are the current issues?

The constitutional court of Bahrain started to function only since September 2003. The few cases before it are only commensurate to the population of the kingdom which is

around one million including foreigners. For this reason the rate of increase of cases in a particular field cannot be monitored.

B-2 International standards of social integration.

B-2-1 What are the international influences on the constitution in relation to issues of social integration / social affairs?

Article 37 of the amended constitution provided that:

“The King shall conclude treaties by decree and shall forthwith convey the same to the consultative council with relevant memorandums. A treaty concluded, ratified and published in the official gazette shall have the force of law. However peace and alliance treaties, treaties concerning state territory, natural resources, sovereign rights, public or private rights of citizens, commerce, navigation and residence treaties and treaties which involve the state treasury in paying extra budgetary expenses or entail amendment of the laws of Bahrain must be enacted by legislation in order to be operative.

Under no condition may a treaty contain secret clauses which contradict the open clauses”

Thus international treaties acquire the force of law only after having met the necessary requirements, been ratified and published in the official gazette. Hence they become part of the municipal law by virtue of incorporation into the internal legislation.

This has been confirmed in CS /3/07 – fifth year-. The court stated that” Also section 20 of the uniform transarabia motor traffic insurance agreement provided that compensation for traffic accidents shall be according to the terms and conditions of the compulsory insurance law in the countries where the accident took place” Bahrain joined in virtue of Decree law No 8/1985 after satisfaction of the required constitutional process, enactment and publication. Therefore the agreement has the force of law “.

B-2-2 Does your court apply particular rules of international origin or background concerning social integration?

Act No. 1/2008 concerning combating traffic in human beings pursuant to the international conventions" U.N convention on the rights of the child – U.N convention on the elimination of all forms of discrimination against women – U.N convention against transnational organized crime–convention on the abolition of slavery and the slave trade" which went through the required constitutional process, was enacted and published in the official gazette; So they became municipal law.

Also Article 121 (a) of the amended constitution stipulates that" Application of this constitution shall not prejudice commitments in treaties and conventions concluded by the kingdom of Bahrain with States and International Organizations." This text does not mean that an international treaty is superior to the constitution – it is of a lower rank than the constitution and equal to the municipal law.

The text shows that Bahrain honors treaties concluded before the inception of the State of Bahrain – so called before the amended constitution of 2002.

B-2-3 Does your court apply directly any international agreements about social integration?

According to Article 37. Of the constitution the Kingdom of Bahrain applies international agreements after they were transformed into municipal law.

B-2-4 Does your court take international agreements implicitly or explicitly into account when it applies them?

According to section 16 of the Constitutional Court Establishment Act (Decree law No. 27/2002) " The Court shall have sole competence to adjudicate on disputes over the constitutionality of Laws and regulations" Law is what issues from the legislature in accordance with the constitution provided that " No law shall be enacted unless passed by either the consultative and deputies councils or the national assembly as the case maybe, and received Royal assent." Regulations that are subject to the constitutional

court supervision are regulatory decisions of a legislative nature issued by the executive authority under Articles 32/38/39 of the constitution.

Nevertheless the constitutional court is free to resort to and highlight international agreements. So far no cases involving international agreements came up before the court.

B-2-5- Did your court encounter inconsistencies between national and international norms? How was the inconsistency resolved?

Not so far. Most international agreements concluded by the government of the Kingdom of Bahrain were incorporated in to the municipal law. They became subject to constitutional supervision by the court as such.

3- The constitutional enhancing and supporting tools of social integration.

B-3-1 what type of constitutional law concerning social integration is applied in your court e.g. basic rights, constitutionality, the substantive Law and guidelines of State objectives?

The amended constitution of Bahrain 2002 is a written constitution. It is rigid. It can only be amended by special strict procedures. According to Article 106 of the amended constitution the constitutional court has sole competence to supervise the constitutionality of laws and regulations. This competence is corroborated by section 16 of the Constitutional Court Establishment Act (Decree law No.27 2002).

In cs/3/04 – second year the constitutional court held that:

“ The most important reason for the court’s existence is to ensure compliance of the legislative and executive authorities with the provisions and precepts of the constitution as they issue general rules that regulate the rights and liabilities of individuals. The court guarantees constitutional legitimacy through preservation and protection of the current constitution against transgression and consolidation of the concept of democracy which is established by the constitution. This legitimacy is at the apex of the

State's legal structure and a branch of the rule of law. It is the highest of the obligatory rules".

The constitutional court has the sole competence to adjudicate on the constitutionality of legislative texts. It confirms legislation that is consistent with the constitution and annuls what is inconsistent with it pursuant to the constitution which is the highest obligatory norm.

The amended constitution contains equal rights for both sexes personal such as freedom under the law (Article 19) No extralegal incrimination or punishment, prohibition against physical or mental punishment and the right to counsel of choice (Article 20) prohibition against extradition of political refuges (Article 21) freedom of conscience, sanctity of places of worship and freedom of performance of religious rites (Article 22) freedom of opinion and scientific research, expression and publication, verbal, in writing or otherwise (Article 23) freedom of the press, printing and publication (Article 24) proscription of entry or search of dwelling places without permission of the dwellers (Article 25) freedom and confidentiality of postal, telegraphic, telephonic and electronic correspondence unless in the case of legally prescribed exigency and subject to the process and security stipulated in the law. (Article 26) freedom of peaceable association and trade unions for lawful purposes as provided under the law (Article 27) freedom of public assembly as provided under the law (Article 28) the right of the individual to petition public authorities in writing and under his own signature (Article 29) The State strives for peace. Integrity of the homeland is part of the integrity of the Arab homeland (Article 30). Rights and liberties enshrined in this constitution may only be regulated or delimited under or pursuant to a law. Regulation or delimitation shall not infringe upon the substance of the right or liberty. (Article 31)

B-3-2- What provisions of constitutional law may individual litigants draw upon?

Submission of suits to the court must be according to sections 18 (b) and (c), 19 and 20 of the court's establishment Act (Decree law No. 27 2002). The court verifies the deadline and standing to sue before going into the merits of the case. The court ruling is conclusive and absolutely binding on all State organs as well as everyone else. This

conclusiveness forestalls further debate over the ruling or attempt at circumventing it by asking the court to review it. The legislature firmly established the finality of the court ruling by setting up a presumption of knowledge. Thus section 31 of the Constitutional Court Establishment Act provides that the ruling". Shall be published in the official gazette within fifteen days from the date of pronouncement".

It is a fact that the court's reasons for dismissing a challenge to the constitutionality of a text do not stop at conformity of the challenged text to the constitutional provisions alleged to have been violated. The court must further satisfy itself that the text does not violate any other constitutional text.

B-3-3- does your court have direct interaction with rival social factions (e.g. through individual plaintiffs / petitioners)?

Section 18 of the Constitutional Court Establishment Act (Decree law No. 27/2002) provides that:

"Disputes over the constitutionality of laws and regulations shall be submitted in the following manner:

A- At the request of the prime minister, the president of the consultative council or the president of the council of representatives".

This means that the prime minister, the president of the consultative council and the president of the council of representatives have standing to sue in their capacity as representatives of their councils.

This right is restricted to the executive and legislative authorities. Individuals may utilize indirect litigation under section 18 (c) of the Court Establishment Act. A party in a hearing pleads constitutionality. If it considers the plea genuine the court adjourns the hearing and grants leave to institute a constitutional suit within one month. It is a matter of public policy that individuals may not initiate direct constitutional action. The stake in the constitutional suit and that in the substantive suit must be correlative in the sense that settling to constitutional issue must be an essential prerequisite to a ruling on the claims relating to it before the trial court.

B-3-4- How does your court resolve social conflict (e.g. nullifying discriminatory legal text by abstaining from applying them?)

Section 31 of the Constitutional Court Establishment Act (Decree law No. 27/2002) provides that "The judgments and rulings of the constitutional court on constitutional issues shall be binding on all State authorities as well as everyone else – they shall be published in the official gazette within fifteen days from the date of pronouncement.

A ruling by the court that a text in a law or regulation is unconstitutional shall have immediate effect. The text shall be inoperative as from the day after publication unless the court specifies a subsequent date.

Where the court's ruling of nonconstitutionality pertains to a penal text any conviction under that text shall be quashed. The secretary general shall forthwith notify the public prosecutor for implementation".

A ruling of nonconstitutionality is of absolute binding authority because it cancels the text thus obviating dispute over its constitutionality. The rulings bind all the courts in the kingdom. The legislative authority would be bound to revise the text to bring it in line with the provisions of the constitution.

The rulings also obligate the executive authority not to apply the flawed text. All individuals and bodies in the kingdom are obliged to shun the tainted text even if they were not parties to the constitutional action in which the ruling of nonconstitutionality was pronounced. According to the general rules both ruling and reasons for the decision in a constitutional dispute are binding.

A ruling that a penal text is unconstitutional applies retrospectively from the date of pronouncement. According to the explanatory note of the amended constitution – which is the reference for interpreting the constitution and has an equally binding authority – "The text excluded from the rule of immediate effect of the judgment criminal convictions under the law which was ruled unconstitutional and thus abated. A fortiori all criminal cases pending at the time of the ruling would lapse"

B-3-5- Can your court take a precautionary measure to avoid social conflict, e.g. by means of imposing a particular interpretation that binds all State organs?

The constitutional court interprets the constitution or law in the context of its competence to resolve legal disputes before it wherever the implementation of the constitutional texts within the scope of the dispute is requisite for resolving the issues raised.

The subject of constitutional suits is mostly resolution of alleged conflict between a legislative text and a constitutional norm. This is because constitutional supervision mostly requires interpretation of the constitutional text so as to ascertain its purport and scope of application. Interpreting the constitutionally challenged text might also be required.

As a rule constitutional texts are considered to be complementary, harmonious and purposeful. They are not viewed as ideal values isolated from their surroundings.

Interpretation does not mean alteration nor supplementation. It is revelation and clarification so that potential ambiguity, obscurity or obfuscation in the text might be removed. After ascertainment of the actual connotation of the text the constitutional court explores the conformity of the legislative text under consideration with the constitutional text. Either the constitutional challenge is dismissed in case of the affirmative or the text is declared unconstitutional in the negative case.

In c/s4/2010 – eighth year – the constitutional court stated that " This court consistently held that in order to exercise its constitutional mandate of supervision this court must verify the texts under consideration and ascertain their conformity with the constitutional provisions. The court is not bound by the legislature's portrayal of the subject which it regulates nor by the parties' interpretation of the text. Therefore identification of the objectives or purports of the legal texts predates the court's examination of constitutional challenges."

B-3-6- Did your court find difficulties in applying these tools?

No – Bahrain is a constitutional monarchy. According to Article 32 of the amended constitution the system of government is based on separation and cooperation of the legislative, executive and judicial authorities. Article 104 (B) proclaims independence of the judges and noninterference with the course of justice. It provides that the law shall guarantee the independence of the judiciary and expound the immunities and prerogatives of judges.

Article 106 of the constitution and section 9 of the Constitutional Court Establishment Act (Decree Law No 27/2002) guarantee job security for the court judges.

B-3-7- Is your court unable to resolve social conflict, e.g. because of restriction of access to State organs?

Please refer to Para 3-3 above.

B-4 the role of constitutional justice in social integration.

B-4-1- Does your constitution enable your court to take effective measures to resolve or avert social conflict?

Article 106 of the amended constitution provides that. "A constitutional court shall be established. It shall be composed of a president and six members. They shall be appointed by Royal order for a period to be fixed by the law.

The court shall have the competence of constitutional supervision of laws and orders... The King may transfer draft laws to the court for verification of constitutionality. The court's determination shall be binding on all state authorities as well as everyone else".

The explanatory note to the constitution stated that "Challenging the constitutionality of a law does not bar enforcing it pending a ruling of nonconstitutionality. This would result in enforcing an unconstitutional law for an indeterminate period. This is the criticism which is levelled at subsequent oversight of the constitutionality of laws. The text avoids this shortcoming by means of enabling the King to transfer to the court for constitutional review any bills passed by the consultative council and the council of

deputies so that He would withhold enactment if the court rules the law unconstitutional. However the King can always refer back to the two councils for review any law on grounds other than constitutionality. The text asserted that in this case the finding of the court binds all state authorities as well as everyone else so as to anticipate challenge to the law after enactment since it would be res Judicata.

The King's right to call upon the court to exercise prior oversight of the law ensures enactment of constitutionally sound legislation thus realizing stability and protecting legal standings based on current laws. This spares individuals the potential pitfalls of unconstitutional laws that eliminate interests and rights because such laws usually persist until an aggrieved party raises a constitutional objection.

His Majesty the King exercised this right by transferring the Bahrain Chamber of settlement of economic, financial and investment disputes bill to the constitutional court for constitutional review.

In RT/1/09 - seventh year - the court found sections 1,10,23,24 and 26 of the bill unconstitutional. The court stated that " according to Article 106 of the constitution the constitutional of court is competent to exercise prior constitutional supervision over the bill under consideration".

It is noteworthy that rulings and findings of the constitutional court on constitutional issues are final. They are binding on all State authorities as well as on everyone else. They are to be published in the official gazette within fifteen days of pronouncement.

B-4-2- Is your court a de facto social medium or / was such a role attributed to it?

The commentary on Article 106 of the amended constitution stated that " This text chose that supervision should be assigned to a specialized court to be set up for the purpose because placing the constitutional court outside the judicial hierarchy would avert many of the problems that would arise from intrusion of the conventional judicial authority in to the vocation of the executive authority".

This means that the constitutional court is a separate and independent judicial entity (section 1 C.C.E. Act,) Its members enjoy all guarantees, privileges and rights accorded

judges of the court of cassation (Section 15 C.C.E Act) Its rulings and findings are final (Section 30 C.C.E. Act) and its rulings and findings on constitutional issues are binding on all State authorities as well as on everyone else. They are to be published in the official gazette within fifteen days of pronouncement. (Section 31 C.C.E. Act).

B-4-3- Did the socially effective elements (Political parties) fail to come to a consensus and referred the issue to your court which had to improvise a legal solution that should have been sought in the political domain?

On 17/11/2008 the council of deputies requested that s. 15 of the Civil Service Act (No. 35/2006) be declared unconstitutional for violating Article 16 (A) of the amended constitution. The section reads as follows: " Public office is a national service entrusted to the incumbent. State employees shall strive for public welfare in the performance of their jobs. Foreigners shall not be appointed to public office except in cases specified by law."

In T/1/08 – sixth year the constitutional court ruled that the action had abated. The reasons for finding stated that. " the dispute in the present request is an action of nonconstitutionality against the text in itself motivated by commitment to the context of compliance with public welfare without any substantive claims.

The present request is in essence a constitutional suit because it is a dispute over the constitutionality of the challenged text but it is not linked to a legal dispute before the courts. Therefore the existence or abatement of the present dispute hinges on the persistence or otherwise of the challenged text. The text no longer has any legal bearing on the present dispute because it had been abrogated. So this dispute is irrelevant and should be adjudged abated.