The Court of Cassation Consultation Chamber in Bahraini Law: A Conflict between Civil and Common Law Traditions

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Abstract

The Court of Cassation (CC) is the highest judicial authority in interpreting the law, in addition to its essential role in unifying national judicial practice.

Recently, and as an attempt to reduce the burden on CC, several judicial systems have introduced what is known as the CC Consultation Chamber, the objective of which is to preliminary review appeals to rule on its admissibility. The Bahraini legislator along with other GCC and Arab states have adopted this approach. Nevertheless, the particular significance of this approach is not only in respect to the notion of the consultation chamber, but is rather related to the recognition of established legal principles (jurisprudence) as a formal ground to reject an appeal. A position that triggers legal questions in relation to the fundamental values in legal systems of civil law tradition where precedents are not classified as a formal source of law.

Hence, it is the aim of this paper to analyze the role played by the consultation chamber in the Bahraini CC when exercising its powers in relation to 'jurisprudence' as a ground to rejecting appeals. The paper tries to address this particular matter by reference to other jurisdictions in civil and common law systems. Furthermore, the paper pays particular attention to one of the recent cases brought before the Bahraini CC where parties have felt that "judicial justice" was jeopardized due to the consultation chamber's decision. The paper concludes that the present situation as it stands today is an illustration of the conflict between common and civil law traditions and recommends abandonment of 'jurisprudence' as a formal ground to reject an appeal in civil law traditions.

Key words: precedents, jurisprudence, appeal, reject, legal systems.

1. Introduction

The Bahraini Law of Civil and Commercial Procedures of 1971 is the main body of legislation which is concerned with regulating litigation procedures, along with methods of appeal before courts in the Kingdom of Bahrain. In order to provide a complete regulation to matters of litigation, the Bahraini Legislator has issued Law of the Court of Cassation of 1989, the latest amendment of which was in 2015.

The Court of Cassation (CC) is the highest authority in the judicial system, yet in judicial systems following the civil law tradition, appeals before the CC are limited to issues of the law, it is not a trial court, hence it does not reexamine the facts or merits of the case. This is the practice followed in France(1) and in all the other GCC States(2). Furthermore, legislators in the GCC states in particular and Arab states in general, classify appeals before the CC as non-traditional method of appeal(3).

To support the crucial role played by the CC, the Bahraini Legislator(4) has established a Technical Office. It provides the CC with an advisory opinion(5), prepares technical reports upon CC president's request, extracts legal principles established by CC, provides CC judges with previous judgments that are related to the legal issues presented before the court(6), and collect and compile CC judgments.

Moreover, the Bahraini legislator has introduced several amendments to CC Law, most important of which to our current discussion, is the amendment introduced by Law no (47) of 2014, according to which a Consultation Chamber (the chamber) was established. The chamber is not a separate entity from the CC, however, the purpose of which is to decide admissibility of appeals before the CC. in other words, it plays a filtering role. In deciding whether to admit an appeal or not, the chamber –as shall be discussed in this paper- is granted the right to assess the appeal against established legal principles (jurisprudence)

(1) For more details with respect to the French judicial authority, visit: http://www.justice.gouv.fr

(2) This shall be explained in details in the next part of this paper.

(3) Mohamed, Aldailami, Explanation of Bahraini Law of Civil and Commercial Procedures, 2nd edn, ASU publication, Bahrain, 2009, pp 282-297.

(4) See Article (7) of the Bahraini Law of Court of Cassation.

(5) It is worth pointing out that article (21) of CC Law (before its amendment) provided that, upon the expiry of the stipulated periods "……. The court clerk shall submit the appeal file to the CC Technical Office, the latter shall provide the president of the CC with its advisory opinion as soon as possible…."

(6) Salem, Alkuwari, Appealing judgments in accordance with Bahraini Law of civil and commercial procedures and court of cassation Law, 1st edn, Gulf News Publications, Bahrain, 2002, p. 228.

of CC. This particular issue was the reason behind this paper as it demonstrates a conflict between civil and common law traditions.

Therefore, this paper shall examine the concept of CC consultation chamber and evaluate its role by reference to civil and common law traditions.

2.Court of Cassation Consultation Chamber in Bahrain

In this section, we shall start by briefly examining composition and competence of the chamber according to Art (21) of Law No (47) of 2014 with respect to amendments of specific provisions of the Law of Court of Cassation. As a second step, the paper explores the difference between precedents and jurisprudence in common and civil law traditions.

2.1. Composition and Competence

Article (21) of Law no (47) of 2014 reads: "upon expiry of the prescribed periods in previous articles, the court clerk shall submit the appeal file to the CC Technical Office, the latter shall provide the president of CC with its advisory opinion as soon as possible. The president of CC shall order referral of the appeal to the Consultation Chamber to decide admissibility of the appeal. If the Consultation Chamber decides that the appeal shall be rejected for reasons related to invalid legal formality or procedures, non-compliance with appeal grounds as stipulated in articles 8 and 9 of this Law, or if the appeal is in contrary to CC previously established legal principles (jurisprudence), where such principles are sufficient to reply to the claims submitted in the appeal in a way that leaves no room to deviate from such principles, then the chamber shall render a final non-reversible decision. The reasons underlying the decision shall be briefly stated in the courts transcript… if the chamber finds otherwise, it shall allocate a date in order to examine the appeal while reserving its right to exclude some of the claims which it might find inadmissible, with brief reference to the reasons behind such exclusion…"

Accordingly, appeal before the Bahraini CC are subject to the following stages(7):

Thus, the appeal will be first examined by CC Consultation Chamber in a private non-public hearing session. The Consultation Chamber consists of CC judges who deliberate and discuss the appeal to reach a final decision regarding the appeal in question on whether it should be admissible or not, hence playing a different role from that of CC Technical Office which

(7) The reader should note that these stages take place within the Court of Cassation itself. The explanatory diagram lists these stages to show its sequence, it shall not however, be understood to mean that the Technical Office or the Consultation Chamber are separate entities from the Court of Cassation.

provides a non-binding advisory opinion. However, it is important to note that the term used in Arabic for this chamber is Mashoura, translated in English to Consultation. In other words, the title inaccurately makes one expects the decisions to be of non-binding nature.

2.2. Jurisprudence and precedents in civil and common law traditions

As explained in the earlier paragraph, the President of CC is ought to refer the appeal to the court held in Consultation Chamber so that it decides admissibility of the appeal. Despite its suggestive name i.e. being merely established for consultation purposes, the decision given by the Chamber in this context is not an advisory one; it is binding, irreversible and will either admit or dismiss an appeal.

Article (21) of CC Law – as amended- provides an exclusive list of the specific grounds for which an appeal is to be rejected by the chamber. Most important of which to our discussion is the Chamber's right to reject an appeal "…. if the appeal is in contrary to CC previously established legal principles, where such principles are sufficient to reply to the claims submitted in the appeal in a way that leaves no room to deviate from such principles…"

As the purpose of such ground is understood in the light of unifying previously established principles of CC; it is yet to be explained whether insertion of such ground is permissible in jurisdictions of civil law tradition.

Hence, it is the aim of this section to clarify this point as the following:

a. Jurisprudence in the civil law tradition

The common law tradition is a legal system that is based on the doctrine of precedents, the civil law tradition on the other hand, is a legal system where judges are bound by statutes[8]. This difference is attributed to the historical background that took place in these jurisdictions. France, prior to the French revolution, has suffered from authoritarian notions of power in the form of authority centralization which later led to the French Revolution. As a reaction to French people suffering, the revolution adopted the principle of absolute separation of powers. Therefore, legislations where the only source of law;

(8) For further details with respect to the difference, pros and cons, between the English and the French legal systems, see: Abbas, Aldakoki, judicial jurisprudence: concept, cases, and scope: comparative study to Islamic Fiqh, 1st edn, National center for legal publications, Cairo, 2015, pp.70-73. Also, for simplified review with respect to the same topic, visit:
The common and civil Law traditions, Bakeley Law Publication:
https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf (Last visit 30 April 2019).

courts had to apply these legislations with no authority to create legal rules through precedents, as this was the task of the legislative authority(9).

However, as the legal system developed, and the fear from the authoritarian notions has gradually disappeared, the French judicial authority started to revise the role played by courts. As a result, judges in jurisdictions following the civil law tradition started to bind themselves with their previous judgments, in a manner that was very similar to how judges in common law tradition dealt with precedents. The aim was to guarantee stability and to allow litigants to build trust in the judicial authority, as disputes of similar facts led to the application of the same legislative rule which consequently resulted in rendering the same judgment(10).

In the light of a constant and stable environment of judgments that were rendered in the absence of a clear or ambiguous legislative rule, French courts developed jurisprudence i.e. legal principles that enjoy stability by virtue of judicial practice. In brief, jurisprudence is not recognized as a source of law, yet remains of legal significance as it unifies judicial practice. In fact, the importance of jurisprudence in the French judicial system is increasing to an extent and significance similar to that of precedents(11).

b. Precedents in the common law tradition

The common law tradition is based on the doctrine of precedents, where courts have the authority to establish legal principles in their judgments. Precedents are defined as "judicial decisions that either establish or exemplify a norm of conduct that is binding for courts in future cases"(12).

The historical development for the notion of precedents is dated back to the 17th and 18th century(13) when courts started to apply the same judgments to

(9) For more details see: Vincy, Fon et al, Judicial precedence in civil law systems: a dynamic analysis, No. 26, International Review of Law and Economics, 2006, p.522

(10) Vincy, Fon et al, Judicial precedence in civil law systems: a dynamic analysis, No. 26, International Review of Law and Economics, 2006, p.521.

(11) Some scholars argued that judgments in the French judicial system are of conflicting nature, as the French legal system being the heart of the civil law tradition, does not follow the doctrine of precedents, yet the importance of jurisprudence in the French judicial system is similar to that of precedents; see: Laurent, Tanugi, Case Law in a Legal System without binding precedent: The French Example, Stanford Law School China Guiding Cases Project, 2016, Available at: https://cgc.law.stanford.edu/commentaries/17-laurent-cohen-tanugi/ (last visit: 30 April 2019).

(12) Bojan, Spaic, The Authority of Precedents in Civil Law Systems, Vol. XXVII, Studia Luridica Lubinensia, 2018, p.28.

(13) At the beginning, English courts - during the 16th century -started to apply the same custom in relation to procedural rules applicable before courts.

disputes that were similar in their subject matter. As a result, there was a shift in the legal significance of previous judgments from having an influential source to becoming the primary source of law(14). Precedents are therefore the cornerstone of common law, a constraint on judges so that like cases are decided alike(15) hence achieving justice, predictability, and efficiency as precedents can reduced the burden on courts so that there is no need to deliberate about every aspect of the case(16).

In the process of applying a precedent which in itself contains a principle, the facts of the two cases need not to be identical, as long as they are substantially similar with no material difference(17), so that the facts of the case are understood as the judge understood them(18).

When it comes to the actual structure of a precedent, the principle being the authoritative element is called ratio decidendi i.e. the rule of law on which a judicial decision is based(19). On the other hand, Obiter Dictum (Latin phrase meaning by the way) in a judgement, does not have a binding effect as it merely refers to what the judge said yet was not part of ratio decendi. However, Obiter Dictum is considered as persuasive authority(20).

In addition, one needs to bear in mind the following points in relation to precedents in common law:

- A precedent can be a precedent of interpretation which is simply a judicial decision laying down an interpretation of existing legal text. Hence, in future cases, where the same statutory or constitutional text is applied, the same interpretation is applicable(21).
- In some common law jurisdictions like the US, there are two types of precedents: persuasive and binding.

(14) Vincy, Fon et al, Judicial precedence in civil law systems: a dynamic analysis, No. 26, International Review of Law and Economics, 2006, p.521.
(15) William, Bader, Precedent and Justice, NO 35, Duq. L. Rev, 2011, p.40.
(16) Bojan, Spaic, The Authority of Precedents in Civil Law Systems, Vol. XXVII, Studia Luridica Lubinensia, 2018, P.40.
(17) Bryan, Garner, The Law of Judicial Precedent: Crafting precedents, Vol 131, Harvard Law Review, 2017, p. 547.
(18) «We are bound by the judge›s statement of the facts even though it is patent that he has misstated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment.» Charles, Collier, Precedent and Legal Authority: A critical history, Vol. 771, Wis. L. Rev, 1988, p. 791.
(19) Charles, Collier, Precedent and Legal Authority: A critical history, Vol. 771, Wis. L. Rev, 1988, p. 794.
(20) For more details, see: Martin, Raz, Inside Precedents: the ration decendi and Obiter Dicta, No. 22, Common Law Review, 2018.
(21) Bojan, Spaic, The Authority of Precedents in Civil Law Systems, Vol. XXVII, Studia Luridica Lubinensia, 2018, pp. 30-31.

- A binding precedent is related to ruling given by a court – on a legal matter- in specific jurisdiction so that courts of the same or lower level are bound by the precedent in cases of similar facts[22]. On the other hand, a precedent is persuasive when a court interprets a law and considers the decision as non-binding. For instance, a typical scenario of persuasive precedents would take place when a court from another jurisdiction delivers a verdict so that it is not binding for courts in another jurisdiction, yet it is observed as persuasive precedent[23].

As precedents are the outcome of judicial practice, one wonders whether future practice can alter or change previous precedents. In fact, a precedent can be changed when a higher court overrules the decision rendered by the lower court. Thus, if a supreme court overrules the decision given by the district court, the legal precedent will no longer be binding. Moreover, a legislation may amend, restrict or reverse a rule of common law but not the other way around[24].

Furthermore, jurists have identified certain factors as to when does a precedent lose its binding effect[25]. These factors include (workability), that is the inability to apply the first precedent due to its ambiguity, or if its application does no longer allow keeping up with the current developments. In addition, the requirement in relation to (legitimacy) is significant, as societies develop, certain legal principles could have been accepted in earlier times but are no longer acceptable in today's world. A factor that is highly influenced by international relations and conventions, and this exact factor plays as an incentive for legislators in civil law traditions to interfere by introducing amendments or by abolishing certain legislations.

The question remains however, as for irreconcilable decisions of equal authority i.e. none of them overrules the other, which triggers the question of which one to follow. In such case, it is agreed that if the case is in the lower court and the two decisions were issued by the jurisdiction's high court, then

(22) For example, if a district court in Florida issues a ruling on a certain legal matter, all Florida district courts and courts within that jurisdiction below district level are bound by that precedent in similar hearings.

(23) https://common.laws.com/precedent, (last visit: 30 April 2019).

(24) Michael, Clegg et al, The Hierarchy of Laws, International Foundation for Electoral Systems, 2016, available online at: https://www.ifes.org/sites/default/files/2016_ifes_hierarchy_of_laws.pdf (last visit: 30 April 2019).

(25) For further details, see: John, Walker , The role of precedent in the United States: How do precedents lose their binding effect, Commentary No. 15, CGC Stanford Law, 2016, Available online at: https://cgc.law.stanford.edu/commentaries/15-john-walker/ (last visit: 30 April 2019)

the recent decision should be followed[26].

c. Identifying grounds of similarities and differences between the two doctrines

The obvious difference between the two doctrines is certainly related to the legal authority of precedents as a formal source of law. As explained earlier, common law courts are bound by precedents whereas courts in civil law jurisdictions are not. However, in practice, both precedents and jurisprudence aim to achieve justice, predictability, and efficiency.

Nevertheless, these identified similarities are not to say that both doctrines are equal, but to merely show that the gap between the two -in relation to the effect in practice- is not that significant.

The difference between precedents and jurisprudence is most pronounced when there is a need to deviate from jurisprudence or precedents as the case maybe. As explained earlier, a precedent could be changed an amended by a higher court or by a legislation. The reasons and factors involved in overruling or amending a precedent are subject to specific conditions[27]. This is because such action is in fact an abolishment or a change to a binding legal rule rather than a mere legal opinion. In analogy, similar legislative restrictions and requirements are applicable when a civil law jurisdiction introduces a change or abolishes a former statutory provision.

On the other hand, it is well established that a judgment in the civil law tradition can by no means amend nor abolish a statute since a judgment should merely be an application of the legislative rule rather than an authority to establish one. Furthermore, if a court judgment contradicts with an expressive legislative rule, then the court has erred in its application of the law and the appeal should fall within the competence of the CC as the authority responsible for oversighting the accurate application of the law.

As for jurisprudence, a court in civil law tradition may deviated from previously established legal principles without being subject to the same requirements or procedures that are applicable in relation to precedents or legislations. This is because the legal significance of jurisprudence is not equivalent to that of precedents in common law tradition, nor to codified legislations in civil law tradition.

(26) Bryan, Garner, The Law of Judicial Precedent: Crafting precedents, Vol. 131, Harvard Law Review, 2017, p. 550.

(27) Kindly refer to our previous discussion under: b. precedents in common law tradition.

In summary, jurisprudence as established legal principles have no formal legal authority despite its moral importance and significance in judicial practice.

3. Evaluation and assessment in the light of other legal systems

As a result of the previous examination of the two legal systems, it is clear that precedents and jurisprudence are not identical doctrines as one is considered a formal source of law in its system whereas the latter is not.

Surprisingly however, the Bahraini legislator has allowed the Consultation Chamber to reject an appeal before CC if it was in contrary to the court's established legal principles. In essence, such provision –in the author's view- contradicts with the Article (1/b) of the Bahraini Civil Code which provides an exhaustive list to the formal sources of law in the Bahraini legal system(28), and does not recognize legal principles (jurisprudence) as one of these sources.

This particular fact is the heart of the argument in this paper as one should not have the right to appeal against a judgment on the grounds that it is in contrary to the jurisprudence of the court that has issued the judgment or any other court for this matter(29). Thus, it makes no legal sense that the legislator allows the Chamber to reject an appeal if it contradicts with the jurisprudence of the court, when such ground is not even listed as a formal source of law.

In fact, the term 'established legal principle i.e. jurisprudence' has not been used by the Bahraini legislator in any other law and it is therefore introduced for the first time by Article (21) of Law No (47) of 2014 as an amendment to CC Law.

The other grounds to reject an appeal that were listed in Article (21) bear no such conflict, as such grounds fall perfectly within the scope of being in violation to the law in the sense presented in Article (1/b) of the Civil Code(30).

In application of any legal provision, the court will certainly reason and justify its judgment. Hence, even if the Chamber decides to reject an appeal on the grounds that it contradicts with the CC jurisprudence, it will do so after thorough examination. Yet, the legal issue which we are trying to address here,

(28) Legislative decree no (19) of 2001 with respect to promulgating the civil code, article (1/b) reads: "in the absence of a provision of law that is applicable, the judge will decide according to custom and in the absence of custom in accordance with the principles of Islamic Sharia′a that suit the conditions and circumstances of the country. In the absence of such principles, the judge shall apply the principles of natural justice and the rules of equity."

(29) Abbas, Aldakoki, judicial jurisprudence: concept, cases, and scope: comparative study to Islamic Fiqh, 1st edn, National center for legal publications, Cairo, 2015, p.67.

(30) invalid legal formality or procedures, non-compliance with appeal grounds as stipulated in articles 8 and 9 of this Law are in essence violation of legislative legal rules.

has nothing to do with how the Chamber is expected to exercise its authority, but it is about giving the court a ground to make such judgment that is not legally recognized in our legal system at the first place.

Once again, this is not to underestimate or overlook the importance of jurisprudence as it unifies judicial practice(31), and is certainly viewed to be of significant moral value. In fact, one can rarely find cases where a judge of a lower court has actually deviated from the principles set by CC(32), as judges bind themselves – morally- to follow previous judgments to safeguard predictability.

Nevertheless, listing jurisprudence as a formal ground to reject an appeal not only contradicts with the Civil Code as the competent legislation to identifying formal sources of Law, but also with the Law of CC itself. This is because the Law of CC clearly states in Article (8/1) that appeals before the court should only be admitted if the appealed judgment was violating the law, or if it has erred in its application or its interpretation. Needless to say, jurisprudence is not law and thus is not a ground to bring an action before CC.

The particularity of 'jurisprudence' in the Bahraini judicial system – as examined earlier – can be further explored in the light of other legal systems:

3.1. 'Jurisprudence' as a cause to reject an appeal in other legal systems

When searching for 'jurisprudence' as a recognized ground to reject admissibility of appeals by Consultation Chambers in other legal systems, one must examine CC in common and civil law systems. Some jurisdictions have adopted the exact concept of the Consultation Chamber recognized by the Bahraini legislator. On the other hand, ad-hoc chambers and pools are found -in other legal systems- with the authority to provide advisory opinion similar in its nature to the role played by the Technical Office in the Bahraini judicial system. The reader should note that deep analysis of the judicial system of other jurisdictions is beyond the scope of this paper; hence, the following examination is purposely limited to finding answers to two questions: the first is weather the examined legal system adopts the concept of Consultation Chamber, and the second is whether 'jurisprudence' is recognized as a formal ground to reject admissibility of an appeal.

(31) See our previous discussion concerning jurisprudence in civil law traditions.

(32) Abbas Aldakoki, judicial jurisprudence: concept, cases, and scope: comparative study to Islamic Fiqh, 1st edn, National center for legal publications, Cairo, 2015, p.67.

• In the American legal system

Judge Warren E. Burger (the 15th Chief Judge of the US Supreme Court) has created what is known as (Cert Pool) in 1973; as the name suggests, it is a certiorari pool similar to a deliberation or consultation chamber, the objective of which is to have each judge appoint an assistant (clerk), who is usually an outstanding law graduate with no minimum requirement regarding age. The clerk shall conduct the needed research and studies and review submitted appeals to check if formal requirements are met. In order to reduce the burden on the clerks, the appeals were divided between clerks so that each clerk would have to study 4 appeals per week and provide the others with a memorandum of his opinion. The other clerks will receive the memo where each will forward it to his judge(33).

Thus, the role played by clerks in deciding admissibility of the appeal is limited to whether the appeal has met the formal requirements, the legal opinion a clerk submits in relation to the merits is merely advisory, and yet it was subject to criticism(34) on the grounds that most clerks are young and inexperienced which negatively affects the outcome of their decisions(35).

• With regard to the judicial practice in the UK(36)

one finds no equivalent notion to the Consultation Chamber as established by the Bahraini legislator. Hence, the matter of admissibility of appeals remains within the competence of the Supreme Court judges, with no reference to allowing rejection of appeals through preliminary review or on grounds of being in contrary to precedents(37).

• In France

the French Court of Cassation(38) does not adopt the approach adopted by

(33) Barbara Palmer, The 'Bermuda Triangle': The Cert Pool and its influence over the Supreme Court's Agenda, Vol. 18, Constitutional Commentary, 2001, p.107.

(34) Ibid, pp.111-119.

(35) It is worth noting that Judge Neil M Gorsuch who was appointed in the Supreme Court in 2017, refused for his clerk to take part in the clerk pool, to be the second judge – after Judge Samuel A. Alito- to reject the concept of clerk pool since its establishment up to date. Accordingly, Judge Neil M Gorsuch will personally review all appeals regardless of the opinion provided by the clerk pool. For further details see: Debra, Weiss, Gorsuch will not join cert pool, ABA Journal, 2017, available online at: http://www.abajournal.com/news/article/gorsuch_joins_alito_in_breaking_with_this_arrangement/, (last visit: 30 April 2019).

(36) For a general reference on the British Judicial System, see: Fahmi, Shukri, Encyclopedia of the British Judiciary, 1st edn, Dar Althaqafa publication, Amman, 2004, pp. 13-25.

(37) For more details, visit the official webpage of the UK Supreme Court: https://www.supremecourt.uk/about/index.html, (last accessed 25/5/2018).

(38) For a detailed reference on the French judicial system, see: Loic, Cadiet, Introduction to French Civil

the Bahraini legislator in relation to CC Consultation Chamber. According to the latest legislative amendment issued by Law No (25) of 2001, each chamber of the French CC – comprising of 3 judges- shall examine submitted appeals in the preliminary review stage, where it is merely in relation to formal requirements or where it is clear that the appeal is not based on any legal ground. It is worth pointing out that the judge in charge of preliminary review of the appeal is required to study the file and write a summary of facts along with his legal opinion with respect to the appeal, in addition to the reasons why the appeal should not be admissible, and eventually this opinion will be submitted to the other court members(39). Hence, the preliminary review stage is similar to the role played by the Court of Cassation Technical Office rather than the authority given to the court as a Consultation Chamber.

Moving to some Arab States, the following is an examination to the role played by the CC Consultation Chamber in these judicial systems:

• **UAE**

In the UAE, the Legislator – at the Federal level- has amended Law No. (11) of 1992 on civil procedures by Federal Law No (18) of 2018. According to Article (183) – as amended- the appeal shall be examined by the Consultation Chamber. The chamber may decide that the appeal is rejected because:

- the prescription period has lapsed;

- procedures were invalid;

- the appeal was brought on the basis of grounds other than the ones listed in article (173) of the Law; or

- if the legal matter that is raised in the appeal has been already decided by the court as one of its previous judicial principles, and there is no justification to deviate from it.

Inadmissibility of the appeal shall be stated in the court's transcript with brief reference to the underlying reasons (40).

Justice system and civil procedural law, No. 28, Ritsumeikan Law Review, 2011.

(39) For better understanding of the French Court of Cassation and admissibility procedures, visit the official webpage of the French Court of Cassation at: https://www.courdeCassation.fr/about_the_court_9256.html, (last accessed 26/5/2018).

(40) A paper concerning the Consultation Chamber in the UAE Judicial system has been examined by: Abdul-wahab, Abdoul, Examination of appeals before the Court of Cassation in Consultation Chamber: paper

Therefore, the legislator in the UAE has adopted the same approach followed by the Bahraini legislator. Both legislators provide for preliminary review of appeals by the court in a Consultation Chamber, and recognize judicial principles i.e. jurisprudence as a ground to reject admissibility of appeals.

- **Kuwait**

Reference to the consultation chamber is found in relation to civil and criminal matters. Article (154) of Legislative Decree No 38 of 1980 promulgating civil and commercial procedures, states that an appeal is examined by the CC -formed as consultation chamber- to decide admissibility of an appeal. However, no reference is found in relation to jurisprudence as a recognized ground to reject an appeal.

As for criminal matters, Law No (40) of 1972 with respect to appeal procedures before Court of Cassation, makes a reference to the consultation chamber in Article (11) in relation to appeals brought by the Public Prosecution, or by the convicted in a custodial penalty. In such case, the court – formed as Consultation Chamber- after hearing the opinion from office of the Public Prosecution at the Court of Cassation, may render a final irreversible decision to reject the appeal for reasons related to formal or procedural invalidity. Inadmissibility of the appeal shall be stated in the court's transcript with brief reference to the underlying reasons(41). Nevertheless, no reference is found in relation to jurisprudence as a ground to reject an appeal.

- **Qatar**

Article (16) of Law no (12) of 2005 with respect to conditions and procedures of appeal before Court of Cassation in non-criminal matters reads: "The Court of Cassation shall review the appeal in the Consultation Chamber once the president of the court appoints one of the judges as a rapporteur; if it finds the appeal to be worthy of review because it is likely to be admissible or a new unprecedented legal principle is expected to come out of deciding such appeal, then a date to review the appeal shall be set. In case the Consultation Chamber finds the appeal to be formally invalid, or unworthy of review, it shall reject the appeal by final irreversible decision.

presented in the second conference for the presidents of supreme courts and courts of cassation in the GCC in the Kingdom of Bahrain, 2013, available online at: https://www.bibliotdroit.com/2016/07/blog-post_22.html, (last visit: 30 April 2019), pp. 8-9.

(41) For full review of Law No (40) of 1972 provisions – in Arabic- you can visit: http://www.gcc-legal.org/LawAsPDF.aspx?country=1&LawID=1035.

Inadmissibility of the appeal shall be stated in the court's transcript with brief reference to the underlying reasons".

Hence, the Qatari legislator adopts the same reasons that were adopted earlier by comparative legislators to refuse an appeal, in particular the reasons related to formal or procedural invalidity. In addition to that, the Qatari legislator uses a general flexible wording 'In case the Consultation Chamber finds the appeal to be … unworthy of review', hence, leaving the matter to be decided according to the discretionary power of the Consultation Chamber. The flexibility and loose boundaries of the wording of this article means that – in theory- the Consultation Chamber may decide to reject an appeal if it finds it to be in contrary to jurisprudence of the court, this analysis is supported by the wording used in article (16) where it is clearly stated that an appeal is to be admissible if a new unprecedented legal principle is expected to come out from deciding such appeal. In other words, an appeal may therefore be considered 'unworthy' if no new legal principle was expected to come out from deciding it.

Nevertheless, the Qatari legislator did not explicitly refer to 'jurisprudence' or 'established legal principles' in the wording of the article.

- **Oman**

Article (248) of the Sultani Decree No 29/2002 with respect of promulgating Law of civil and commercial procedures, reads: "…. The appeal shall be reviewed by the court set as Consultation Chamber. The chamber may decide that the appeal is to be rejected because of reasons related to lapse of prescription period, invalidity of procedures, or if it was not based on any of the legal grounds listed in articles (239) and (240) of this Law. In such case, rejection of appeal shall be stated in the court's transcript with brief reference to the underlying reasons. If the Consultation Chamber finds that the appeal should be admissible, it should continue with review procedures…"

Therefore, the Omani legislator allows the Consultation Chamber to exercise its competence in preliminary review, yet limits its capacity to reject appeals to specific clear grounds, and does not refer to 'jurisprudence' nor does the legislator describe the decisions rendered by the Consultation Chamber as final and irreversible.

- **Egypt**

The Consultation Chamber is recognized by the Egyptian legislator in relation to criminal and civil matters.

The Egyptian Law on Criminal Proceedings promulgated by Law no (150) of 1950 – as amended by Law no (95) of 2003, refers to the Chamber in articles 101-109 where it was stated that preliminary investigation decisions issued by the Public Prosecution or the Investigation Judge shall be appealed before Consultation Chamber. The concept of Consultation Chamber as adopted by the Egyptian legislator in this sense, is different from the one applied in the context of appeals before the court of cassation as recognized in comparative judicial systems(42).

On the other hand, Law No (76) of 2007 amending provisions of civil and commercial procedures law, has introduced an amendment to Article (263) where the CC held in Consultation Chamber was given the competence to reject an appeal on grounds including if the appeal was brought on grounds contrary to the court's established judicial principles. Hence, adopting the position that was followed in Bahrain and UAE.

- **Jordan**

The concept of CC Consultation Chamber was not adopted by the Jordanian legal system(43). The Technical Office of CC supports the court in carrying out its tasks in a manner similar to the role played by the Technical Office of CC in comparative judicial systems. Accordingly, the legal system in Jordan does not authorize CC to reject appeals if it was in contrary to the jurisprudence of the court.

In conclusion, the concept of examining an appeal by the CC held in a consultation chamber is recognized in several legal systems. However, recognizing jurisprudence as a formal ground to reject an appeal if it was based on a legal claim that is contrary to what has already been established by CC as legal principles, was only adopted by the legislator in Bahrain, UAE and Egypt.

3.2. Consultation Chamber and the issue of conflicting outcomes

It is beyond any doubt that principles of justice and equality are fundamental principles in today's civilized societies and the cornerstone of the rule of law. These principles were recognized in The Universal Declaration of Human Rights 1948. The legal significance of UDHR was interpreted by states, and the principle of justice and equality were recognized as constitutional rights; therefore stating that all are equal before the law in rights and

(42) For more details, see: Ebrahim, Sayed Ahmad, Competence of Consultation Chamber in Civil and Criminal Matters, 1st edn, Dar Alkutob Alqanuniah, Cairo, 2003.

(43) The official webpage of the Jordanian Judicial Council: www.jc.jo/types.

obligations[44]. The Bahraini constitution –as amended in 2002- established these principles in article (4) of Chapter II titled (Basic Constituents of Society) where it reads: "Justice is the basis of government, cooperation and mutual respect provide a firm bond between citizens. Freedom, equality, security, trust, knowledge, social solidarity and equality of opportunity for citizens are pillars of Society guaranteed by the State"[45].

These fundamental principles are safeguarded by the judicial system as courts aim to achieve justice by treating all parties equally. In common law tradition parties are equal since precedents mean that similar cases are decided alike. In civil law tradition, similar cases are subject to the same legal rules and jurisprudence enjoys a moral authority in order to unify judicial practice.

However, as illustrated earlier in this paper, jurisprudence was recognized as a formal ground to reject an appeal before CC Consultation Chamber in Bahrain. A ground that is not 'clearly defined' in the Bahraini legal system when compared to legislative rules found in published legislations. This leads to the question on whether obtaining judicial justice is hindered by enforcing 'jurisprudence' as a ground to reject an appeal. In other words, is it –at least – theoretically possible that an appellant may miss the opportunity to have his appeal reviewed by the CC if the latter–when held as a consultation chamber- decides in its preliminary review that the appeal is to be rejected for reasons related to conflict with court's jurisprudence? A reason that – as explained earlier in this paper- should not be recognized as a formal legal ground in this legal system at the first place, therefore, jeopardizing the principle of judicial justice.

This theoretical assumption was in fact a reality in one of the recent cases before the Bahraini CC. The CC as a Consultation Chamber has issued a decision in Appeal No. (1151) of the year 2015[46] which was in contrary to a previous judgment by the Court of Cassation -Appeal No (857) of the year 2015[47]- where the merits of both cases were exactly the same with time difference of merely 4 months between the two cases. To illustrate further,

(44) For thorough analysis to the principle of equality and how it is protected in Constitutions of Arab states, see: Shehata, Diab, Principle of Equality in Constitutions of Arab States, 1st edn, Dar Alnahda publications, Cairo, 2001. The author addresses the historical development of this principle, its concept, nature, and means of protection which varies according to the political system of each state.

(45) To illustrate the importance of this principle, article (120) of the Bahraini Constitution does not allow introducing any change or amendment to the constitutional principles of equality and freedom. Moreover, article (18) of the constitution guarantees that all citizens are equal before the law in public rights and duties without discrimination

(46) Appeal No. 10/1151/2015/3 Case No. 7/14641/2013/02 dated 26th Oct. 2017.

(47) Appeal No. 10/2015/8571/1 Case No. 02/2013/14695/6 dated 20th June 2017.

the following is a summary of the facts of both appeals:

- **The first appeal** (Appeal No (857) of the year 2015): the appellant submitted her appeal to the CC against a real estate company that failed to comply with its obligation to deliver the property on the agreed date. She requested to be refunded -double the amount she paid as a deposit- according to the terms of the contract. The CC held as a Consultation Chamber in this case decided to admit the appeal, accordingly a date was set to review the case by the court. When the case was heard on the set date, the court ruled in favor of the appellant and ordered the real estate company to pay the claimed amount and clearly stated in the judgment that the parties' intentions were explicit in the contract which leaves no room for the court to exercise its discretionary power by otherwise interpreting the terms of the contract. Hence the real estate company is ought to pay double the amount paid by the appellant as it was agreed between the parties that the amount is a deposit rather than a down-payment.

The court -held in consultation chamber- did not explicitly state, in its judgment, that the second appeal was rejected as it was contrary to the court's jurisprudence(48). Yet, rejection was not made on grounds of invalid formality or procedures, nor because the appeal was not based on the legal grounds listed in article 8 and 9 of the CC Law. Thus leaving one final ground to be applied i.e. contrary to the court's established legal principles that matters of merits should be left for the trail court to decide, although in the first appeal the court found that trail court's interpretation to the contract provisions was in breach of provisions of the civil Code and against established legal principles of the Court.

This decision as it is in conflict with a prior judgment given by the CC itself, has in fact wasted the appellant's constitutional right in obtaining equal judicial justice, thus risking justice as an element of the basic constituents of the society.

It is worth noting that the law prescribes no method to dealing with any error committed by the Consultation Chamber, hence leaving litigants with no alternative but to claim compensation from the Ministry of Justice(49).

4. Conclusion

The aim of this study was to highlight the role of the Consultation Chamber

(48) The established legal principle here being CC has no authority over a judgment rendered by the court of first instant if it was based on enough grounds to justify its conclusion.

(49) Abdulwahab, Abdoul, Examination of appeals before the Court of Cassation in Consultation Chamber: paper presented in the second conference for the presidents of supreme courts and courts of cassation in the GCC in the Kingdom of Bahrain, 2013, available online at: https://www.bibliotdroit.com/2016/07/blog-post_22.html (last visit: 30 April 2019), p. 13.

in the Bahraini judicial system. The explicit reference to 'jurisprudence' as introduced in the amendment to the CC Law, triggered the question with regard to the validity of such ground in the Bahraini legal system as a civil law jurisdiction.

For complete comprehension of the matter, the paper has examined the doctrine of precedents as opposed to jurisprudence, and then studied the position adopted by other legislators from both legal traditions. As a final step, the paper has examined a particular case before the Bahraini CC where two identical appeals were decided differently as one was admitted and the second was not.

In conclusion, this paper can be summed up in the following points

1. The Bahraini legal system is not alone in adopting the concept of consultation chamber in the Court of Cassation. However, only few legislators – including the one in Bahrain- have recognized 'jurisprudence' as a formal ground to reject an appeal in jurisdictions of civil law tradition.
2. There is no legal basis in the Bahraini legal system or the civil law tradition in general, that allows recognized jurisprudence as a formal legal ground to reject an appeal.
3. The current practice of the Consultation Chamber seems to have the potential of creating serious legal risks. This was clearly illustrated in the decision given by the court in two appeals that were identical on their merits; yet the court -as consultation chamber- decided inadmissibility of the latter, therefore denying the appellant the right to obtain judicial justice.

Although there is no study yet as to whether the CC consultation chamber has achieved the goals for which it was established, one can still find answers in other jurisdictions. In Kuwait for example, the Consultation Chamber failed to achieve its main objective which was to reduce the number of appeals brought before the CC. The Kuwaiti experience in this respect showed that most of the appeals that were admitted by the Consultation Chamber were supposed to be rejected at the preliminary review stage, and as a result some suggested abolishing the Consultation Chamber all together(50).

In the light of the above, this paper calls for the following recommendations:

1. The judicial authority in the kingdom of Bahrain shall Conduct a formal study to assess and evaluate the role played by the consultation chamber and whether it has achieved the goals for which it was established;

(50) Suggestion submitted by the MP Abdulla Alroumi, Feb 2017, see: http://www.mohamoon-kw.com/default.aspx?action=DisplayNews&type=1&id=37906&Catid=30 (last accessed June 2018)

2. The future of the Consultation Chamber should be decided depending on the outcome of such study, hence, if the study shows that the 'filtering' process exercised by the chamber is not being accurately carried out, then the whole concept of consultation chamber should be abolished;
3. In any case, even if abolishment of the consultation chamber was not feasible, amendment of its competence is required. It shall limit inadmissibility of appeals in preliminary review to formal and procedural invalidity. Jurisprudence as a formal ground to reject an appeal should be overruled as it has no legal basis in our legal system and presents a real risk to achieving judicial justice.

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