

BUCHBESPRECHUNGEN / BOOK REVIEWS

Anja Schoeller-Schletter (ed.), Constitutional Review in the Middle East and North Africa, Nomos, Baden-Baden 2021, 405 pages, EUR 89.00, ISBN 978-3-8487-7151-6.

What is the legacy of the Arab Spring? When people across the Arab world took to the streets in 2011 and long-term autocratic rulers, such as Tunisia's Ben Ali and Egypt's Mubarak, were ousted from government within weeks, this came as a surprise to the vast majority of international (and Arab) observers. A new era promising freedom, social justice, and democracy had dawned in a region where autocratic rule historically appeared to be embedded in the political DNA. Once the US and Europe had realized that the political landscape across the Middle East and North Africa (MENA) was changing dramatically, there was frantic support for the peaceful transition to democracy. Ten years down the road, most observers would take a much more sober approach: in many countries in the MENA region, authoritarian rule is back. To the extent constitutional reforms were implemented, they were rather limited. Some countries are plagued by protracted instability, civil wars, and economic crisis. EU foreign policy is guided by fears of unregulated migration and terrorism.

Against this backdrop, the volume on Constitutional Review in the Middle East and North Africa, edited by Dr. *Anja Schoeller-Schletter*, provides a counterpoint that is more than welcome. The editor, an international specialist of comparative constitutional law who worked for many years as a researcher, practicing lawyer and head of program for a political foundation in Egypt and Lebanon, holds that since 2011 there was a "rising awareness in the region of the importance of constitutional review as an instrument of judicial oversight" (p. 13). This, according to Schoeller-Schletter, was part of a larger development: "Several countries have undertaken significant reforms. Initiatives to improve institutional structures are abundant." (p. 13). This was overlooked internationally as news reporting on the Middle East instead focused on political instability and migration and, in an academic context more relevant, "feeble links and connectivity between regional [sc. MENA focused] research and the international research community" (p. 13) have deprived these developments of the attention they deserve.

The volume grew out of a project of the regional Rule of Law Program Middle East and North Africa of the German Konrad-Adenauer-Stiftung from 2017 to 2019 (that was also headed by the editor). In the words of *Schoeller-Schletter*: "The idea was to 'map', to identify, assemble and analyze information on constitutional review in the Middle East and North Africa, its institutions and procedures, models of reference, developments, and trends, in a structured way, concentrating on selected topics that seemed to be at the heart of the matter" (p. 14). A series of workshops and a concluding symposium brought together 50 constitutional law experts – judges, academics and practicing attorneys – from the Middle East, Europe, and the US. The volume comprises 17 peer reviewed papers, carefully

selected and edited, and organized along four trajectories: (i) appointment procedures and judicial independence, (ii) procedures of constitutional review, (iii) the control of elections, and (iv) the role of religion and religious law in the constitutional order. Papers focusing on the experiences in selected jurisdictions are complimented by contributions from international experts who deal with cross cutting issues.

It, of course, is impossible to do justice to the variety of papers collected in the work in a book review. The first cluster broadly is concerned with the independence of the constitutional judiciary: in Algeria, the executive effectively controls the composition of the Constitutional Council what reflects an overall weak separation of powers (*Wissam Benyettou*, pp. 35 ff.). In Jordan, the strong role of the monarch and the imperfect separation of powers undermine the independence of the constitutional judiciary (*Sufian Obeidat*, pp. 47 ff.). The constitutional court is embedded in the political system leading the author to conclude that “reforming the Constitutional Court requires the reform of the political system first” (*Obeidat*, p. 60). The second cluster is concerned with the procedure of constitutional review, in particular the manner in which a matter may be submitted to the constitutional court (and by whom). *Francesco Biagi* forcefully argues that the emergence and strengthening of constitutional review bodies was one of the most significant trends following the Arab Spring (pp. 161 ff). Some countries such as Jordan for the first time introduced a constitutional judiciary. In Morocco the constitutional council (in the past effectively a political advisory body) was turned into a judicial body vested with the powers to review the constitutionality of legislation. The third cluster is dedicated to the control of elections. The control of elections for a long time has been a strong hold of constitutional courts in the MENA Region; even before the Arab Spring courts have annulled elections in Egypt (*Yussef Muhammad Auf*, pp. 211 ff.) and more recently in Kuwait (*Fawaz Almutairi*, pp. 229 ff.). The last cluster deals with the role of religious law in the constitutional order. Many, if not most, constitutions in the MENA contain a “Sharia clause” according to which “Islamic Law” [Sharia] or the “principles of Islamic law” are “a” or “the source of legislation”. How the proclaimed supremacy of Islamic legality can conceptionally be reconciled with a modern constitution based on people’s sovereignty, and how the courts have applied these clauses in concrete cases, is a matter that has been studied extensively with studies easily filling an entire bookshelf of its own. *Nathalie Bernard-Maugiron*, a pioneer of constitutional law research in the Middle East, concludes that the “attachment to religion proclaimed in the constitution has little impact on national positive law” (pp. 273 ff. [286]). This conclusion is supported by the case law of the Egyptian Supreme Constitutional Court (SCC) that effectively vested the secular judiciary with the last word of what is Islamic. Deputy Chief Justice of the SCC *Adel Omar Sherif* elaborates on this process, granting the reader a rare glimpse into the “kitchen” of constitutional justice. The SCC was driven by a modernist agenda pursuant to which the constitution must be interpreted “as a single, organic unit”. The Sharia clause in Art. 2 of the Egyptian constitution only has a prospective nature by imposing a political responsibility on the legislator to issue future legislation in compliance with Islamic principles, and hereby only being limited by the “definite” or “immutable” rules of Islamic law

(*Sherif*, pp. 291 ff. [302-303]). This vests the legislator with a broad discretion in re-formulating the rules of Islamic law in the light of “time and clime” in order to conform to the requirements of modern society. Effectively, the state defines religion (and not religion legislative policies).

In the introduction, *Schoeller-Schletter* states that a “subsequent publication should situate the regional developments in the global context and discourse on constitutional review”. It would indeed be interesting to see how the findings in the volume relate to findings in other parts of the world. *Schoeller-Schletter* characterizes constitutional review as an “instrument of judicial oversight” (p. 13) that curtails the powers of both the legislative and executive branch and increases the accountability of government. While this essentially describes the legal mechanism of constitutional review, political scientists have argued that within the context of autocratic regimes, a strong and independent constitutional court can also have a stabilizing function. The Egyptian SCC, that was set up in 1979, often is referred to as an example: the court supported the transition to a market economy of the Mubarak Era, pacified international donors and investors and helped the regime to absorb internal political pressure. An independent and strong constitutional court certainly is good to have, but the development of the rule of law may be detached from democratization. At the same point in time, after 2011 constitutional courts in Egypt and Libya have emerged as political actors, who also took sides in a political struggle. Looking at the political and constitutional crisis in Tunisia in 2021 it would have been interesting to see how a constitutional court – had it been in operation – would have positioned itself between the “Islamic” and “secular” political camp. Constitutional courts of the Post Arab Spring era play a role that goes far beyond the technocratic defense of constitutional legality.

Constitutional reform and the reform of constitutional justice is high on the agenda of international donors and institutions supporting law reform. The concrete effect these interventions have on the ground may be debatable in many instances. Nevertheless, the increasing involvement of academia in international legal co-operation certainly has the positive side effect that a new body of research on constitutional law in Africa, Asia and South America has emerged. International legal co-operation has enriched comparative constitutional scholarship by a new focus on jurisdictions in transition outside Europe and the US. One outstanding example is the project on the mapping of constitutional review in the MENA Region.

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