

Anja Schoeller-Schletter [ed.]

Constitutional Review in the Middle East and North Africa



Nomos



KONRAD
ADENAUER
STIFTUNG

Nahoststudien. Middle Eastern Studies

Edited by

Prof. Dr. Thomas Demmelhuber,
Universität Erlangen-Nürnberg

Prof. Dr. Claudia Derichs,
Universität Marburg

Prof. Dr. Georg Glasze,
Universität Erlangen-Nürnberg

Prof. Dr. Mathias Rohe, M.A.,
Universität Erlangen-Nürnberg

Dr. Stephan Roll,
Stiftung Wissenschaft und Politik, Berlin

Volume 4

Anja Schoeller-Schletter [ed.]

Constitutional Review in the Middle East and North Africa



Nomos



**KONRAD
ADENAUER
STIFTUNG**

The Open Access-publication of the electronic version of this work was supported by Konrad-Adenauer-Stiftung, 10907 Berlin.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-8487-7151-6 (Print)
 978-3-7489-1201-9 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-7151-6 (Print)
 978-3-7489-1201-9 (ePDF)

Library of Congress Cataloging-in-Publication Data

Schoeller-Schletter, Anja
Constitutional Review in the Middle East and North Africa
Anja Schoeller-Schletter (ed.)
405 pp.
Includes bibliographic references.

ISBN 978-3-8487-7151-6 (Print)
 978-3-7489-1201-9 (ePDF)

1st Edition 2021

© Anja Schoeller-Schletter (ed.)

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-7151-6 (Print)
ISBN 978-3-7489-1201-9 (ePDF)
DOI <https://doi.org/10.5771/9783748912019>



Onlineversion
Nomos eLibrary



This work is licensed under the Creative Commons Attribution – ShareAlike 4.0 International License.

Acknowledgements

Looking across the banks of the river Nile some years ago, I discussed with my husband the lack of literature and substantive analysis of the current work of constitutional courts in the Middle East and North Africa. After many years in Egypt, observing two revolutions, analyzing two constitutions, and comparing them with constitutional developments in Latin America, Eastern Europe and even Asia, the idea of a research project to “map” constitutional review in the Middle East and North Africa was born. My subsequent position as Director of the Rule of Law Programme Middle East & North Africa of the Konrad-Adenauer-Stiftung offered me the opportunity to make this endeavor a “lighthouse” project of the programme. Grateful for the encouragement and backing from all sides, I am now presenting a selection of the many papers that resulted from the project, bringing it to a conclusion with the support of the Konrad-Adenauer Stiftung for printing this book.

The project could not have been undertaken without the close and unwavering cooperation of the constitutional courts and councils of the region. I owe them deep gratitude for their trust, for generously hosting the workshops, and to each of their members for participating with highly valuable contributions during the many rounds of discussion. I am especially indebted to Issam Sleiman, former President of the Constitutional Council of Lebanon, for reaching out to fellow institutions and thus for giving the project a productive start from the beginning. Deep thanks go to Adel Omar Sherif, Deputy Chief Justice at the Supreme Constitutional Court of Egypt, for his continuous backing of this research project, for decades of friendship, and a shared and unshakable passion for comparative constitutional law worldwide and for Egypt. To Yousef Jassim Al-Mutawaa, President of the Constitutional Court of Kuwait, I wish to express sincere gratitude for the honor of trust, and unrivalled hospitality; and to Justice Ali Bou Kmaz and Counsellor Faisal Al-Gharib for building a wonderful “bridge” to Kuwait. Continuous exchange on the Moroccan experience in and outside Morocco was made possible by Said Ihrai, President of the Moroccan Constitutional Court, and ties were deepened by the warm welcome by all members of the Constitutional Court of Jordan in Amman.

Special credit goes to Noha El-Mikawy and Malte Graßhof for their never tiring readiness to discuss the project and its progress, and for their

valuable comments throughout all phases of the project; to Zaid Al-Ali, for his unlimited willingness to open networks in support of comparative constitutional law in the region and for bringing the Arab Association for Constitutional Law into this project. He and Rainer Grote supported from the start my idea of an English-language Online Journal for Constitutional Law in the Middle East and North Africa, which is now complementing this volume with an easy access and international platform for publications in the field.

I would like to thank each and every one of the participants from the Middle East and North Africa, from Europe and beyond – I ask forgiveness for not mentioning all by name - for their willingness to travel, their wonderful spirit, and their valuable comments and contributions, all of which were essential to the success of this endeavor. And I express my sincere gratitude to the team of the Rule of Law Programme in Beirut, for years of hard work, enthusiasm for the cause, and relentless support. Robert Poll has been wonderful to work with, and I am deeply grateful to him for organizing the peer-review process of the papers published in this book.

Last but not least, my full admiration goes to Felix Arnold, my husband, for his never-ending backing, his share in bringing this project to publication, and for always accommodating the extraordinary task to make two careers and a family life compatible against all odds, with an incorruptible sense of values and justice.

Over the past three years, in my time as Director, the Programme has put considerable emphasis on fostering and linking thematic discussions of cross-cutting regional and international interest. In accordance with our aim of encouraging exchange of expertise and partnership on a peer-to-peer-level regionally and internationally, this publication marks just one step of an initiative dedicated to highlighting remarkable developments in constitutional law and practice in the MENA region and making insights accessible in English to the international research community. May all of them thrive and many others follow.

Madrid, December 2020

Anja Schoeller-Schletter

Table of Contents

Introduction

Mapping Constitutional Review in the Middle East and North Africa: Historic Developments and Comparative Remarks <i>Anja Schoeller-Schletter</i>	13
---	----

Part I: Constitutional Review and Judicial Independence

The Appointment of the Members of the Algerian Constitutional Council <i>Wissam Benyettou</i>	35
--	----

The Independence of Constitutional Judges: The Case of Jordan <i>Sufian Obeidat</i>	47
---	----

Guarantees and Challenges of Judicial Independence: The Constitutional Courts of Kuwait and Bahrain as Case Studies <i>Salma Waheedi</i>	61
--	----

Constitutional Courts and Supreme Courts: A Difficult Relationship <i>Rainer Grote</i>	77
--	----

Part II: Constitutional Review Procedures

Constitutional Review in Algeria Following the 2016 Reform: With Particular Reference to the “Exception of Unconstitutionality” <i>Francesco Biagi</i>	95
--	----

Table of Contents

Lebanon's Constitutional Council: Access Blocked to Protect the Consensus System? <i>Nizar Saghieh</i>	119
--	-----

The Kuwaiti Constitutional Court and its Role in Protecting the Fundamental Liberties <i>Fawaz Almutairi</i>	137
--	-----

Constitutional Review after the Arab Spring: Reforms, Challenges and Perspectives <i>Francesco Biagi</i>	161
--	-----

Integrating or Polarising? How to Promote Integrative Decision-Making in Constitutional Courts <i>Gertrude Lübbe-Wolff</i>	189
---	-----

Part III: Control of Elections and Electoral Laws

Judicial Review of Elections: The Egyptian Experience <i>Yussef Auf</i>	211
--	-----

The Extent of the Authority of the Constitutional Court of Kuwait to Annul an Elected Parliament: The Cases of the 2012 Parliaments <i>Fawaz Almutairi</i>	229
---	-----

Challenging the Validity of Membership of the House of Representatives in Jordan <i>Laith K. Nasrawin</i>	259
---	-----

Part IV: Role of Religious Law in the Constitutional Order

Religious References in the Constitutions of the Arab World: Islamization of the Constitution or Constitutionalization of Religion?	273
<i>Nathalie Bernard-Maugiron</i>	
The Allocation of Power between Religious and Secular Authorities in Egypt	291
<i>Adel Omar Sherif</i>	
Islamic <i>Sharia</i> in the Legal Orders of Saudi Arabia and Kuwait	307
<i>Salma Waheedi</i>	
The Changing Constitutional Framework of Church-State Relations in Europe	329
<i>Rainer Grote</i>	
The Jurisprudence of the European Court of Human Rights on <i>Sharia</i> Law	345
<i>Angelika Nußberger and Rike Sinder</i>	
 <i>Annex</i>	
Constitutional Courts and Councils in the Middle East and North Africa: Basic Facts and Figures	379
<i>Anja Schoeller-Schletter and Robert Poll</i>	
List of Authors	403

