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Anja Schoeller-Schletter [ed.]

Constitutional Review in the Middle East and North Africa

Nomos

KONRAD ADENAUER STIFTUNG

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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

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Introduction

Mapping Constitutional Review in the Middle East and North Africa: Historic Developments and Comparative Remarks

Anja Schoeller-Schletter

1. Introduction: Mapping constitutional review – the project

Nine years after the Arab Spring, many parts of the region are still struggling with the consequences of armed conflict, the balance of power tilted in favour of the executive, and challenges to the rule of law. Meanwhile, several countries have undertaken significant reforms. Initiatives to improve institutional structures and procedures are abundant[1]. As news is generally dominated by civil war or refugee topics, profound developments and modernisation in the region tend to go unnoticed. Partly due to feeble links and connectivity between regional research and the international research community, structural changes and developments in the Middle East and North Africa do not enter international comparative research, although fundamental and striking[2].

Among these recent developments, is a rising awareness in the region of the importance of constitutional review as an instrument of judicial oversight[3]. While the topic of constitutional oversight was at its heights in the 80s and early 90s in Latin America following the fall of authoritarian military regimes, and in Eastern Europe, Africa, and Asia subsequent to and driven by the reform spirit after the fall of the wall, constitutional review in the Middle East and North Africa has come to rise as a political demand and prominent topic lately. In recent years, the institutions charged with constitutional review in the countries of the Middle East and North Africa – be it constitutional courts, constitutional councils, supreme

1 For recent developments in the region see Gallala-Arendt 2012; Biagi and Frosini 2014; Lombardi 2015; Bellin and Lane 2016; Sultany 2017; Elbasyouny 2020; Razai 2020. For critical voices see Ishiguro 2017 and Bedas 2020.

2 Among the few studies on the subject are Mallat 1994 and 2007; Brown 1997, 2001 and 2002; Choudhry and Glenn Bass 2014; Grote and Röder 2012 and 2014.

3 For the international debate on the role of constitutional courts see Shapiro and Stone 1994; Bryde 1999; Thomas 2002; Schoeller-Schletter 2004; Malleson and Russell 2006; Ginsburg 2008; Ginsburg and Moustafa 2008; Klug 2009; Buquicchio and Dürr 2012; Chen 2018; Saunders 2018; Ríos-Figueroa 2019.

courts, or high tribunals – have been reformed substantially. Some have been established for the first time (e.g., Bahrain in 2002, Iraq in 2004, and Saudi Arabia in 2009), others have been attributed new competences and new procedures have been introduced (e.g., Morocco in 2011 and Tunisia in 2014).

While the number of online collections of constitutional documents has multiplied, a comprehensive survey of the constitutional courts of the region is still lacking. This publication intends to shrink this gap. It is the outcome of a research project on constitutional review in the Middle East and North Africa that I was able to conduct in my capacity as head of the regional Rule of Law Programme Middle East North Africa of the Konrad-Adenauer-Stiftung from 2017 to 2019, based in Beirut, Lebanon.

The idea was to "map", to identify, assemble and analyse 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.

To this end, old networks were revived and new ones created to bring together members of constitutional courts, lawyers, and scholars in a series of thematically focussed workshops and a concluding symposium:

1. Beirut, Lebanon, October 2017: "Qualification, Nomination and Appointment Procedures of Justices to Constitutional Courts and Councils: Impact, Controversies, and Reform". Workshop held in cooperation with the Arab Association of Constitutional Law.
2. Cadenabbia, Italy, March 2018 and Beirut, Lebanon, April 2018: "Constitutional Review Procedures for the Protection of Fundamental Rights – Recent Changes, Challenges and Trends". Workshop Part I held at Villa La Collina. Workshop Part II held under the auspices of the Conseil Constitutionnel of Lebanon.
3. Cadenabbia, Italy, November 2017: "Role of Religious Law & Courts in the Constitutional Order"; Workshop held at Villa La Collina.
4. Kuwait City, Kuwait, April 2018: "Constitutional Review of Elections and Electoral Disputes in the MENA Region"; Workshop held in cooperation with the Arab Association for Constitutional Law, under the auspices of the Constitutional Court of Kuwait, at the premises of the Kuwait Bar Association.
5. Amman, Jordan, November 2018: "Role and Jurisdiction of Constitutional Courts and Councils in Relation with other High Courts"; Workshop held in cooperation with the Arab Association of Constitutional Law, under the auspices of the Jordanian Constitutional Court.

6. Beirut, Lebanon, April 2019: "Mapping Constitutional Control in the MENA Region – Recent Developments, Challenges and Reform Trends". International Synthetic Symposium.
7. Berlin, Germany, September 2019: "Constitutional Control and the Rule of Law in the Middle East and North Africa", Presentation of research results within two panel discussions at the Allianz Forum and at Humboldt University.

The meetings brought together more than 50 constitutional law experts, members and justices of constitutional courts, scholars, and lawyers from the region, from Europe and the United States. The Arab Association for Constitutional Law (AACL) unremittingly made accessible their vast network of constitutional scholars and experts from the region. A great number of constitutional courts and councils actively participated and generously hosted meetings. Without their willingness to jointly explore and frankly discuss topics of cross-cutting interest and relevance – not among peers only, but in an exchange between research and practice – this undertaking would not have been possible.

The present publication assembles a selection of peer-reviewed papers that were presented at the meetings. The work combines contributions of constitutional scholars and practitioners on a set of fundamental topics for understanding constitutional review. These include:

- Appointment procedures and judicial independence to constitutional courts and councils,
- Procedures for the protection of fundamental rights and accessibility, control of elections and electoral law,
- Control of elections and electoral laws, and
- Role of religion and religious law in the constitutional order.

Each part of the book is dedicated to one of the topics. A comparative outline on the historic development of constitutional review, the underlying models, reform trends and challenges shall give an introductory overview.

The various country analysis and regional perspectives are complemented by perspectives beyond the region, discerning commonalities and differences within the region and linking them up to developments outside of it.

An annex assembles essential facts and figures on a number of these courts, including data on institutional design, composition, decision-making processes, case-loads, minority votes, based on research and personal interviews with members of constitutional court and council and surveys, verified by a constitutional expert from the country.

With the selection of papers that are published here, the book presents fundamental first-hand insights into the current situation of constitutional review in the Middle East and North Africa. It does not aspire to be encompassing and complete. As a thematically focussed publication on the subject, the book gives insights into the present state and highlights reform achievements, challenges, and perspectives of constitutional control in the region. A subsequent publication should situate the regional developments in the global context and discourse on constitutional review.

Constitution-building processes and reform of constitutional courts are continuously ongoing in the Middle East. Expertise in comparative constitutional law is, therefore, needed to complement country-specific and regional scholarly knowledge. Constitutional scholars and judges worldwide increasingly take into consideration other countries' experience and practice, analysing different constitutional models, principles, designs, and their functioning. Many of the challenges currently discussed in the Middle East and North Africa have been faced in other continents in the past and are still being faced, such as control of elections, banning of extremist parties as unconstitutional, or balancing individual rights with religious freedom.

Along with the recently vibrant debates and ongoing reforms in constitutional review in the Middle East and North Africa, an immense quantity of highly interesting court decisions on constitutional matters and research publications has been published during the past years. Some countries have undertaken remarkable efforts to encourage regional or continent-wide discussions. More efforts are to be expected with regards to digitalization and accessibility as the benefits of visibility and accessibility to the international research community are becoming more and more obvious[4].

With the world becoming increasingly interconnected, countries are not limited to looking for inspiration or options in their own neighbourhood, are not bound to south-south dialogues, but are increasingly investigating the options existing globally. This publication is meant as a contribution to encourage further much-needed analysis, comparative research and interaction between researchers from the region and international fora.

4 In support of this development: Schoeller-Schletter 2020.

2. *Overview of historic developments, legal traditions, and the models for constitutional review*

In most countries of the Middle East and North Africa, "modern" constitutions were passed in the wake of Western influence and colonization by European powers, starting with the Napoleonic expedition to Egypt (1798-1801) and continuing in the late 19th and early 20th century. Several "waves" of constitution-giving and constitutional reforms may be identified. Most have followed significant historical events, including the end of World War I (Turkey, Egypt, Lebanon, Jordan and Iraq), the end of World War II (Egypt, Lebanon, Jordan, Iraq and Tunisia), the Six-Day War of 1967, the First Gulf War, 9/11 and the Arab Spring (see Fig. 1).

2.1. Historic ties, legal traditions and the models for constitutional review

In the beginning, the system of constitutional review was heavily influenced by the legal tradition of the major colonial powers. Most countries under French influence adopted a *conseil constitutionnel* (constitutional council) along the lines of the French model, among them Lebanon in 1926, Tunisia in 1959, Morocco in 1962, and also Algeria in 1963, reinstated in 1989[5].

These allowed for limited *a priori* constitutional review of law projects by a constitutional council that included non-jurists, and which in composition and mandate may be described as politico-judicial. Jordan, by contrast, adopted a High Tribunal in 1952, following the British prototype.

The growing influence of the US is reflected by the introduction of institutions similar to the US Supreme Court, allowing to a certain extent for diffuse constitutional review, but foreseeing a jurisdictional last instance decision on incidental questions of constitutionality, for example in Egypt in 1969, in the United Arab Emirates in 1973, and in Yemen in 1991 (see Fig. 2). In Jordan, limited constitutional interpretation was attributed to the High Tribunal, while diffuse constitutional review was to a certain extent practiced by ordinary judges.[6]

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5 On different models of constitutional review see Bzdera 1993; Harding, Leyland and Groppi 2009; Calabressi 2016. For the French model see Belloir 2012; Mouton 2018. Regarding Algeria, see Benyettou and Biagi in this publication.

6 See Obeidat, in this publication.

Fig. 1: Constitutions of the Middle East and North Africa.

Historic context	**1798** *Napoleonic Expedition* Modernization	**1919** *Paris Peace Conf.* Civil State	**1948** *Arab-Israeli War* Pan-Arabism	Socialism	**1967** *Six-day War*	**1979** *Islamic Revolution*	**1991** *First Gulf War*	**2001** *9/11*	**2011** *Arab Spring*
Egypt	Const. 1805, 1825, 1831, 1833, 1837, 1866, 1876 **Const. 1879**, **Const. 1882**	**Const. 1923** **Const. 1930**	Interim 1952 Interim 1953 **Const. 1956** Interim 1958	Interim 1962 Interim 1964	**Const. 1971**				**Const. 2012** **Const. 2014** Am. 2019
Tunisia	Fundamental Pact 1857 **Const. 1861**		**Const. 1959**				Am. 1999	Am. 2002	**Const. 2014**
Turkey	**Const. 1876** Am. 1908	**Const. 1921** **Const. 1924**		**Const. 1961**		**Const. 1982**		Am. 2007	Am. 2010 Am. 2017
Iran	**Const. 1906**					**Const. 1979** Am. 1989			
Iraq		**Const. 1925**	Interim 1958	Interim 1963 Interim 1964 Interim 1968	Interim 1970			**Const. 2005**	
Lebanon		**Const. 1926**				Am. 1989			
Jordan		Organic Law 1928	Const. 1947 **Const. 1952**						
Libya			**Const. 1951**		**Const. 1975**				Interim 2011
Mauretania				**Const. 1961**		Charter 1985	**Const. 1991**	Am. 2006	Am. 2017
Kuwait				**Const. 1962**					
Morocco				**Const. 1962**					Am. 2011
Algeria				**Const. 1963**	**Const. 1976**	**Const. 1989**	Am. 1996	Am. 2008	Am. 2016 Am. 2020
Syria				Interim 1964	**Const. 1973**				Am. 2012
UAE					**Const. 1971**				
Bahrain					**Const. 1973**			**Const. 2002**	
Sudan					**Const. 1973**		**Const. 1998**	Interim 2005	Const. D. 2019
Yemen							**Const. 1991**	Am. 2001	
Saudi Arabia							**Basic Law 1992**		
Oman							**Basic Statute 1996**		Am. 2011
Qatar								**Const. 2004**	

Fig. 2: Establishment of constitutional courts, councils, and supreme courts.

	before 1970	1970-1980	1980-2000	since 2001
Egypt	Supreme Court 1969	Constitutional Court 1979		
UAE		Supreme Court 1973		
Syria		Constitutional Court 1973		
Kuwait		Constitutional Court 1973		
Libya		Constitutional Court 1975		
Tunisia			Constitutional Council 1987	Constitutional Court, pending
Yemen			Supreme Court 1991	
Mauretania			Constitutional Council 1991	
Morocco			Constitutional Council 1992	Constitutional Court 2011
Lebanon			Constitutional Council 1993	
Algeria			Constitutional Council 1996	Constitutional Court, pending
Sudan			Constitutional Court 1998	
Bahrain				Constitutional Court 2002
Iraq	Constitutional Court 1968			Supreme Court 2005
Saudi Arabia				Supreme Court 2007
Jordan	High Tribunal 1952			Constitutional Court 2012

2.2. *The trend to concentrated a posteriori constitutional review*

By the end of the 20th century, most countries of the Middle East and North Africa had institutions charged with constitutional review, be it constitutional councils inspired by the French *Conseil constitutionnel* (e.g. Algeria, Lebanon, Mauretania, Morocco, Tunisia), be it Constitutional Courts (e.g. Egypt, Kuwait) or Supreme Courts (e.g. Iraq) or a High Tribunal (Jordan). Competences varied and the competences of Constitutional Councils were mostly limited to abstract review of laws or draft laws.

The Austrian-Kelsenian idea of a specialized and centralized judicial *a posteriori* constitutional review, that had conquered Continental Europe increasingly in the second half of the 20th century, has only gradually found favour in the Middle East and North Africa[7]. Early examples are Turkey 1961, Iraq 1968, Egypt in 1971[8] and Syria and Kuwait 1973[9]. The model has gained in influence since, "constitutional courts" were introduced in several countries, including in Sudan in 1998.

Along with constitutional reforms following the Arab Spring, and following the example of France in 2008[10], most constitutional councils of the region have been attributed incidental *a posteriori* control of norms, characteristic of concentrated judicial review institutions modelled along with the Kelsenian idea.

The vast majority of countries in the region adopted *a posteriori* constitutional review of norms, mostly by incidental/concrete review within an ongoing court case when doubts are raised about the constitutionality of a law to be applied, some countries by individual complaint procedure, and in the exceptional case of Kuwait by all of these (see Fig. 3). Many countries have thus complemented previously very limited review of legislation, frequently limited to *ex ante*, often restricted to organic laws, and/or by initiative of a selected group only.

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7 See Mallat 2007, chapter on "Constitutional Review: The Spread of Constitutional Councils and Courts." For the Kelsenian model see Cruz Villalón 1987.

8 Created by the Egyptian Constitution of 1971, it started functioning in 1980 following the promulgation of its implementation legislation, Law 48 of 1979 on the Supreme Constitutional Court of Egypt. See also Moustafa 2007, chapter on "The Establishment of the Supreme Constitutional Court", and Annex C for a translation of the law.

9 *Law No. 14 of 1973 on the Establishment of the Constitutional Court*.

10 Introduction "of the possibility of constitutional review *a posteriori* (reasoning by experience)" by the Constitutional Amendment of 2008; *Constitutional Law on the Modernisation of the Institutions of the Fifth Republic*, art. 61.

Independent of the legal tradition under which the constitutional review institution has originally been created, notwithstanding country-specific variations and specific characteristics of constitutional review institutions in the region, the tendency to *a posteriori* incidental review of norms has, in principle, brought the various models of departure closer together over time.

Fig. 3: Procedures of constitutional review (simplified).

		Abstract a priori	Incidental/ concrete control	Individual complaint
Mauretania	Constitutional Council	Yes	No	No
Lebanon	Constitutional Council	Yes	No	No
Syria	Constitutional Court	Yes	No	No
Egypt	Constitutional Court	Yes	Yes	No
Tunisia	Constitutional Court	Yes	Yes	No
Bahrain	Constitutional Court	Yes	Yes	No
Morocco	Constitutional Court	Yes	Since 2011	No
Algeria	Constitutional Council	Yes	Since 2016	No
Saudi Arabia	Supreme Court	N/A	Yes	No
UAE	Supreme Court	No	Yes	No
Iraq	Supreme Court	No	Yes	No
Jordan	High Tribunal	No	Filtered (Cass. C)	No
Kuwait	Constitutional Court	Yes	Yes	Yes
Libya	Supreme Court	Yes	No	Yes
Sudan	Constitutional Court	No	No	Yes
Yemen	Supreme Court	No	Yes	Since 1991

3. *The rise of constitutional review as an instrument*

3.1. *The limits of abstract, a priori, non-judicial constitutional review: From constitutional councils to constitutional courts*

Recognized as institutions that may play an important stabilizing role in young and fragmented states and societies – as had been witnessed in the making of the US since *Marbury vs. Madison*, and of Europe after World War II – the idea of constitutional review as an instrument subsequently became more and more attractive also in the Middle East and North Africa.

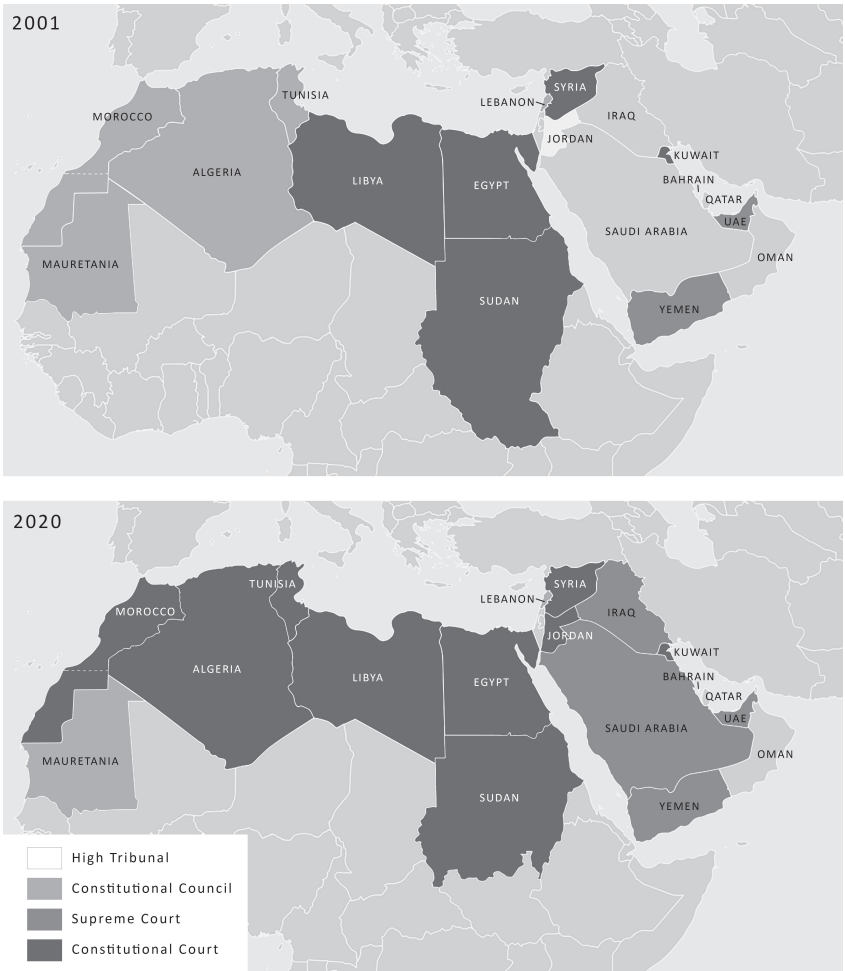
The region thus witnessed a continuous departure from the original French model of a *conseil constitutionnel*, the institution that was predominant in many of the countries due to (colonial) history and its repercussions, but which in its shape of 1958 has been increasingly viewed as inefficient as an institution of constitutional review. Not only did countries with constitutional review institutions that were modelled after the French *Conseil Constitutionnel*, follow the reform in France, thus introducing the procedure of *contrôle prioritaire de constitutionnalité par voie d'exception*, which gives the possibility of challenging the constitutionality of laws within an ongoing court case[11]. Several countries, by constitutional amendments, more fundamentally reformed their constitutional councils to become "constitutional courts"[12].

Thus, constitutional councils were transformed into "constitutional courts" (see Figure 4). Tunisia and Morocco are prominent examples of constitutional review institutions that are increasingly adopting traits of the Kelsenian-modelled constitutional courts, departing further from the French-inspired constitutional council model. Algeria seems to be following in that direction; in a recent referendum, it has also opted for the establishment of a constitutional court[13]. Today only Lebanon and Mauretania have not yet introduced the possibility of *ex post* incidental review of laws[14].

This trend to *a posteriori* review of laws is going along with a tendency to professionalization and "judicialization"[15] of constitutional review in organizational and procedural aspects. In most of the countries in the region, the institution charged with constitutional review has been through a process of instituting a professional body with court functions, judges and legally trained members. In most cases, eligibility criteria for candidates to the constitutional courts or councils have been introduced or tightened, requiring legal or juridical expertise.

11 Philippe and Stéfanini 2010; Mouton 2018.
12 For developments in Morocco see Biagi 2014; AlModawar 2016; Hamdon 2018.
13 International Commission of Jurists 2020: 14.
14 See Saghieh, in this publication.
15 See Biagi, in this publication.

Fig. 4: Institutions of constitutional review in 2001 and 2020.



These newly demanded standards in legal and technical skills and methodological capacity for members of constitutional courts and councils are to be seen as an inherent requirement and logic consequence of the increasing "judicial" quality and function that constitutional review is gaining in the region. Similarly, along with increased competences for judicial constitutional review and increasing demands for judicial independence, nomination and appointment procedures have become subject to critical scrutiny, and in some cases, reform.

3.2. Strong courts building tradition

Over the past two decades, developments go towards a constitutional review body, which if not always by name, but by characteristics, bears an increasing resemblance to constitutional courts of the so-called Continental European or Kelsenian model of centralized constitutional review. Here, role models and intra-regional influences play a significant role.

Of undisputed influence in this regard has been the Supreme Constitutional Court of Egypt, which in many ways has risen to the role-model of a strong court, a "lighthouse" court in the region. It looks back on a highly interesting and well-developed dogmatic history in constitutional jurisdiction, which gained its reputation in its "golden age" under Chief Justice Awad Mohammad El-Morr[16]. In the countries of the Gulf region, this role is increasingly adopted by the Constitutional Court of Kuwait, a court that is to some extent departing from its Egyptian model and is observed closely by other courts in the Gulf. In the past decade, it has increasingly faced the challenge and demonstrated its capacity for balancing fundamental rights[17] instituted in the text of the constitution, wisely taking into consideration realities of society, thus striking the balance with societal consensus.

Developments in the region have confirmed what has been the case in Europe and elsewhere: that constitutional courts staffed with legally trained members, gradually allowing for broader access and relevant caseloads, tend to become more influential. Needless to say, constitutional courts in the region, as elsewhere in the world, as "judicial" as their task is, inherently also fulfil a political and societal function, and are thus prone to be the subject of political pressure or interference.

16 On the Constitutional Court of Egypt and its development see El-Morr, Sherif and Nossier 1996; Khalil 1999; Lombardi 2009; Bernard-Maugiron 2013 and 2015; Brown 2013 and 2014; Haimerl 2014; Schoeller-Schletter 2014a and 2014b; Fadel 2018; Alkady 2019.

17 For a discussion of some of these decisions, see Fawaz Almutairi, in: Schoeller-Schletter and Poll, 2021: 13-34.

4. Constitutional review revisited

4.1. New names, new procedures: Pending implementation

In spite of its growing importance within the constitutional state, constitutional review still faces great challenges in most countries of the Middle East and North Africa. In several cases, the institutions now carry the name "constitutional court", reflective of an institution of specialized concentrated review, thus bearing reference to the continental European based Kelsenian model. Also, most of the institutions have been given the competence to review existing legislation, which is a core competence of any institution that is meant to be exercising constitutional review. Still, much remains to be done and implementation has proven to be tedious.

In Tunisia the nomination process of members to the constitutional court is blocked by a deep political divide, leaving the country for years with a provisional constitutional court that has very limited competences and no incidental review of legislation for the time being. In Morocco, the implementation and practice of the possibility under Article 133 of the Constitution of 2011, allowing individual litigants to challenge the constitutionality of laws on which the issue of the litigation depends, is staggering. Parliament still has to pass a revised organic law following the decision of the Constitutional Court that declared the first draft law as partly unconstitutional.

Although the majority of countries have instituted "constitutional courts" by name, a corresponding scope of competences, judicialization in terms of members' professional background, working methodology, and professional support staffing, all of which are necessary to fulfil the inherent intention and task, are not completed. New procedures such as the incidental or "concrete" review of norms, for example the *contrôle prioritaire de constitutionnalité par voie d'exception* have been adopted, but remain to be put into practice; examples are Tunisia and Morocco, where recent reforms still await implementation.

4.2. More cases, more work: The challenge of filtering and accessibility

Along with the increasing influence of the Kelsenian model a general but still hesitant tendency to widen accessibility to constitutional review can be observed, allowing other groups beyond fractions of government or parliament to also initiate constitutional review procedures. Several countries have introduced the possibility of certain individual complaint

procedures, mostly within the scope and limits of incidental review of norms.

Almost all countries have introduced new types of procedures, extending abstract *ex-ante* control to *ex-post* control in order to allow control not only of law projects prior to promulgation, but control of existing laws also, when flaws become obvious in application.

Still, in some cases, these attempts to widen review and access are stifled by lacking capacities and professional support structures that are able to cope with increasing case-loads. Also, other mechanisms may tend to restrict this idea, such as filtering organs outside these courts that may keep cases away from these courts. In Jordan, for example, cases are filtered by the Court of Cassation that decides which of the cases are handed to the Constitutional Court, similar to the filtering functions of the highest courts of the respective jurisdiction in France.[18] In Jordan, this is resulting in the fact that the very little number of referrals is pushing the Constitutional Court into a state that risks to come close to irrelevance. In Morocco, in an attempt to prevent a similar fate, the Constitutional Court has struck down the draft organic law setting out the rules governing appeals for unconstitutionality. The Court considered the procedure of incidental review of laws as partly unconstitutional, ruling out pre-filtering by the Court of Cassation as an intrusion into a competence that the constitution clearly assigned to the Constitutional Court. In Lebanon, the scope of judicial review attributed to the Constitutional Council and accessibility to constitutional review is still very limited, the need for reform is being widely acknowledged and reform projects at hand.[19]

4.3. Jurisdiction for comparative analysis

The methodology of constitutional review, as interesting as it is in comparative research, is extremely difficult to analyse in countries where it is not the norm to have decisions published. In spite of this difficulty, it is clear that some interpretative notions and principles used by constitutional courts in Europe and elsewhere have found entry into certain courts and into the scholarly debate of the region, including "unconstitutional consti-

18 For the at times difficult relations between constitutional courts and the highest courts, including the example of France, see Grote, on constitutional court jurisdiction and relation to other high courts in practice, in this publication.

19 For a detailed analysis for the complex dilemma of the Lebanese Constitutional Council, see Saghieh, in this publication.

tutional law", "core content of fundamental rights", and the methodology of balancing between competing constitutional rights.

In the region, the latter is, for example, being increasingly applied in cases of balancing between individual rights or equality rights respectively, and the freedom to exercise religious beliefs. Many countries have opted to place references to these religious laws into the text of their constitutions, to highlight the importance of this set of laws in society and to add legitimacy to the constitutional state, mostly without implementing a clear mechanism on how these laws are to be interpreted, or which of the traditional interpretations is to be given preference. It is then mostly the highest courts, the courts charged with constitutional review in particular, that are tasked with the challenge of balancing controversial interpretations of constitutional rights enshrined in the constitution and based on culturally and historically rooted religious and secular norms. As a result, the courts are continuously defining the substance and limits of individual rights and freedoms in view of - and sometimes pushing for – a developing societal consensus.

Largely unrecognized by the international community, the constitutional courts and councils of the MENA region have met this challenge in their very own and constructive ways.[20] Along with more vibrant debates on constitutional law issues and constitutional control in the Middle East and North Africa, a large quantity of highly interesting court decisions on constitutional matters has been published during the past years.[21]

To understand constitutional review in the Middle East and North Africa, access to and comparative analysis of decisions of constitutional courts and councils is essential, not only for scholars, but also for the practicing constitutional justices themselves. I do hope – and I am sure I speak for all contributors to this project, whether their valuable contributions are published in this volume or elsewhere – that many more initiatives will foster much-needed research and contribute to the evolution of an international community of comparative constitutional law experts.

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20 Kuwait is one example, see Almutairy, on decisions of the Constitutional Court of Kuwait, in chapter 2 of this publication.

21 A comparative analysis of the jurisdictional development in three countries, Tunisia, Egypt and Kuwait, presenting milestone decisions that balance individual rights or equality rights respectively with religious law or freedom of belief, has just been published. Schoeller-Schletter and Poll, 2021.

5. Summary and outlook

In many countries of the Middle East and North Africa, the institutions charged with constitutional review – constitutional courts and councils – have expanded their role and relevance in recent decades, mostly gaining in standing and respect. Many steps have been undertaken to strengthen constitutional review and remarkable progress achieved.

Within this introductory overview, I have tried to briefly give an overview of historical developments and typological differences in the region, identifying outside influences, their reasons and consequences. The relevance of certain models has become obvious (e.g. *conseil constitutionnel*). The success of the continental European (Kelsenian-based) model of constitutional review in Europe has undoubtedly played a role in the dynamics and results of modifying constitutional review institutions in North Africa and to some extent also in the Middle East. Some trends can be identified in general, such as the tendency towards a concentrated system of constitutional review and the adoption of ex-post review procedures, both of which seem to bring the various models of departure closer together over time.

Over the past years, "constitutional review" has gained prominence in regional debates. The guarantee of constitutional rights and freedoms is subject to constant interpretation and development as societies are evolving. With reforms of constitutional courts in the region ongoing, comparative constitutional law has become a topic on the rise. Constitutional experts and judges worldwide increasingly take into consideration the experiences and practices of other countries, analysing different constitutional models, principles, designs, and functioning. Many of the challenges currently discussed in the Middle East and North Africa have been faced in other continents in the past, and are still being faced, including the control of elections or balancing individual rights and religious freedom. Some countries have undertaken remarkable efforts to encourage regional or international discussions, allowing for a mutual exchange of expertise and inspiration. Given the unique history of the region and the very individual circumstances of each of the countries, each country is developing and shaping its own system of constitutional review over time, based on its cultural and legal heritage and hopefully inspired by what it considers best and fitting solutions based on comparative analysis. These developments need international support – and time.

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Part I:
Constitutional Review and Judicial Independence

The Appointment of the Members of the Algerian Constitutional Council

Wissam Benyettou

Abstract
Algeria has introduced a constitutional council only a few years after France has done so in its Fifth Republic. Still, it has come to life as a permanent institution for constitutional review in 1989. Although being inspired by the French model, the Algerian Constitutional Council has increasingly parted from this model. By giving an account of the composition of the Constitutional Council and the appointment process through the past decades, the chapter discerns the Council's nature and weakness as being more of a political character than a judicial one. This is identified as a general reflex of the weak separation of powers to the benefit of the executive. Comparing with other countries in the region that have also been inspired by the French model, the author recommends to follow the direction of Morocco and Tunisia, which have moved away from the political-judicial composition and mandate (French).[1]

1. Introduction

Algeria has a constitutional council since its independence; thanks to its first constitution adopted by referendum in 1963. Established as a politico-judicial institution, it was inspired by the French Constitutional Council that was created five years earlier by the constitution of the Fifth Republic. Since the creation of this model, more than a dozen countries around the world have decided to adopt this type of institution, among them four Arab countries alongside Algeria (Morocco, Mauritania, Tunisia, and Lebanon).

Although the idea originated in France, the Algerian Constitutional Council stands out from the French model by certain elements. The appointment of the members of the Council is among the most salient

1 This chapter has been written in 2018 and reflects the situation up to that date.

points. While in France two constitutional "powers" appoint the members of the Constitutional Council, namely the legislature and the executive, in Algeria the choice was to also include the judiciary. The French idea of excluding the judicial "authority" from the appointment process was not accepted by independent Algeria.

The Algerian Constitution of 1963 opted for a model of the composition of the Constitutional Council giving priority to the judicial and legislative power over the executive power. The Council was composed of three members from the judiciary, three members from the legislature and one member appointed by the President of the Republic. The Council's president was to be elected by its members and explicitly had no preponderant vote (art. 63).

The First Algerian Constitutional Council survived only three years. Thus, following the political overthrow of President Ben Bella in 1965, the 1963 Constitution was suspended. It was not until 1983 that the Single Party Congress (FLN) called for the creation of a constitutional review body.

Finally, the Constitution of 1989 resurrected the Algerian Constitutional Council. The composition was still of seven members but with a majority of three members appointed by the President of the Republic, whereas the members of the judiciary and the legislature are now only two each (art. 154). Here, the first shift towards more influence of the executive power started, with the first democratic Constitution of Algeria. The 1996 Amendment increased membership to nine members, this time giving the majority to Parliament (art. 164). Finally, the 2016 revision established composition of 12 members, giving each constitutional power an equal share of four members to be appointed. The changes in the composition of the Algerian Constitutional Council show how the political system is searching for a specific model that would integrate the judicial component into the original model without jeopardizing the stability of the political regime dominated by the executive.

In this chapter, the issue of the appointment of the members to the Algerian Constitutional Council will be addressed by examining aspects of the composition of the Council through a comparative perspective. It should be kept in mind that the analysis of the Algerian Constitutional Council is at the same time an analysis of an institutional model of French inspiration transposed into a post-colonial country of the Arab region.

2. *The procedure for the appointment of members of the Constitutional Council*

Since 1963, the Algerian constitutions stipulate that the members of the Constitutional Council should be appointed representing each of the three constitutional powers. Consequently, the members representing the judicial power are judges of the highest courts. Members representing the legislature are members from the two chambers of Parliament. The members representing the executive power are freely chosen by the President of the Republic.

This rule was respected despite the various reforms. The appointment within each power is specific and differs from that applied in France or other Arab countries with constitutional councils. The composition according to the 2016 revision (art. 183) is the following:

- *The members representing the judiciary:* Four of them are judges elected in the Supreme Court and the State Council (two per court). In other words, they are judges of the two courts elected by their peers. Since 1989, the practice has been that of internal elections by the judges of each court under the supervision of the respective presidents. Any judge of the Supreme Court and of the Council of State shall have the right to stand as a candidate and to request the voting of his or her pairs.
- *The members representing the legislative power:* There are four members originating from the legislature, elected within the two chambers. Here also the vote is organized by the presidents of the chamber and the candidatures are open to any MP.
- *The members representing the executive power:* Four of the members are personalities freely chosen by the President of the Republic. Two of the four members appointed by the President are, by constitutional provision, the resident and vice-president of the Council. They are therefore the most important and influential members of the Council.

This overview of the procedure demonstrates the distance taken from the model of the French Constitutional Council. There, members appointed by the French Parliament do not come from the legislature, but traditionally are judges/lawyers appointed by the presidents of the two parliamentary chambers (The People's National Assembly and Council of the Nation). The difference is that in France the Speaker appoints members to the Council on behalf of Parliament while in Algeria the members of the parliamentary chambers elect among themselves four members to the Council.

The Algerian Constitutional Council is therefore an institution composed of judges of the highest judicial bodies and members of the legislature elected by their pairs in addition to members freely chosen by the President of the Republic.

One can argue that the result of this method of appointment is to have a politically legitimate and institutionally balanced institution. Despite these appearances of balance of power in the composition of the Constitutional Council, the influence of the executive power is decisive at least on two counts.

First, the President of the Republic appoints the President of the Council. The latter having a casting vote in the event of a tie. He also has wide powers in the internal management of the Council, in particular in terms of calling meetings, appointing the distribution of appeals and cases between members.

The President of the Republic also interferes in the appointment of judges to the Constitutional Council in an indirect way, via the judicial power. It is the Supreme Council of the Judiciary which decides on the appointment of all judges. This body for judicial appointments is chaired by the President of the Republic as a "guarantor of the independence of the judiciary". In other words, judges eligible to become members of the Constitutional Council were first appointed to their function under the supervision of the President and by presidential decree.

3. *Eligibility criteria*

Until the revision of 2016, no conditions were set for personal or academic eligibility criteria. Since then, Article 184 of the Constitution requires that a member of the Constitutional Council must imperatively:

- be 40 years of age or older;
- have at least fifteen (15) years' professional experience in higher education in the legal sciences, the judiciary, the legal profession of the Supreme Court or the Council of State, or function of the State.

These new conditions will certainly reduce the scope of eligible candidates in both chambers of the legislature. Indeed, if in the past these conditions have *de facto* applied to the judges elected from the high courts and to the majority of the members designated by the President, it did not with regard to the members from the legislature appointed to the Constitutional Council.

This new criterion of professional experience will undoubtedly reinforce the technical judicial skills of the Constitutional Council.

It is interesting to note that the addition of technical capacity criteria in law follows the trend that prevails in the Arab region and departs from the French model. Indeed, the Tunisian, Moroccan, Libyan, and Yemeni constitutions require qualifications in law or political science for appointment to constitutional courts. France, despite the introduction of the *a posteriori* control of legislation *(question prioritaire de constitutionnalité)*, continues to require no technical or age criteria for the appointment of members of the Constitutional Council.

The 2016 reform can be expected to strengthen the judicial character of the Council. Political legitimacy stemming from the constitutional powers that designate the members was no longer considered sufficient. Thus, to this indirect democratic legitimacy was added a technical legitimacy.

4. Profiles of members of the Constitutional Council

The profile of Council members appointed since 1989 varies according to the institution from which they come. Members elected under the Supreme Court and the Council of State are highly experienced judges who have left the Institute for Judicial Training (ESM) or the National School of Administration (ENA).

Parliamentarians, on the other hand, who for the most part have a purely political career and have little legal expertise. What counts for the election of the members of the Council is partisan affiliation. Indeed, since 1996 the members of the legislature sitting in the Constitutional Council are almost all from the FLN (National Liberation Front) and the RND (National Rally for Democracy). Traditionally the Senators of the Council of the Nations (the Upper House) come from the RND whereas the deputies of the Popular National Assembly (the Lower House) are of the FLN. This division reflects the division of roles between these two parties that has shared power for over 20 years in Algeria. The FLN has always assumed the presidency of the Assembly while the RND presides over the Senate.

The new criteria mentioned above must therefore upset the traditions of the appointment of parliamentarians to the Council. The technical filter imposes itself on the calculations between these two parties.

With regard to the members of the Constitutional Council appointed by the President of the Republic, and given the President's freedom of choice, it is interesting to dwell on the nature of choices made since 1989.

The Presidents of the Republic appointed 18 members of the Council since 1989. Ten of the designated members were lawyers or judges. The remaining eight were senior officials who have served as ministers or ambassadors, half of which lawyers by training. As a whole, of the members appointed by the President, only two were women.

In the waves of appointments to each new term, it can be noted that in the majority of cases, the President of the Republic appoints trained and career lawyers to around two thirds. The Council by 2017 is an exception, as only two out of four are legal experts (see Fig. 1). Overall, from the members of the Constitutional Council nominated by the President of the Republic, between 1989 and 2017, 56% were politicians or senior officials, and 44% judges or jurists.

As for the Presidents of the Council, out of the six that have succeeded this post, by 2017 three were lawyers against three political personalities.

Fig. 1. The members of the Constitutional Council (2017).

Member	**Nominated by**	**Profile**
Mourad MEDELCI (President)	President of the Republic	Economist, FLN Leader and former Minister of Economy and Foreign Affairs
Mohamed Habchi (Vice President)	President of the Republic	Senior Official, Former Advisor to the President of the Republic
Hanifa BENCHABANE (Member)	President of the Republic	Jurist, Professor of Private Law
Abdeldjalil BELALA (Member)	President of the Republic	Jurist, Professor of International Public Law
Brahim BOUTKHIL (Member)	Council of Nation (Upper House)	RND Leader, Member of the Parliament
Hocine DAOUD (Member)	Council of Nation (Upper House)	RND Leader, Member of the Parliament
Abdenour GRAOUI (Member)	Popular National Assembly (Lower House)	FLN Leader, Member of the Parliament
Mohamed DIF (Member)	Popular National Assembly (Lower House)	FLN Leader, Member of the Parliament
Ismail BALIT (Member)	Supreme Court	Supreme Court Judge
M. El Hachemi Brahmi (Member)	Supreme Court	Judge of the Supreme Court, former President of the National Commission for the Supervision of Elections
Kamel Fenniche (Member)	Council of State (Highest Administrative Court)	Judge of the Council of State
Faouzya BENGUELLA (Member)	Council of State (Highest Administrative Court)	Judge of the Council of State

While the criteria for appointment to the Constitutional Council have been laid down by the various succeeding constitutions, the functioning of the Council is governed by an organic law. It gives a preponderant role to the President of the Council, appointed by the President of the Republic.

5. Limited term of office

The members of the Algerian Constitutional Council are appointed for a single term of eight years. They are renewed by half every four years. Their mandate is incompatible with any other professional or political activity. They are subject to the obligation of reserve and impartiality. If a member of the Council ceases to fulfil the conditions required for the performance of his duties or has seriously failed to fulfil his duties, he shall submit his resignation if requested unanimously by the Council.

The Constitutional Council as described by the Constitution is independent and its decisions apply to all. No other authority can challenge its opinions and decisions. As a result, the members of the Board enjoy full independence in the performance of their duties. In 30 years of existence, no cases of resignation have been noted for political pressure. The criteria for eligibility make the Board naturally homogeneous. Dissenting opinions are almost impossible. The opinions and decisions of the Council are signed and proclaimed by unanimity of the members, individual opinions not being a traditional practice of the Constitutional Council.

6. The impact of the composition of the Constitutional Council on its decision-making process

The composition of the Constitutional Council derives from the political and judicial powers in place. The selection procedure reflects the political nature of the institution. *De facto*, two-thirds of the Council (eight members) stem from the political institutions that govern the country. These eight members are appointed by the President-elect of the people and among the deputies elected in the two chambers of the legislature. The nature of the Algerian political system being of semi-presidential type with broad presidential powers, cohabitation in the sense of the President being from a different political party than the majority in Parliament, is very unlikely and has never occurred before. Consequently, the eight members designated by the political authorities are a priori like-minded.

The remaining four members are judges elected by their peers from among the high courts. As mentioned above, these same judges are appointed by a Supreme Judicial Council chaired by the President of the Republic. Even if it is legitimate to describe its members as worthy representatives of the judiciary, it must be noted that the influence of the executive power remains.

The engineering of the composition of the Constitutional Council is therefore made so that political allegiance is paramount. The duty of ingratitude becomes difficult. The Algerian judicial system inspired by the French model does not encourage the emergence of a strong and independent judicial personality with a well-known public reputation. The Council, therefore, remains an institution where the decision-making process is dictated by the collegiality, unanimity and coherence of the members guaranteed by the political nomination.

7. Controversies around members of the Constitutional Council

The appointment of members as such has not been controversial. However, certain questions emerged in the Algerian public debate concerning the members of the Constitutional Council.

Firstly, politicians who are appointed Chairman of the Council are sometimes challenged. It is hardly understandable for a party of observers to appoint former ministers close to the President of the Republic to preside the Constitutional Council; especially when these personalities do not necessarily have the technical capacities to judge the constitutionality of the laws, and are equipped with a preponderant voice in case of equality of the votes.

Secondly, the members of the Constitutional Council elected from among the members of the legislature are hardly detached from their political affiliation. In some cases, these members continue to have activist activity while serving as Council members.

For example, a controversy arose during the 2014 presidential elections around a member of the Constitutional Council who attended a meeting of President Bouteflika. It should be remembered that the Constitutional Council has the competence to validate candidates, to deal with electoral appeals and to declare results. The commitment of the member of the Board in question who attended a meeting of his political party prompted the reaction of the opposing candidates to the President of the Republic that consisted of challenging the impartiality of the Constitutional Council.

It should be noted that the election of members to the Constitutional Council by the legislature is often a moment of controversy. In 2011, no rivalling candidate appeared in the Council of the Nation (Upper House) against the candidate of the RND Hocine Daoud who became part of the Constitutional Council. In 2013, opposition MPs from the People's National Assembly boycotted the election session of the member to be appointed to the Constitutional Council, Mr Graoui Hocine. The election of Judge Farida Laroussi by the magistrates of the Council of State in 2005 was challenged by her colleague Kamel Fenniche who would have won according to several reports. Judge Fenniche had denounced the irregularities of the ballot and the intervention of the President of the court in favor of the competitor. Finally, the Electoral Committee of the Council of State did not follow up on these allegations. Nevertheless, Judge Fenniche was finally elected in 2016 by his peers and installed in the Constitutional Council.

8. The Constitutional Council in the middle of the Algerian political crisis

Relatively, little attention was paid to the provisions governing the Constitutional Council in the debates on constitutional reforms. Between 2011 and 2016, political parties and Algerian civil society focused on the type of political regime, the rebalancing of powers and identity issues. The Constitutional Council remains an institution that has been misunderstood by a large number of players because of its hybrid character and discretion since 1989.

The constitutional revision of 2016 was the culmination of a long 5-year process of consultation and debate. It closed the debate, which brought together hundreds of associations and political parties. This revision modified for the third time the composition of the Constitutional Council. It seems therefore very unlikely that a new amendment will occur in the short term and will change the current provisions. That said, the Constitutional Council finds itself in the midst of the most important political crisis in the country.

The state of health of President Bouteflika is today the source of the first concern that animates the political scene. In his fourth mandate, he has delivered only one public speech since May 2012. Victim of multiple strokes, his ability to stand for re-election in 2014 was challenged by the political opposition. In spite of this state of health, the Constitutional Council validated the medical file of the candidate Bouteflika allowing him to run for a fourth term. Concerns were confirmed when Bouteflika

was unable to hold any public meeting during the election campaign. Once reelected, his public appearances continue to show the deterioration of his state of health. Article 102 of the current contrition and 88 of the previous constitution give it to the Constitutional Council to declare the state of an impediment for medical reasons. According to the Constitution as by 2016, the Council meets by its own right and decides over this observation. No seizure or external action is required.

Since 2012, the Constitutional Council has never used this prerogative. This abstinence seriously undermined the Council's credibility, underlined by the fact that it is chaired by a former minister and close to the president. The members of the Constitutional Council are therefore perceived as political actors favoring the maintenance of the regime in place, to the detriment of the Constitution of which they are supposed to be the guardians.

This situation illustrates the limits of a politico-judicial model of constitutionality control. The appointment of the President of the Council by the President of the Republic also jeopardizes the balance of power and the impartial functioning of the Council.

9. Conclusion

The composition of the Algerian Constitutional Council enshrines its political and judicial nature. Although it differs from the French model by giving one-third of the seats to high court judges, it remains an institution of a more political than judicial character.

The decisive influence of the executive on the appointment of members is also an important feature of the Algerian Council. The President of the Republic shall appoint four members of the Council, including the President (who shall have a casting vote). This means that five out of 12 votes come from the executive. Two of the four members of the legislature are appointed by the Council of the Nation, one third of whom is appointed by the President of the Republic. Finally, the judges of the Supreme Court and the Council of State are appointed to office by the Council of the Magistracy, which is presided over by the President of the Republic.

As a result, the Constitutional Council reflects the Algerian political system, which suffers from a weak separation of powers and an imbalance for the benefit of the executive.

Tunisia and Morocco have chosen to depart from the French model since the Arab Spring and to move towards a constitutional court composed of judges, approaching the Kelsenian model. Algeria, Lebanon and

Mauritania are the last three Arab countries still attached to the composition and the politico-judicial mandate of French tradition. It may take a new wave of political crises to challenge this model.

The Independence of Constitutional Judges: The Case of Jordan

Sufian Obeidat

Abstract
This study aims to demonstrate why the independence of constitutional judges in Jordan is undermined. The study describes the system of government in constitutional and political contexts; the powers of the unaccountable monarch, undermined branches of power and compromised political parties. A backdrop of the constitutional review history is followed by a detailed description of the constitutional and legal organization of the Jordanian Constitutional Court, including the mode of appointment of Constitutional Court members, the absence of a proper nomination process, and the restricted accessibility to the Court for the public and the Court itself. The study concludes with a discussion of the feasibility of reforming the Constitutional Court in a flawed political system where the unaccountable king, who has the sole power to select, appoint and remove the judges of the Constitutional Court by virtue of the Constitution. It argues for a substantial role for all the political actors in the appointment of members of the Constitutional Court in order to achieve a significant advancement towards constitutionalism.

1. Introduction

The selection and appointment of a member of the Constitutional Court in Jordan is not a complex procedure. On the contrary, it is very basic, though controversial. By virtue of the Constitution of Jordan of 1952 (the "Constitution"),[1] the King has the sole power to appoint the chairperson and judges of the Constitutional Court without sharing such power with any other entity in the Jordanian system of government.

Historically, the Jordanian constitutional review used to be a diffused system carried out by courts of general jurisdiction. In 2011, a popular

1 *The Constitution of The Hashemite Kingdom of Jordan of 1952*. *Official Gazette* 1093, 8 January 1952: 3.

movement emerged in Jordan demanding reform. Among such demands has been a call for the establishment of a constitutional court. To appease the popular sentiments, a set of constitutional amendments were introduced and provided for the establishment of a constitutional court.[2] Hence, the Constitutional Court of Jordan came into existence in 2012, and constitutional review became a centralized system carried out solely by the Constitutional Court (the "Court").

If one main purpose of institutionalizing a constitutional court was to entrench democratic reforms, at least in the case of Jordan, the newly created Jordanian Constitutional Court might not be suited to achieve such purpose. The Constitution limits the powers of the Court and makes it difficult for the public to access. The powers of the Court are limited to determining the constitutionality of laws and interpreting the Constitution.[3] The right to request the Court to interpret a constitutional provision is exclusive to the Council of Ministers (the "Cabinet"), the Chamber of Deputies (the "Chamber") and the Senate.[4] No other party has the right to such a request, including the Court itself. Furthermore, only the Cabinet, the Chamber and the Senate have the right to submit a direct challenge to the constitutionality of laws before the Court. The public, including political parties, has the right to an indirect challenge only. In cases adjudicated before courts, any party may submit a motion to challenge the constitutionality of a law. The adjudicating court, if it considers the motion substantive and serious, refers the motion to the Court of Cassation to finally decide on the seriousness of the motion and grant permission to submit the challenge to the Constitutional Court.

While hardly any constitutional court in the region possesses comprehensive powers to carry out all types of constitutional review, the Jordanian Constitutional Court namely lacks the power to review the "constitutionality" of constitutional amendments. Since the establishment of the Court, the Constitution was amended twice;[5] both amendments extended the King's powers, which effectively changed the nature of the parliamen-

2 *The Constitution of The Hashemite Kingdom of Jordan of 1952, as amended in 2011*. *Official Gazette* 5117, 1 October 2011, art. 58, 59 and 61.
3 *The Constitution as amended in 2011*, art. 59.
4 *The Constitution as amended in 2011*, art. 60.
5 *The Constitution as amended in 2014*. *Official Gazette* 5299, 1 September 2014: 5138; *The Constitution as amended in 2014*, *Official Gazette* 5396, 5 May 2016: 2573.

tary system of government and made it closer to a presidential monarchy – a hybrid of presidential and monarchic systems.[6]

Basically, the fact that the King monopolizes the appointment of members of the Constitutional Court leaves no room to discuss the dynamics of such appointments. Therefore, in order to understand the factors that determine the level of independence of the constitutional judges in Jordan, this chapter starts by revisiting and assessing the Jordanian constitutional and political context. Subsequently, a brief history of the constitutional review mechanism in Jordan will be followed by a description of the constitutional and legal organization of the Constitutional Court including nomination, appointment, terms and removal of members of the Constitutional Court. The chapter concludes with a discussion of the feasibility of reforming the appointment mechanism of constitutional judges in the context of political reform in Jordan.

2. Constitutional context

2.1. System of government and the executive

By virtue of the Constitution, the system of government is parliamentary with a hereditary monarchy.[7] The King is the Head of the State who is immune from all liability and responsibility[8] and carries out executive powers through his ministers.[9] His written and verbal orders do not release the Ministers from their responsibility.[10] The King exercises his powers by royal decrees countersigned by the Prime Minister and the Minister, or Ministers, concerned with the subject matter of the decree. The King expresses his consent by placing his signature above the signatures of the Prime Minister and the Ministers.[11]

The King appoints the Prime Minister and Ministers and dismisses them or accepts their resignations. He issues orders for holding elections of the Chamber and he appoints members of the Senate. The King convenes the Parliament (Chamber and Senate) and adjourns or prorogues it. He

6 http://constitutionnet.org/news/jordans-2016-constitutional-amendments-return-absolute-monarchy, accessed on March 19, 2019.
7 *The Constitution*, art. 1.
8 *The Constitution*, art. 30.
9 *The Constitution*, art. 26.
10 *The Constitution*, art. 49.
11 *The Constitution*, art. 40.

may dissolve the Chamber or the Senate, and relieve any Senator of his/her membership in the Senate. The King's powers also include ratifying laws upon their adoption by the Parliament. The King is the supreme commander of the armed forces.[12] Accordingly, he declares war, concludes peace and ratifies treaties and agreements. He also creates and confers civil and military ranks, medals and honorific titles, and currency is minted in his name. He has the right to grant a special pardon, commute any sentence and confirm a death sentence.

The Cabinet is responsible for administering internal and external affairs of the state,[13] and collectively accountable to the House of Representatives, the elected Chamber of the legislature, for the public policy of the state and for the affairs of their ministries.

According to constitutional jurists, who are very few in Jordan, the Jordanian Constitution borrowed significantly from the 1921 Belgian Constitution, which in turn had borrowed from British constitutional customs.[14] The powers granted to the King by the Constitution of 1952 seem to be identical with European constitutional monarchies, where the King acts as the Head of the State but does not rule.

2.2. The legislative

Members of the Senate are appointed by virtue of a royal decree and usually include the conservative class of present and former prime ministers and ministers, senior retired government officials and military officers, in addition to tribal leaders and businesspersons. The members of the House of Representatives are elected by secret ballot in a general direct election for a term of four years. The House of Representatives votes for confidence in cabinets upon their formation. It has the right to address questions to the Prime Minister and Ministers. In addition, the House of Representatives may vote for no confidence against the entire cabinet or any of its Ministers at any time.

Although the Constitution guarantees the right for establishing political parties as part of the constitutional fundamental rights, political parties are not a major player in the parliamentarian life.

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12 *The Constitution*, art. 32.
13 *The Constitution*, art. 45.
14 Mohamad Al Hamoury, *The Rights and Freedoms of the Whims of Politics and the Obligations of the Constitution: The Case of Jordan*: 192–193.

2.3. The judiciary

The Judiciary is the third branch of power and is vested in the courts. The Judiciary is independent and judgments are pronounced in the name of the King.[15] The Constitution upholds the principle of the independence of judges by stating that they are independent and their judgments are subject to no authority other than that of the law.[16] The Constitution further states that litigation is available to all by declaring that courts shall be open to all, hearings shall be public, and courts shall be free from any interference in their affairs.[17] Courts are divided into three categories: regular courts, religious courts and special courts. The regular courts have jurisdiction over all persons, including the government, in civil, criminal and administrative matters. The Judicial Council, which oversees regular courts, has the exclusive right to appoint judges and is responsible for all of their affairs.[18] The Judicial Council is presided over by the Head of the Court of Cassation, who is appointed and dismissed by a royal decree. All members of the Judicial Council are judges, except for one who is the Undersecretary of the Ministry of Justice.[19]

2.4. Recent amendments

Since its promulgation in 1952, the Constitution has been amended a number of times. Disappointingly, most of these amendments were to give the King wider authority at the expense of the Parliament, weakening its ability to play its legislative and oversight roles. The two major amendments that concern this study took place in 2011 and 2016. The 2011 Amendment provided for the establishment of a constitutional court as a standalone independent judicial entity comprised of nine members, including the Chairperson, to be appointed by the King by virtue of a royal decree.[20]

The 2016 Amendment represented a radical departure from the parliamentary monarchy system of government. It changed the mode of exer-

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15 *The Constitution*, art. 27.
16 *The Constitution*, art. 97.
17 *The Constitution*, art. 101.
18 *The Constitution*, art. 98.
19 *The Independence of Judiciary Law, as amended no. 29 for the year 2014. Official Gazette* 5308, 16 October 2014: 6001.
20 *The constitution as amended in 2011*, art. 58. *Official Gazette* 5117, 1 October: 4452.

cising royal powers. The King, who is immune from any liability and responsibility, now exercises direct executive powers in isolation from his Ministers.

Before such amendment, the Constitution provided that the King exercises the powers vested in him by royal decrees, which must be countersigned by the Prime Minister and the Minister concerned. The Constitution was amended to give the King the sole power, without any countersignature by the Prime Minister or concerned Minister, to select the Crown Prince, appoint the Regent, appoint and dismiss the Speaker and members of the Senate, appoint and accept the resignations of the Chairperson and members of the Constitutional Court, appoint and accept the resignation of the Head of the Judicial Council, appoint and dismiss the commander of the army, and the heads of Intelligence and the Gendarmerie.[21]

Fundamentally, these latest amendments constitutionalized the dominant powers that the King exercises on the ground, and formalized the absolute monarchy by virtue of a constitutional provision, which concentrated the power in a King who is neither legally nor politically accountable.

3. Political context

The constitutional text is in many ways far from the political reality in Jordan. Predictably, the consolidation of political powers in the hands of the King obstructs the democratic process and the transition of power. In such a political system, the only player is the King who has a strong presence and actual political power, with a Cabinet bearing the political and legal responsibility on the King's behalf.

3.1. An unaccountable monarch

In reality, the King exercises extensive governmental powers in a manner that disables the checks and balances in place within this theoretical constitutional framework. In addition to his direct control on the military and security apparatuses, the King appoints and dismisses Cabinet without providing justification. The appointment and dismissal of Cabinet is not

21 *The constitution as amended in 2016*, art. 40. *Official Gazette* 5396, 5 May 2016: 2573.

the result of parliamentary elections through which political parties arrive at the helm of the executive. Despite the fact that Ministers are subject to means of constitutional accountability, the King has the final word in government because he reigns and rules. Subsequently, Ministers and the Prime Minister face responsibility for actions that are not the result of their own independent decisions.

3.2. Legislative and political parties undermined

Although Senators are selected among those who usually keep in with the mainstream, the King may dissolve the Senate or relieve any senator of his/her membership in the Senate.[22] The King issues orders for holding elections and dissolves the Chamber at his sole discretion; powers which have been extensively exercised. Further, the role of the Chamber is subverted by brazen and tacit ways of interference in parliamentary elections, and support for certain candidates by encouraging them to run and oppose other candidates. In fact, parliamentary and even municipal elections have been rigged more than once without holding anyone accountable for such an act.

Political parties were banned in Jordan from 1957 until 1990. During that period, affiliation with a political party was illegal. Although twenty-seven years have elapsed since lifting the ban, political parties, whether from the right, the left or the center, were never represented in Cabinets, achieved a substantial number of seats in the Chamber, or appointed in the Senate. In other words, participation of political parties is never encouraged and they have never been integrated within the fabric of the political system.

3.3. An undermined judiciary

Although the Constitution explicitly recognizes the independence of the judiciary, the division of the courts into civil, religious and special courts has led to the existence of different jurisdictions, negatively impacting

22 The power to dissolve the Senate and relieve a senator of his membership did not exist at the time when the Constitution was issued, but was added in a later constitutional amendment in 1974: *The Constitution as amended in 1974*. *Official Gazette* 2523, 10 November 1974.

the unity of the judiciary and detracting from its independence. This is due to the fact that the provisions of the Constitution that pertain to the judiciary and the courts have been undermined through the enactment of various laws. These laws have dispersed judicial jurisdiction among a large number of regular, religious and special courts with different mandates. Furthermore, the establishment of special courts that are not under the jurisdiction of the judiciary, and the appointment and direction of judges by the executive power, violate the principle of separation of powers. There is no doubt that the greatest impact has been in weakening the control of the judiciary over the executive and exempting the military and security apparatuses from judicial control. The State Security Court is one of the most important examples of the special courts that lack independence. The Prime Minister constitutes the court, appoints judges and in some cases sets its mandate. In addition, some laws have created a system to combat corruption exercising judicial powers.

4. History of constitutional review

When the popular movement chanted in the streets demanding a constitutional court in Jordan, most of the public did not realize that there was an existing, albeit compromised, system of constitutional review in place.

4.1. The High Tribunal

Prior to the constitutional amendment of 2011, which created the Constitutional Court, the constitutional review and the interpretation of the Constitution were dealt with separately. The Constitution provided that a High Tribunal is to be constituted and to have the right to interpret the provisions of the Constitution upon the request of the Cabinet, the Senate or the Chamber. The High Tribunal was composed of the Speaker of the Senate as president, three Senate members to be selected by ballot, as well as five members to be selected from amongst the judges of the Court of Cassation. The High Tribunal had also the capacity of a special court to try ministers for offences attributed to them in the course of their ministerial duties.[23]

23 *The Constitution*, art. 56, prior to the constitutional amendment of 2011.

Before a constitutional amendment that took place in 1958, the President of the Court of Cassation used to chair the High Tribunal. The amendment made the Speaker of the Senate the President of the High Tribunal. This action eliminated the High Tribunal's judicial identity and it became more political.

Besides, at the times when the Constitution provided for the composition of the High Tribunal - which included three members of the Senate – Senators were immune from dismissal during their tenure, and the King had no power to dissolve the Senate before the end of its term. A constitutional amendment took place in 1974 to give the King the power to dissolve the Senate and relieve any senator of his/her membership. Not surprisingly, this power attributed to the King, compromised the immunity and independence of Senators both in their capacities as members of the Senate and as Members of the Constitutional Court. Moreover, dissolving the Senate would automatically lead to paralyzing the High Tribunal due to the absence of its Senator members.

4.2. Diffused constitutional review

The power to determine the constitutionality of laws was granted to all regular judges in Jordan by default. This power was not written in the Constitution or any other law, but based on the general rule of hierarchy of laws, or legitimacy of laws; a law shall not contradict the constitution and a regulation shall not contradict the law. Judges exercised this power by refraining from applying a law if they determined that it contradicted the Constitution, but they had no power to repeal a law.

Thus, within limits, constitutional review of laws existed in Jordan prior to establishing the Constitutional Court. However, the current general understanding in Jordan is that the establishment of the Constitutional Court terminated the power of the judiciary to decide on the constitutionality of laws and regulations, and confined such control to the Constitutional Court.

Regular judges, who comprised the majority of the previous two constitutional review bodies, used to have a relatively high level of independence. Even members of the Senate, who were part of the High Tribunal, benefitted at that time of a high level of protection, and thus from removal.

4.3. The Judicial Council

All regular judges, except for the President of the Court of Cassation, are appointed, promoted, disciplined, transferred and dismissed by decisions of the Judicial Council.[24] The Judicial Council takes decisions by voting and its deliberations are confidential.[25] The Independence of Judiciary Law provides for criteria for the appointment and nomination of judges. Generally, the Judicial Council forms a committee composed of senior judges to carry out a contest for the applicants. After running background checks for the successful applicants, the Judicial Council appoints them with a trial period of three years. Graduates of the Judicial Institute are exempted from such exams, and judges of higher courts reach their posts through promotion. The Judicial Council also has the right to appoint experienced lawyers in any court, including the Court of Cassation. Removal of judges must be through a disciplinary board and by virtue of a decision of the Judicial Council.

Theoretically, the influence of the executive on the appointment and nomination of judges is minimal. Other than the President of the Judicial Council, who is appointed solely by the King, the only executive member of the council is the Undersecretary of the Ministry of Justice. In reality, the executive would always have a word in judicial appointments through the Minister of Justice.

5. The Constitutional Court

5.1. Mode of nomination and appointment

The amended Constitution of 2011 provides for the establishment of a constitutional court, by virtue of a law, as an independent and separate judicial body. The Constitutional Court is composed of a minimum of nine members (the "Member" or "Members"), including the chairperson, appointed by the King for a nonrenewable six years term.[26]

According to the Constitution, in order to be nominated as a member of the Court, a person must[27]: (i) be a Jordanian who does not hold any

24 *Independence of Judiciary Law*, art. 6.
25 *Independence of Judiciary Law*, art. 7.
26 *The Constitution*, art. 58.
27 *The Constitution,* art. 61.

other nationality; (ii) have reached fifty years of age; and (iii) have served as a judge in the Court of Cassation and the High Court of Justice,[28] a university lecturer of law with a professorship degree, or a lawyer with a minimum practice of fifteen years. The relevant provision of the Constitution then adds that the Member must be "one of the specialists" who meet the conditions of membership in the Senate.

The Constitutional Court Law[29] that was issued in 2012 following the constitutional amendments of 2011 reiterated the first three of the above nomination criteria, while this time requiring that only one member be a "specialist" who meets the conditions of membership in the Senate.[30]

Although the Constitution provides that certain Members must have a judicial background, it neither specifies their number nor states if they should form the majority of the Members. The other types of Members that can be appointed to the Court (lawyers and law professors) must have a legal background, except for the "specialist" Member who should meet the conditions of membership in the Senate. As for the latter, it is not clear what the word "specialist" means, but it is clear that such Member is not required to come from a legal background. It appears that the condition for filling this seat is left open for candidates with political affiliations and agenda that keep with the mainstream. The Constitution and the law are silent on whether the "specialist" member is eligible to chair the Court. This means that the Court could be presided over by a person without legal background, let alone being of a high level of legal expertise.

In practice, this is exactly how the provision was implemented in the first appointment of the first Members of the Court in 2012. One of the Members was a former Senator with no legal qualifications. When this Member passed away a few years later,[31] he was replaced with another former Senator with a non-legal background.[32]

Other than the eligibility criteria for nomination mandated by the Constitution and reiterated in the law, there is no transparent criterion that governs the nomination of Members. The decision-making mechanism

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28 This used to be the name of the High Administrative Court in Jordan before the constitutional amendments of 2011.

29 *The Constitutional Court Law no. 15 for the Year 2012, Official Gazette* 5161, 7 June 2012: 2519. See also http://www.cco.gov.jo/Portals/0/ConstitutionalCourtLaw.pdf

30 *Constitutional Court Law*, art. 6.

31 Marwan Dudin. http://www.cco.gov.jo/en-us/Constitutional-Court/Court-Members, accessed on October 13, 2017.

32 Mohammad Dwaib. http://www.cco.gov.jo/en-us/Constitutional-Court/Court-Members, accessed on October 13, 2017.

in the Royal Palace is unknown to the public and is not regulated in legislation. Prior to the latest constitutional amendment that dispensed with the countersignature of the ministers on royal decrees, it was assumed that decisions are made within the cabinet. This is not clear anymore.

There are some indications, however, that certain non-transparent criteria are considered in the selection of Members of the Court. On 19 October 2016, news came out announcing a royal decree appointing four new Members to the Constitutional Court.[33] Apparently, after the issuance of the decree, it was discovered that one of the new appointees had a dual nationality, which violates the constitutional conditions of appointment in the Court. A new decree was issued the second day replacing him with a new member.[34] This incident revealed two issues: the first is that the process of nomination is injudicious and that the due background check of nominees is not well observed; and the second issue is that both appointees were Christians, which is indicative that the nomination process in the royal palace takes religious affiliation into consideration.

The other serious threat to the Court's independence in the nomination process is the loose standard in defining the number of Members of the Court. The Constitution requires that the Court be constituted of nine Members "at least". This leaves the door open to the executive to manipulate the composition of the Court and add judges to the bench to ensure that a majority will always rule in its favor. [35]

The mode of nomination and appointment of Members embodies a major threat to the Court's independence; an appointment dominated by the executive. The appointing authority is not an elected one, but rather an executive who is neither legally nor politically accountable. A judge, who is solely selected by the executive without participation of any other political actor, stands little chance of being able to act independently.[36]

33 Ammon News Agency. http://www.ammonnews.net/article/285875, last modified on October 19, 2016, accessed October 13, 2017.

34 Ammon News Agency. http://www.ammonnews.net/article/286033, last modified on October 20, 2017, accessed October, 13 2017.

35 Choudhry, Sujit, and Katherine Glenn Bass, *Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence*. New York: IDEA and Center for Constitutional Transitions at NYU Law 2014: 30.

36 *Constitutional Courts after the Arab Spring*: 29.

5.2. Term and removal

According to the Court's Law, the term of the Member expires in the event of death or resignation that becomes effective upon its acceptance by the King. The King has the right to remove a Member upon the recommendation of six other Members of the Court in the following circumstances:

1. Ceasing to meet any of the conditions of membership;
2. If the Members of the Court grant consent to prosecute a Member for a criminal act or a criminal complaint relating to the duties and activities entrusted to such Member;
3. Health issues that prevent a Member from doing his/her job; or
4. Loss of civil capacity.

If the number of Court Members becomes less than nine, due to the removal of a Member or expiry of membership, the King appoints a replacement Member for the remaining term of the departing Member.[37]

No third party monitors the work of the Court or the Members. The Constitution provides that the judgments of the Court are issued in the name of the King and are final and binding to all authorities and to the public.[38] While this is not a unique situation in constitutional courts, judgments of the Jordanian Constitutional Court are by the above-explained structures and constellations suited to be unduly influenced, considering the state of independence of the court and mode of appointment of judges.

6. Conclusion

According to the Constitutional Court's website, since its establishment in 2012, the Court issued 15 interpreting decisions and 28 rulings.[39] A quick look at the decisions and rulings shows that most of the issues adjudicated by the Court were not very controversial. This may be due to the fact that constitutionalism is not a major part of the Jordanian legal and political mindset. The constitutionalized monopolization of power by the King left no room for the natural political actors to be part of the constitutional and political scene. The Constitution narrowed the path to the Court and

37 *Law of Constitutional Court,* art. 22.
38 *The Constitution*, art. 59/1.
39 http://www.cco.gov.jo/en-us/Documents-of-the-Court/The-Court-in-Numbers, accessed on March 19, 2019.

deprived most of the important political players from directly accessing the Court in an effective way.

Ironically, the Constitution limits the right to directly challenge the constitutionality of laws to entities authorized to draft and approve such laws: namely, the Cabinet, which drafts bills, and the Parliament, which passes the laws. In this way, ordinary citizens, political parties and civil society organizations are deprived of the ability to directly challenge laws before the Court, even though the laws directly affect these entities' interests. The Court itself also lacks any autonomous authority to extend its control to any text or law that it deems unconstitutional. Even where the amendment of the constitution was concerned, the Court stood watching as its members were being appointed in accordance with an exclusive power.

Reforming the Constitutional Court requires the reform of the political system first. In a system where an unaccountable executive undermines all the different actors, including political parties, the participation of such actors in the appointment of constitutional judges will not lead to any meaningful change.

Guarantees and Challenges of Judicial Independence: The Constitutional Courts of Kuwait and Bahrain as Case Studies

Salma Waheedi

Abstract
This chapter examines the constitutional and legal framing of judicial independence in the two case studies of Kuwait and Bahrain, with a specific focus on considering the extent to which the constitutional courts of Kuwait and Bahrain are empowered to exercise their judicial powers independently. The chapter begins with an outline of relevant constitutional provisions, followed by an examination of the primary and secondary legislation governing constitutional court judges' selection and appointment, terms of service and tenure, training and qualification, and discipline and removal procedures. As part of this examination, the chapter considers the effectiveness of these existing governing frameworks in enabling or limiting the exercise of judicial independence by the constitutional judiciary in Kuwait and Bahrain. The two states are shown to share broad similarities in their constitutional and legal systems but also to diverge in their legislation and the different ways in which political decision-makers use legal tools to exert indirect influence on judicial composition and outcomes.

1. Introduction

Judicial independence is universally recognized as an essential prerequisite for the functioning of a judicial system that upholds justice and the rule of law. Practically, it is a means towards realizing justice, ensuring institutional accountability, and promoting public confidence in the judiciary and the broader legal system. Judicial independence is guaranteed in the vast majority of national constitutions across the globe and in key international law instruments, including the Universal Declaration of Human

Rights and the International Covenant on Civil and Political Rights.[1] The United Nations Basic Principles on Independence of the Judiciary in turn were formulated to assist United Nations Member States in securing and promoting the independence of the judiciary in national legislation and practice.[2] These principles take into account judges' selection and appointment procedures, qualifications and training, conditions of service and tenure, professional secrecy and immunity, and procedures for discipline and removal.[3] These categories are particularly helpful in assessing the extent to which institutional judicial independence is secured by legal stipulations. It is broadly recognized as well that formal instruments and mechanisms are alone insufficient to guarantee the impartiality of judges and judicial decision making, which is highly dependent on the political context, power dynamics, and strength of institutions in any given context.

The constitutions of all Arab Gulf States incorporate broad guarantees of the independence of the judiciary and the rule of law. The constitutions of Kuwait, Bahrain, the United Arab Emirates, and Qatar, as well as the Basic Laws of Saudi Arabia and Oman, all provide for the independence of judges and prohibit interference with the operation of courts.[4] In turn, each of these constitutions leaves the application of the principle of judicial independence and the details of its institutional mechanisms to be determined and elaborated by ordinary law. They regulate their judiciaries by means of detailed legal instruments that create the structures and procedures that govern the selection and tenure of judges, as well as the judicial procedures and administrative operation of these courts. This article is a brief examination of the institutional independence of judges in two of the Arab Gulf States, Kuwait and Bahrain, with a particular focus on constitutional court judges sitting at the apex of these two states' judicial hierarchies. The article provides an overview of the constitutional and

1 See *Universal Declaration of Human Rights*. General Assembly Resolution 217 A (III), art. 10, U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*. General Assembly Resolution 2200A (XXI), art. 14, December 19, 1999, 999 U.N.T.S. 17.

2 *Principles on the Independence of the Judiciary. Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan*, U.N. Doc. A/CONF. 121/22Rev.1 (1985). The Principles were endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

3 Ibid.

4 *Basic Law of Saudi Arabia* (1992), art. 46; *Constitution of Kuwait* (1962), art. 163; *Constitution of Bahrain* (2002), art. 104; *Constitution of Qatar* (2004), art. 130; *Basic Law of Oman* (1996), art. 60; *Constitution of the United Arab Emirates* (Permanent, 1996), art. 94.

legal framework governing the constitutional judiciary in each state and analyzes their legal and procedural implications, with the understanding that questions of impartiality, closely related to the personal independence of judges, would require a separate in-depth inquiry into the wider political, historical, and social contexts in which these courts operate.

The article begins with an outline of relevant constitutional provisions, followed by an examination of the primary and secondary legislation governing constitutional court judges' selection and appointment, terms of service and tenure, training and qualification, and discipline and removal procedures. As part of this examination, the article will consider the extent to which these existing governing frameworks work to enable or limit the exercise of judicial independence by the constitutional judiciary in Kuwait and Bahrain. As will be shown below, the two states share broad similarities in their constitutional and legal systems but also diverge in their legislation and the different ways in which political decision-makers use legal tools to exert indirect influence on judicial composition and outcomes.

2. *Kuwait*

2.1. *The constitutional and legal framework*

Enacted in 1962, the Constitution of Kuwait became the first among the Arab constitutions to mandate the establishment of a dedicated and specialized court to review the constitutionality of legislation.[5] The Kuwait model was largely replicated elsewhere in other Gulf countries and across the Arab world.[6]

The 1962 Kuwaiti Constitution provides for the establishment of a "specialized judicial body" to review the constitutionality of laws, decrees, and regulations but leaves the structure and jurisdiction of this body, as well as its governing procedures and judicial appointments process, to be deter-

5 *Constitution of Kuwait* (1962), art. 173. For a discussion of the political context and the legal debates surrounding the establishment of the Kuwaiti Constitutional Court, see, e.g., Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*. Cambridge: Cambridge University Press, 2006: 129-186.

6 The constitutions of Bahrain (2002), Qatar (2004), and Oman (1996) provide for the establishment of a designated judicial body to review the constitutionality of laws.

mined by law.[7] Article 173 on constitutional review further emphasizes that the law shall ensure the right of both the government and interested parties to challenge the constitutionality of laws and regulations and that a law or regulation that is determined to be unconstitutional by "that said body" shall be considered null and void.[8]

While the Constitution of Kuwait does not use the term "court" explicitly, the Explanatory Memorandum to the Constitution is insightful in revealing the intention of the draft that a specialized court be established to rule on constitutional disputes.[9] The Memorandum also reveals the drafters' full awareness that a guarantee of the independence of the court is central to its effective empowerment to review legislation in order and avoid "conflict of opinions in interpreting legislation" and confusion that may result from "exposing laws to [the risk of] being struck down without taking into account different arguments and considerations."[10] The Kuwaiti Constitutional Court was established eleven years later, in 1973, with the enactment of Law No. 14 Establishing the Constitutional Court ("Kuwaiti Constitutional Court Law").

The Constitution of Kuwait includes several provisions that enshrine the independence of the judiciary. Article 50 of the Constitution provides for the separation of powers, while Article 53 provides that judicial powers are vested in the courts, which exercise their powers in the name of the Emir and within the bounds of the Constitution. Article 163 of the Constitution prohibits "any authority" from yielding dominion over judges in the administration of justice or interfering with their performance, and provides that the law shall guarantee the autonomy of the Judiciary and define the Judges' warranties and the conditions governing their immunity from dismissal.[11] The Constitution provides that the organization, jurisdiction, and functions of the courts shall be determined by law.[12] Further, Article 165 provides that all court hearings shall be public, save in "exceptional cases" to be determined by law.

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7 Records of the discussions of the Constituent Assembly are available in Arabic at http://www.kna.kw/clt-html5/run.asp?id=1568.

8 *Constitution of Kuwait* (1962), art. 173.

9 *Introductory Memorandum to the Constitution of Kuwait* (1962), art. 173. Records of the discussions of the Constituent Assembly are available in Arabic at http://www.kna.kw/clt-html5/run.asp?id=1568.

10 Ibid.

11 *Constitution of Kuwait* (1962), art. 163.

12 *Constitution of Kuwait* (1962), art. 164.

The primary legislation regulating the functions of the Constitutional Court is the Constitutional Court of 1973 and its bylaws, whereas the appointments, functions, immunities, and independence guarantees of all judges, including Constitutional Court judges, are governed by Law No. 23 of 1990 Organizing the Judiciary ("Kuwaiti Judiciary Law"). The Kuwaiti Constitutional Court Law empowers the Court to determine the procedures of bringing and adjudicating cases and to set its own litigation fees in its bylaws, which are issued by means of an Emiri Decree.[13]

The Kuwaiti Constitutional Court Law establishes an "independent court" with the mandate of "interpreting constitutional text, adjudicating disputes related to the constitutionality of laws, decrees, regulations, and National Assembly election disputes…"[14] It affirms the supremacy of the rulings of the Kuwaiti Constitutional Court, declaring them binding on all other courts.[15] The Constitutional Court Law also specifies that rulings of the Constitutional Court must be issued by a majority vote of its seven members, and that any dissenting opinion of the minority of judges shall be noted and attached to the Court's ruling.[16]

Disputes can be raised to the Constitutional Court in three different ways: First, legislation may be referred to the Court prior to enactment by the Cabinet of Ministers or the National Assembly (abstract review); second, specific cases or controversies may be referred to the Court by any of the lower courts or by any party to a case, if it was determined there was a constitutional issue with the applicable law or regulation (concrete review); and third, a natural or a juridical person may dispute the constitutionality of a law, decree, or regulation before the Court, provided that this person has a specific interest that is impacted by the legal instrument in question.[17] Among the Arab Gulf countries, Kuwait affords the greatest accessibility to the Constitutional Court and remains the only one to empower natural and legal persons (private entities) to bring direct challenges

13 See *Emiri Decree* (no number) of 1974, issued May 13, 1974 Issuing the Bylaws of the Constitutional Court.

14 *Kuwaiti Constitutional Court Law* (1973), art. 6. Kuwait is the only Gulf country that grants its constitutional court the mandate to adjudicate election disputes.

15 *Kuwaiti Constitutional Court Law* (1973), art. 1.

16 *Kuwaiti Constitutional Court Law* (1973), art. 3.

17 *Kuwaiti Constitutional Court Law* (1973), arts. 4 and 4(R). The ability of persons to bring direct challenges to the court was incorporated in 2014 by way of a legal amendment to the *Constitutional Court Law*; see *Law No. 109 of 2014 Amending the Constitutional Court Law of 1973*.

to the Constitutional Court, independent of the existence of an ongoing court dispute.

The Kuwaiti Constitutional Court Law includes broad guidelines with respect to the composition of the court, whereas rules of judicial appointment, responsibilities, immunities, and dismissal, are all governed by the Kuwaiti Judiciary Law of 1990. A key feature of the Kuwaiti Constitutional Court Law is that it empowers the High Judicial Council to shape the composition of the Constitutional Court by selecting its members from senior members of the Kuwaiti judiciary.[18] The Constitutional Court Law provides that the Constitutional Court is composed of five judges, in addition to two additional alternative judges to be chosen by the High Judicial Council from among the senior judges by secret ballot.[19] All seven judges must be Kuwaiti nationals. [20] Upon appointment by Emiri Decree, the seven judges form the bench of the Constitutional Court, and Court rulings are issued by a majority vote of judges.[21]

Judges of the Constitutional Court undertake their duties in addition to their original appointments at the Cassation Court or High Appeals Court.[22] Significantly, once judges are appointed, the Kuwaiti Judiciary Law guarantees their immunity from dismissal, except in accordance with disciplinary procedures outlined in the law, and by decision of a disciplinary panel composed of senior judges.[23] The law does not specify term limits for Kuwaiti Constitutional Court judges. Nothing in either the Constitutional Court Law or the Judiciary Law prevents the appointment of women as judges. However, to date, there has not been any woman appointed to the Bench of the Kuwaiti Constitutional Court.[24]

As Constitutional Court judges are selected by the High Judicial Council from among senior members of the Kuwaiti judiciary, it is useful

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18 *Kuwaiti Constitutional Court Law* (1973), art. 2.

19 Ibid.; senior judges include judges in the Cassation Court and High Appeals Court.

20 Ibid.

21 *Kuwaiti Constitutional Court Law* (1973), art. 3.

22 *Kuwaiti Constitutional Court Law* (1973), art. 2.

23 *Kuwaiti Judiciary Law* (1990), art. 23; see Section VI of the *Law on Disciplinary Procedures*.

24 Kuwait appointed its first batch of eight women to the judiciary on 5 July 2020, in a historic move that followed decades of activism by women and strong opposition by Islamist forces. The women were initially appointed as public prosecutors in 2014. See e.g., "Kuwait: Why the Delay in Appointing Women to the Judiciary?" (in Arabic) *BBC Arabic* (2 July, 2020), https://www.bbc.com/arabic/middleeast-53257876.

to trace the process of appointment of senior judges as outlined in the Kuwaiti Judiciary Law. This law establishes a High Judicial Council responsible for the administration of the judiciary. Specifically, the High Judicial Council is mandated with managing the appointments, promotions, and transfers of judges in the manner specified in the law, in addition to providing its opinion in matters related to the judiciary and the public prosecution, either on its own initiative or by request of the Minister of Justice.[25] The Kuwaiti Judiciary Law provides that the High Judicial Council is composed of nine members: President of the Cassation Court (who shall be the President of the Council), Vice-President of the Cassation Court, President of the Court of Appeals, the Public Prosecutor,[26] Deputy of the Court of Appeals, President of the Courts of First Instance, the two longest-serving Kuwaiti judges, and the Undersecretary of the Ministry of Justice.[27] Article 18 of the Law further provides that the Minister of Justice may attend meetings of the High Judicial Council, although he cannot vote in these meetings.[28]

With the exception of the Constitutional Court, the Minister of Justice and the High Judicial Council share the responsibility of appointing judges at all court levels in Kuwait. Specifically, Article 20 of the Kuwaiti Judiciary Law (as amended in 1996), grants the Minister of Justice the primary responsibility for nominating all new judges, which are appointed by an Emiri Decree after the approval of the High Judicial Council. Promotion of judges to senior judicial positions, such as the positions of President and Vice-President of the Cassation Court and Presidents of the High Court of Appeals and Courts of First Instance, are also issued by an Emiri Decree based on a proposal of the Minister of Justice and approval of the High Judicial Council.[29] These senior judges in turn form the core membership of the High Judicial Council, which select appointees to the Constitutional Court. Lower court judges are generally appointed from amongst members of the public prosecution, and the law states that the promotion system shall be based on both experience and qualification.[30]

The process of appointment to the judiciary reserves to the executive branch, represented by the Minister of Justice, the power to exercise indi-

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25 *Kuwaiti Judiciary Law* (1990), art. 17.
26 The Public Prosecutor is appointed by an Emiri Decree upon nomination by the Minister of Justice.
27 *Kuwaiti Judiciary Law* (1990), art. 16, as amended by *Law No. 10 of 1996*.
28 *Kuwaiti Judiciary Law* (1990), art. 18.
29 *Kuwaiti Judiciary Law* (1990), art. 20.
30 *Kuwaiti Judiciary Law* (1990), arts. 21 and 22.

rect influence over the selection of members of the Courts. In view of the composition of the High Judicial Council – to include two direct executive appointees (the Public Prosecutor and the Undersecretary of the Ministry of Justice) and seven members essentially selected by the executive and later approved by the judiciary – it is difficult to imagine Constitutional Court appointments taking place without the political approval of executive leadership.

The Kuwaiti Judiciary Law recognizes the importance of training and capacity building for judges,[31] and the 1996 amendment to the law declares enrollment in training programs to be a fundamental duty of a judge.[32] The Law Establishing the Kuwait Institute for Judicial and Legal Studies (Decree No. 37 of 1994) tasks the Institute with providing in-service training as well as induction training for judges, judicial nominees, members of the public prosecution, and judicial assistants. The Institute reports to a Board of Directors, which sets its general policies and operational priorities, determines its organizational structure and proposed budget, approves all hiring decisions of training and teaching staff, and defines its programs and annual training plans.[33] The Minister of Justice serves as the Chairman of the Board of the Institute and the Institute itself is placed under full legal and administrative supervision of the Ministry of Justice. [34] The Minister of Justice also appoints the Director of the Institute, by consent of the High Judicial Council, allocates an operational budget to the Institute from the budget of the Ministry, and issues a decree organizing the operation of the Institute.[35]

Administratively, Articles 3-8 of the Kuwaiti Judiciary Law grant significant administrative discretion to Minister of Justice, including the power to determine compensation and bonuses of judges across all courts. Financial compensation of judges of all levels – including non-Kuwaiti judges on temporary contracts – are determined by the Cabinet of Ministers upon proposal of the Minister of Justice, and the Ministry of Justice directly recruits and hires all support staff in courts and regulates their operation.[36] More broadly, powers to issue and administer all human resources policies

31 See *Explanatory Memorandum to Law No. 10 of 1996 Amending the Kuwaiti Judiciary Law (1990)*, Section IV.
32 *Kuwaiti Judiciary Law* (1990), art. 72.
33 *Kuwait Institute for Judicial and Legal Studies Law* (1994), art. 5.
34 *Kuwait Institute for Judicial and Legal Studies Law* (1994), art. 3.
35 *Kuwait Institute for Judicial and Legal Studies Law* (1994), arts. 3 and 5–8.
36 *Kuwaiti Judiciary Law* (1990), art. 67.

with respect to the courts are delegated to the Ministry of Justice.[37] No administrative staff member may be demoted or dismissed from the courts without an order by the Minister of Justice.[38]

The budget of the judiciary in Kuwait is allocated by the state as part of the budget of the Ministry of Justice. The Judiciary Law empowers the Minister of Justice to determine the proposed budgetary allocation of the courts upon consulting with the High Judicial Council.[39] Under Article 69 of the Law, the proposed budgetary allocation is then submitted to the Ministry of Finance for inclusion in the draft state budget, which requires the approval of the National Assembly.[40] Budgetary allocations of the court are classified under the heading of expenses and transfers by the Ministry of Justice.[41]

2.2. Legal and institutional challenges

The Kuwaiti Constitutional Court is said to enjoy a relatively high degree of legal and functional independence in comparison to its counterparts in the Gulf region. Nonetheless, achieving full judicial independence remains subject to some significant legal and institutional challenges. A key feature of the Kuwaiti Constitutional Court Law is that it empowers the judiciary, represented by the High Judicial Council, to select the bench of the Constitutional Court. The process of appointment to the judiciary itself, however, grants the executive branch, represented by the Minister of Justice, significant indirect influence over the selection of members of the Court. The composition of the High Judicial Council includes two direct executive appointees (the Public Prosecutor and the Undersecretary of the Ministry of Justice), while the remaining seven are essentially selected by the executive and later approved by the judiciary. It is difficult to imagine a scenario whereby an appointment to the bench could occur without executive approval.

Once appointments are made, the law takes steps to ensure that judges on the Constitutional Court are shielded from undue influences on their decision-making. The lack of term limits and the protection from dismissal except by disciplinary proceedings are notable in that regard. Ensuring that

37 *Kuwaiti Judiciary Law* (1990), art. 70.
38 *Kuwaiti Judiciary Law* (1990), art. 67.
39 *Kuwaiti Judiciary Law* (1990), art. 69.
40 Ibid.
41 *Kuwaiti Judiciary Law* (1990), art. 67.

all members of the court bench are tenured judges is a further protection from external pressures on the person of a judge. While non-Kuwaiti Arab judges are regularly appointed to serve in the judiciary and may serve in their professional capacity on the High Judicial Council, the Constitutional Court Law, in particular, ensures that only Kuwaiti judges may serve on the Constitutional Court and excludes non-tenured judges – non-Nationals on temporary contracts – who may be more vulnerable to pressure.

In order for a judicial authority to maintain a degree of autonomy, it is essential to have in place an institutional structure that allows the judiciary to regulate its own affairs, including appointments, termination of service, impeachment, and procedures. Kuwait – like most Arab Gulf States – has historically followed a civil law model where the executive branch of government is involved in regulating and overseeing the administration of judicial affairs through the Ministry of Justice. A problematic feature in the Kuwaiti Judiciary Law, which directly impacts the functional independence of the Kuwaiti Constitutional Court as well as its serving judges, is the wide discretion of the Minister of Justice to make financial and administrative decisions with respect to the operation of the courts. Institutionally, courts remain dependent on the budgetary allocations controlled by the Ministry and judges themselves are compensated and trained in accordance with the will of the executive. Training programs available to judges, and optional training bonuses, also fall under the control of the Ministry of Justice.

3. *Bahrain*

3.1. *The constitutional and legal framework*

Bahrain adopted a centralized system of judicial review in its amended Constitution of 2002,[42] which explicitly provides for the establishment of a specialized constitutional court that was granted the sole power to conduct constitutional review of legislation.[43] Article 106 of the Constitution of Bahrain specifies that the Court "shall comprise a President and six members" but leaves the term of appointment and procedures to be followed

42 The post-independence Constitution of 1973 did not mention a constitutional court, and was suspended two years after its enactment.

43 *Constitution of Bahrain* (2002), art. 106. The Bahraini Constitution of 1973, later suspended in 1975, did not include any mention a constitutional court.

by the court to be determined by law. It instructs the lawmaker, nonetheless, to "ensure that members of the court are not liable to dismissal."[44] The Constitution provides that challenges to the constitutionality of law can be brought to the court by either the Government, either chamber of the bicameral National Assembly,[45] "notable individuals," and others, including lower courts in the context of an ongoing judicial dispute, e.g. when the constitutionality of legislation is in question. The King may also refer any legislation to the court prior to its enactment to rule on its constitutionality. The Constitution states that a ruling of unconstitutionality by the Court shall have an immediate effect, unless the Constitutional Court specifies otherwise, and that rulings of the Court are binding on all courts and state authorities.[46] The Constitution of Bahrain recognizes judicial independence; Article 104 of the Constitution of Bahrain declares the judiciary to be "independent and free from any interference." Articles 33 and 34 of the Constitution provide for the separation of powers and vests judicial powers in courts, which issue their rulings in the name of the King, who is also the President of the High Judicial Council.

The Constitutional Court of Bahrain was established soon afterwards in pursuant to Law No. 27 of 2002 ("Bahraini Constitutional Court Law"). The Bahraini Constitutional Court Law outlines the structure of the court, appointment procedures, and general rules governing the exercise of the Court's powers. Article 3 of the Bahraini Constitutional Court Law provides that the Court shall be composed of seven judges appointed directly by the King by a Royal Decree. The Law also grants the King the power to name the Constitutional Court's president and vice-president.[47] The Bahraini Constitutional Court Law does not prevent non-nationals – Arab judges serving on temporary contracts – from serving on the bench of the Constitutional Court. The Law sets strict term limits for Constitutional Court judges. In the original 2002 version, the term limit for Constitutional Court judges was set at nine years, and it was not renewable. In 2012,

44 *Constitution of Bahrain* (2002), art. 106.

45 The National Assembly of Bahrain consists of a lower elected Chamber of Deputies and an upper Shura (Consultative) Council, directly appointed by the King. Each chamber consists of 40 members. *Constitution of Bahrain* (2002), arts. 33 and 52–61.

46 *Constitution of Bahrain* (2002), art. 106.

47 *Bahraini Constitutional Court Law* (2002), art. 3.

an amendment to the law reduced the term limit to five years and made it renewable for one additional term.[48]

The Constitutional Court Law departs from the procedure of appointing ordinary judges, regulated by Article 33(h) of the Constitution and Decree No. 42 of 2002 promulgating the Judicial Authority Law ("Bahraini Judicial Authority Law"), which states that judges shall be appointed by Royal Decree upon nomination by the High Judicial Council.[49] Instead, the Constitutional Court Law does not explicitly provide for a role for the Council in the selection of judges, nor does it offer guidelines on the process or criteria of selection of Constitutional Court judges.[50] The King retains full power to shape the composition of the Court by unilaterally appointing Constitutional Court judges.

The Bahraini Constitutional Court Law permits the appointment of non-serving judges to the bench of the Constitutional Court, requiring simply that judges on the Court be qualified to practice law and should have not less than fifteen years of legal experience.[51] The Law does not specify mechanisms for the selection of judges, nor does it mention specific qualifications or specific relevant judicial experience. From the text, it appears that no training in constitutional law or constitutional adjudication, for example, is required.[52] As per the law, Constitutional Court judges may not hold any other public appointment while serving on the Court's bench.[53] For the duration of their limited appointment terms, judges may not be dismissed or transferred without their consent.[54] In 2007, Bahrain became the first among the Arab Gulf States to appoint a woman to the bench of its Constitutional Court.[55] The current composi-

48 *Bahraini Constitutional Court Law* (2002), art. 3; *Law No. 38 of 2012 Amending the Constitutional Court Law*.

49 *Bahraini Judiciary Law* (2002), art. 24; the High Judicial Council is appointed by the King according to article 33 of the Constitution.

50 See also, for example, *Royal Order No. 46 of 2002 Appointing Members of the Constitutional Court*; *Royal Order No. 41 of 2013 Appointing the President of the Constitutional Court*.

51 *Bahraini Constitutional Court Law* (2002), art. 4.

52 Ibid.

53 *Bahraini Constitutional Court Law* (2002), art. 11.

54 *Bahraini Constitutional Court Law* (2002), art. 9.

55 *Royal Order No. 17 of 2007*. Bahrain was also the first Arab Gulf country to appoint a female judge in 2006 pursuant to *Royal Decree No. 15 of 2006*. As of 2016, women occupied 9% of judicial positions in Bahrain. See "Women in the Judiciary in Arab States: Removing Barriers, Increasing Numbers," *E/ESCWA/ECW/2019*, https://undocs.org/pdf?symbol=en/E/ESCWA/ECW/2019/2.

tion of the Court also includes one female judge on the bench, appointed in 2016.[56]

The Bahraini Constitutional Court Law states that the Court shall have administrative and budgetary independence, yet the budget allocation of the Court shall be determined in agreement with the Minister of Finance and that internal budgetary allocation of the Court shall follow the guidelines of the state budget – issued by the Minister of Finance.[57] Financial compensations, including regular salaries and bonuses, of judges, are determined by a decision of the King and pursuant to a Royal Decree.[58] On the other hand, the Bahraini Constitutional Court Law grants the Court administrative independence from the Civil Service Bureau with respect to the hiring, management, and dismissal of staff.[59]

In terms of training and capacity building, a Judicial and Legal Studies Institute was established pursuant to Decree No. 69 of 2005 ("Judicial and Legal Studies Institute Law") as part of the Ministry of Justice, to manage and administer training and capacity building programs for all judges, judicial nominees, and prosecutors.[60] The Institute reports to a Board of Trustees, headed by the Minister of Justice.[61] The Bahraini Judicial and Legal Studies Institute Law provides for a role for the High Judicial Council in approving the training programs mandatory for judges and prosecutors, as well as approving the appointment of the Director of the Institute.[62] The Minister of Justice, however, retains full financial and administrative control over the Institute by determining its budget allocation and issuing its internal bylaws and operational guidelines.

3.2. Legal and institutional challenges

Similar to the Kuwaiti judiciary model, the Constitution of Bahrain provides broad guarantees of judicial independence and leaves the means by

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56 Current Members of the Constitutional Court, Official Website of the Bahraini Constitutional Court (Arabic), http://www.ccb.bh/ccb/Pages_ar/MemberList.aspx?encr=1B3A&mtype=TQ.

57 *Bahraini Constitutional Court Law* (2002), art. 8(R).

58 See *Royal Decree No. 40 of 2012*, specifying the salaries of judges of the Constitutional Court.

59 *Bahraini Constitutional Court Law* (2002), art. 8(R).

60 *Judicial and Legal Studies Institute Law* (2005), arts. 1 and 2.

61 *Judicial and Legal Studies Institute Law* (2005), art. 3.

62 *Judicial and Legal Studies Institute Law* (2005), art 4.

which this independence is to be achieved for the determination of the legislator. In the political context of Bahrain, broadly characterized by a weak institutional culture and a disproportionately strong influence by the executive leadership over other branches of government, this creates greater flexibility for the executive leadership to influence the legislation governing the judicial branch. Structurally, a weak institutional culture combined with structural limitations to the legislature – of which one chamber is directly appointed by the executive leadership and another chamber is elected on the basis of carefully-crafted districts – translates into a wide margin of influence by the executive over the basic defining parameters of the courts, including Constitutional Court composition and case dockets.

Article 106 of the Constitution of Bahrain, for example, provides that term limits of Constitutional Court judges are to be determined by ordinary legislation and does not set a minimum limit. In Bahrain and beyond, term limits broadly are considered to be a restricting factor that could restrain judges' independence and their ability to exercise impartial judgment, in the absence of the career and financial security afforded by lifetime appointments. The short limits on the terms of service for judges – recently reduced to five years instead of nine – is atypical even for the Arab Gulf countries and raises concerns of the possibility of rendering judges vulnerable to excessive executive influence. Similar concerns arise with the possibility of appointing non-nationals – mostly Arab judges on temporary contracts – to serve on the bench of the Constitutional Court.[63]

One other feature of the Constitutional Court Law that poses a threat to judicial independence is the opaque selection process of judges. Notwithstanding Article 33(h) of the 2002 Constitution, which provides that "the King shall appoint judges by nomination of the High Judicial Council," the Constitutional Court Law – unlike the Judicial Authority Law – is silent on the nomination or selection mechanism of Constitutional Court Judges. Further, the High Judicial Council itself is appointed by a Royal Order, and the Judicial Authority Law does not outline any nomination mechanism, nor does it mandate any form of consultation before issuing appointments, thus further entrenching executive control over judicial composition at all levels.[64]

63 Currently, all judges on the Court are Bahraini nationals.

64 See, for example, *Royal Order No. 56 of 2016* appointing the High Judicial Council. Judicial Council Members are appointed for a limited term of three years that may be renewed once.

The rules governing adjudication and court administrational and management are also passed by ordinary legislation, in contrast to the Kuwait model where the Constitutional Court is empowered to issue its own bylaws. The Bahrain model allows for further executive influence over the functions of the courts. For example, in terms of budgetary allocations, the Constitution of Bahrain grants Parliament the authority to set the judiciary's budget. In view of the weak prerogatives of Parliament, this has meant that the executive effectively retains control of the financial resources available to the judiciary.[65]

4. Conclusions

Constitutional review has been most effective in liberal democracies, where it serves as a constitutional check on the will of the majority to ensure that elected government institutions do not usurp their constitutional limits. This requires an effective separation of powers and an independent exercise of power by each branch of government, so the courts may act as an umpire between these conflicting powers, relying on their constitutional grants of independence and enforcement powers that permit the exercise of this mandate. Broadly speaking, political systems in both countries remain dominated by strong executive branches that overshadow all other political actors, and the exercise of political power in all Arab Gulf States remains subject to extra-constitutional sources of power, with dynastic and tribal exercises of influence permeating all state institutions and political dynamics. This tradition of weak institutional checks continues to dominate, despite the current constitutions' ostensible commitments to the separation of powers. State institutions, including the legislature, continue to function as subsidiaries of the executive branch and depend on its willingness to cooperate, and yield very limited enforcement power except on politically weaker actors.

The constitutions of both Kuwait and Bahrain include provisions that promise independence of the judiciary, of which the constitutional courts are an integral part, but leave the details of the mechanisms of guaranteeing this independence to ordinary law. Yet none of the legislatures in the Gulf are fully elected, with Bahrain's National Assembly consisting of two

65 See, for example, report of a "50% increase in the Salaries of Judges by Royal Decree" (Arabic), *Al-Ayam*, 12 October, 2012, http://alayam.com/newsdetails.aspx?id=101388.

chambers, a lower elected chamber and a higher appointed one, and with Kuwait having the highest ratio of elected members (the ratio varies with the number of government ministers, who sit in Parliament as deputies). In turn, this structural relative weakness of the legislatures results in significant influence by the country's executive leadership over lawmaking. One can easily observe that across the broad legislation governing the judiciary continues to reserve to the executive branch significant powers to nominate the pool from which constitutional court judges are selected, to nominate or appoint the high judicial councils responsible for selecting judges, and to undertake administrative functions with respect to all judges' financial compensation, and in the case of Bahrain, appointment terms.

Notwithstanding formal guarantees of independence, textual provisions that permit formal executive interference combined with the political realities of traditionally strong executives dominated by highly influential dynastic and tribal powers leave ample room for the executive branches to influence judicial decisions and – if they choose to – even alter the composition of these courts in order to ensure or prevent certain outcomes. This issue is compounded by historically weak state institutions that function in large part under the patronage of the Head of State, rather than wielding their own constitutional sources of power. Going forward, it is difficult to envision any legal changes that would expand the powers or independence guarantees of either of the two constitutional courts, absent significant shifts in the political dynamics, locally and regionally. In the meantime, it remains to be seen whether political forces in the National Assembly of Kuwait succeed in their attempts to amend the Kuwaiti Judiciary Law, which has been the subject of discussions and government resistance for years,[66] and whether these amendments effectively strengthen the independence of the courts, including the Constitutional Court, in practice.

66 See latest proposed draft of an amended *Kuwaiti Judiciary Law*, available in Arabic at http://www.aljarida.com/articles/1462219661155004600/.

Constitutional Courts and Supreme Courts: A Difficult Relationship

Rainer Grote

Abstract
In countries with a specialized constitutional jurisdiction, the smooth functioning of the separation of powers between a constitutional court and the supreme courts in the administrative, criminal, civil and other jurisdictions cannot be taken for granted. The expanding reach of constitutional law and especially of the fundamental rights provisions of contemporary constitutions render close cooperation between the former and the latter both more necessary and more complex. A comparative survey shows that this central institutional relationship has evolved very differently in the four major constitutional democracies of Germany, Italy, Spain and France. While in Germany a hegemonic position of the Constitutional Court was swiftly established and has largely been accepted by the supreme courts of the other jurisdictions, in Spain the relationship between the Constitutional Court and the Supreme Court has taken a confrontational turn which has severely impaired the former's authority. These widely diverging experiences show that constitutional and statutory regulation alone is not sufficient to produce a stable and productive relationship if it is not backed up by mutual respect and understanding which can only result from a permanent dialogue between the courts.

1. Introduction

Constitutional courts are not established in a legal vacuum. The determination of their jurisdiction and powers has to take into account the judicial structures which already exist in the country. As the establishment of a specialized constitutional jurisdiction by definition takes place outside the traditional structure of the judicial branch, its relations to the traditional or ordinary judiciary, and in particular the supreme court, or supreme courts respectively, which are placed at the apex of the established judicial hierarchies, have to be fixed in the constitution or the law on the constitutional court, with any remaining issues to be settled by judicial practice.

In almost all civil law countries, at least two parallel supreme courts exist, one for civil and criminal cases and one for administrative law cases[1] (e.g. in France, where the respective courts are the *Cour de Cassation* and the *Conseil d'Etat*). In some countries, an even higher number of supreme courts have been established, reflecting a high degree of specialization of the judiciary. In Germany, for example, there are not just two, but five supreme courts: in addition to the supreme courts for civil and criminal cases (Federal Court of Justice) and administrative cases (Federal Administrative Court), the Federal Finance Court, the Federal Labour Court and the Federal Social Court are operating as supreme courts in the fields of tax law, labour law, and social security law, respectively.[2]

2. *The delimitation of the respective functions of constitutional and ordinary courts: the point of departure*

In theory, the delimitation of functions between the constitutional court and the ordinary courts is quite clear: the resolution of constitutional cases and controversies, and the interpretation and application of the constitutional law rules this involves, fall within the competence of the constitutional court, whereas the resolution of all cases and controversies involving the interpretation and application of ordinary law belongs to the province of the ordinary courts. This also seems to have been the idea of Hans Kelsen when he introduced centralized constitutional review in the Austrian Constitution of 1920. The initial text of the Constitution of Austria of 1920 provided only for the abstract review of legislation, i.e. the review of its constitutionality outside the context of litigation, with no direct links between the constitutional control by the Constitutional Court and the application of statutory legislation by the ordinary courts.[3]

In this model, constitutional jurisdiction and ordinary jurisdiction operate each within their own distinct spheres, without the need or the possibility for direct interaction between them. The constitutional court focuses exclusively on the issue of constitutionality. If it strikes down a provision as unconstitutional, the provision may no longer be applied by the ordinary courts. Conversely, if the review before the constitutional

1 Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5.1, 2007: 45.
2 *German Basic Law*, art. 95 (1).
3 Garlicki, "Constitutional Courts versus Supreme Courts": 46.

court results in a finding of constitutionality, the ordinary courts will continue to apply the respective provisions just as they had done before.

The separation of functions is particularly neat if the constitutional court is limited to a preventive control of constitutionality of legislation, i.e. of statutes that have already been adopted by the legislature, but not yet been promulgated. Preventive control of legislation was the standard procedure of constitutional review that was introduced in France by the Constitution of 1958 and remained the only form in which the constitutionality of statutes could be reviewed until the constitutional reforms of 2008.

3. *The growing overlap of functions between the constitutional court and the ordinary judiciary: contributing factors*

However, with the proliferation of constitutional courts around the globe at the end of the 20th century, and the process of growth and expansion of constitutional adjudication that has accompanied it, the demarcation line between the functions of constitutional courts and the prerogatives of the ordinary judiciary has become increasingly blurred, and the potential for conflict or even confrontation between the two jurisdictions has grown significantly. As a result, a genuine separation of constitutional jurisdiction and ordinary jurisdiction is no longer possible in a modern *Rechtsstaat*:[4] the separation model had to be replaced by a cooperation model, whose precise features vary from one country to the next.

The growing impact of constitutional adjudication on the activity of the ordinary courts is due to a variety of factors, which reflect both the increasingly sophisticated nature of constitutional procedural law and the increased importance of constitutional law in ordinary litigation.

With regard to the former, a procedure for the incidental review of statutes by the Constitutional Court was introduced in Austria within a decade of the Court's existence and quickly became a standard procedure of constitutional courts wherever a specialized constitutional jurisdiction was established. Ordinary courts were given the right to refer the issue of the constitutionality of a statutory provision which they had to apply to a case before them to the Constitutional Court if they had serious doubts that the provision in question was in conformity with the constitution. Since then, different combinations of abstract and incidental review of

4 Garlicki, "Constitutional Courts versus Supreme Courts": 49.

the constitutionality of statutes have become a common feature of most specialized constitutionalized jurisdictions in Europe and elsewhere.[5] This procedure involves the constitutional court in the adjudication of individual litigation by resolving preliminary issues relating to the constitutionality of the statute to be applied to the case at hand.

Even more dramatic in terms of challenging traditional concepts on the separation of constitutional and ordinary jurisdiction has been the introduction of the constitutional complaint procedure, especially in the form which allows the constitutional court to review not only acts by the legislature and the administrative authorities for their conformity with the constitution, but also final judgments and decisions issued by the judicial authorities. In this latter form, the constitutional complaints procedure becomes a powerful tool of control of the constitutional court over the ordinary judiciary with regard to the correct interpretation and application of the constitutional fundamental rights provisions which are central to the litigation at hand. It is therefore not surprising that the constitutional complaints procedure that gives persons who have allegedly been violated in their fundamental rights by a judicial decision or order the right to appeal directly to the constitutional court has been introduced only by a small number of countries with a specialized constitutional jurisdiction (see below IV.). It is thus going beyond the procedure of incidental review of legislation where the decision to refer the constitutional question to the Constitutional Court as well as the application of the response it gets to the case is in the hands of the court before which the litigation which has given rise to the issue of constitutionality is pending.

In parallel to the diversification of the procedural tools at their disposal, constitutional courts have refined their techniques of constitutional interpretation and adjudication. In particular, they no longer limit themselves to merely stating that a statutory provision is either constitutional or unconstitutional, and to declare its invalidity or inapplicability in the latter case. Out of respect for the democratically elected legislature, they usually try to uphold the statutory law being challenged wherever possible, i.e. if there is at least one plausible interpretation of the provision in question which would not bring it into conflict with the constitution. Known in Germany as *verfassungskonforme Auslegung*, in France as *déclaration de conformité sous reserve*, this approach requires the constitutional court or council to proceed to the interpretation of the ordinary law provision to

5 Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis*, Oxford and Portland 2014: 133.

see if there is scope for interpreting it in conformity with the constitution; or, conversely, to determine which of the interpretations which would fit its wording and its purpose should nevertheless be discarded because they are in conflict with the constitution.[6] In both cases, the constitutional court interferes with a traditional prerogative of the ordinary courts, i.e. the judicial interpretation and application of statutory law. This interpretative technique is thus double-faced: while it reduces the potential for conflict in the constitutional court's relationship with the legislative branch by avoiding declarations of non-conformity or nullity, it creates previously unknown problems of overlap with the ordinary judiciary by involving the constitutional court directly in a task that has traditionally been considered the province of the judicial branch, and in particular the supreme courts: the final and binding interpretation of statutes.

Another important development is the dramatically expanded scope of constitutional law which has direct repercussions on the relevance of constitutional court jurisprudence to the resolution of individual cases and controversies by the ordinary courts. Constitutional law was initially seen as primarily regulating the structure of the state and the powers of the central state institutions. Although fundamental rights already figured in early constitutions, they were far fewer in number than today, and were often given a narrow interpretation by the courts, limiting their application to the exercise of traditional forms of state authority, with little or no relevance at all for the litigation between private parties. This has changed dramatically in recent decades. The expansion of the types and number of constitutional fundamental rights and the frequently broad interpretation given to them by the constitutional courts has meant that constitutional law, and in particular fundamental rights, have permeated all branches of the legal system, including private law. Although the speed and the depth of this transformation vary from one country to another, and is more directly felt in areas of the law with a strong public dimension like administrative and criminal law, ordinary courts today are far more likely to be confronted with issues of constitutional law, especially with the impact of fundamental rights on all sorts of different legal relationships, including legal relations among private parties, than at any time in the past. The supremacy and the direct effect of constitutional rules and principles in all aspects of the judicial settlement of disputes are no longer contested. As a result, few branches of law today remain totally unaffected by the expanding reach of constitutional law.

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6 de Visser, *Constitutional Review in Europe*: 292.

4. Conflict and cooperation in practice: a comparative survey

As the overlap of the functions of constitutional courts and supreme courts has grown, the potential of conflict between them has also increased substantially. Thus, a *modus vivendi* has to be found which does not undermine the authority of either the constitutional court or the ordinary judiciary and contributes to the overarching objective which motivated the creation of specialized constitutional courts in the first place, i.e. the strengthening of the normative effectiveness of the constitution. The difficulties which this has raised, and the strategies which have been developed by the courts as well as the legislatures in dealing with this delicate problem, can be illustrated by a brief comparative survey.

4.1. Germany

In Germany, things came to a head shortly after the Constitutional Court's establishment in 1951, when the new court started to use its powers to impose its expansive concept of the fundamental rights guarantees of the Basic Law as developed in early landmark cases like *Elfes*[7] and *Lüth*[8] on the ordinary courts through the constitutional complaint procedure. The Basic Law itself contains no indication with regard to the delimitation of the functions and powers of the Constitutional Court and the other federal supreme courts listed in Article 95 (1). The Act on the Federal Constitutional Court, however, reflects the need for dialogue between the Constitutional Court and the supreme courts of the ordinary judiciary by prescribing, in § 2 (3) of the Act, that three of the eight members of each of the two Senates shall be elected from among the judges of the supreme federal courts. As a general rule, only judges who have served at least three years on one of the supreme federal courts shall be elected. The Constitutional Court is thus familiar with the jurisprudence of the federal supreme courts through those of its members who have served on those courts before they were elected to the Constitutional Court.

This has not prevented controversies between the constitutional and the ordinary jurisdictions, however. The first conflict arose in the procedure of incidental review of constitutionality. In its initial version, the Act on the Federal Constitutional Court provided that the incidental review of

7 Elfes Case. *Bundesverfassungsgerichtsentscheidung* 6.32 (1957).
8 Lüth Case. *Bundesverfassungsgerichtsentscheidung* 7.198 (1958).

legislation could take place only by an interposition of the supreme court of the jurisdiction concerned, not by direct referral from the court before which the litigation that had given rise to the constitutional question was pending. What was more, the competent supreme court had the right to submit its own opinion on the constitutional question referred by the lower court: in the practice of the *Bundesgerichtshof*, the supreme court in all civil and criminal matters, these opinions soon took the form of fully reasoned judgments on the issue of constitutionality published in the official collection of its decisions, sometimes even before the Constitutional Court had had the opportunity to adopt its decision on the matter. The Federal Constitutional Court felt that this practice undermined its authority as the supreme constitutional jurisdiction and in 1955 declared that the supreme courts would in the future be barred from submitting their own views on the questions of constitutionality raised in the incidental review procedure. This move gravely upset the supreme courts, which in response addressed a letter of protest signed by their presidents to the President of the Constitutional Court.[9] The controversy had to be resolved through the intervention of the political branches which in 1956 decided to amend the Federal Constitutional Court Act, abolishing the involvement of the supreme courts in the procedure of incidental review altogether. Since then, the ordinary court before which the case that gives rise to a question of constitutionality is pending may submit the matter directly to the Constitutional Court, and the Court will rule on the admissibility, and eventually, on the substance of the matter without being prejudiced through prior intervention by the competent supreme court. Thus, a direct channel of communication between the ordinary courts and the Federal Constitutional Courts has been established which allows the lower courts to circumvent the established judicial hierarchy in constitutional matters.

This still leaves the initiation of the referral procedure as well as the application of the ruling on the constitutionality issue handed down by the Federal Constitutional Court in the hands of the referring court. However, the Federal Constitutional Court has the means to impose its opinions on recalcitrant courts at any time through the constitutional complaint procedure. In Germany, constitutional complaints may be lodged against any act of public authority which allegedly violates one or several of the fundamental rights protected by the Basic Law, including judicial decisions. The

9 Hans Joachim Faller, "Bundesverfassungsgericht und Bundesgerichtshof," *Archiv des öffentlichen Rechts* 111.2, 1990:189–191.

only restriction here is that all available remedies against the act must have been exhausted, which in the case of a constitutional complaint against a judgment means that all possibilities to have the judgment overturned by way of appeal to a superior court, in the last instance to the respective federal supreme court, must have been exhausted before the matter can be brought before the Constitutional Court. The constitutional complaint has to be lodged by the aggrieved individual. A lower court which has obtained a preliminary ruling by the Federal Constitutional Court on the issue of the constitutionality of a statutory provision which is central to the outcome of the case before it can therefore expect that its decision of the case will be appealed if it diverges from the Constitutional Court's opinion and that compliance will be enforced through the constitutional complaint procedure. This form of enforcement is all the more effective as the Constitutional Court in the constitutional complaint procedure is not limited to a declaratory judgment. If it comes to the conclusion that the challenged judicial decision rests upon an unconstitutional interpretation or application of the law, § 95 (2) of the Federal Act on the Constitutional Court authorizes the Court to quash the decision and to remand the matter to a different court of the competent jurisdiction for a fresh decision. The constitutional complaints procedure in this way enables the Constitutional Court to impose its views on constitutional matters on the ordinary courts and turns it effectively into the court of final appeal on all matters concerning fundamental rights, modifying to this extent the traditional judicial hierarchy.

This has given rise to a discussion, in the Court's own case law as well as in constitutional law doctrine, how the Constitutional Court can be prevented from usurping the functions of the supreme courts by inflationary use of its statutory powers to overturn decisions made by the ordinary judiciary. Academic writers have submitted a number of proposals that aim to distinguish the specific issues of constitutional law from those matters that concern primarily the interpretation and application of ordinary law, the traditional prerogative of the ordinary courts.[10] However, none of the formulas suggested has managed to establish a clear-cut delimitation of the respective prerogatives of the Federal Constitutional Court and the supreme courts. The task of fixing the limits of constitutional review is thus effectively left to the discretion of the Court itself which seems to determine them on a case-by-case basis rather than by application of some

10 On this discussion see Christian Starck, "Verfassungsgerichtsbarkeit und Fachgerichte", *Juristenzeitung* 51.21, 1996: 1034.

abstract formula. While the Court keeps emphasizing that it must not act as a *Superrevisionsinstanz*, it has occasionally ventured even into a second-guessing of the establishment of facts by the (lower) ordinary courts if this seemed indispensable for the determination of the constitutional issue at hand, e.g. in cases concerning the scope of the freedom of speech. On the whole, however, only a small number of challenges to supreme court judgments through the constitutional complaint procedure have been successful, demonstrating that the Constitutional Court, anxious to respect the authority and special expertise of the federal supreme courts, uses its cassation powers cautiously.[11]

4.2. Italy

Unlike the German Constitutional Court, the Italian Constitutional Court does not have the power to review, and even less to overturn, judgments issued by the ordinary courts on constitutional grounds. Italian law does not provide for a constitutional complaint procedure, neither against judgments nor against any other act of public authority. Instead, the *Corte costituzionale* communicates and interacts with the ordinary courts, and in particular with the *Corte di Cassazione*, (solely) through the procedure of incidental review: the courts of general jurisdiction may refer questions concerning the constitutionality of those statutory provisions that form the basis for the respective court's resolution of a pending case to the Constitutional Court. The Constitutional Court examines the matter and rules on the constitutionality of the referred provision(s), its ruling becoming part of the law of the case.

At first glance, this seems like the very model of a horizontal separation of functions, each jurisdiction being supreme within its sphere of competence - the Constitutional Court with regard to constitutionality issues, the courts of general jurisdiction with respect to all matters related to the interpretation and application of ordinary legislation. However, matters have not rested there but have been complicated by the Constitutional Court's refusal to limit itself to a simple positive or negative ruling on the issue of constitutionality. The *Corte costituzionale* has been among the first constitutional courts to use interpretative techniques to avoid rulings of unconstitutionality. This means basically that the Court will declare a statutory provision unconstitutional only if no plausible interpretation

11 Garlicki, "Constitutional Courts versus Supreme Courts": 52.

of the provision in question can be found which permits to confirm its constitutionality.[12] Rulings of unconstitutionality of the Court are thus rarely adopted in absolute terms, but only in relation to a particular interpretation of the provision at issue. These interpretative decisions can take different forms, depending on whether the Court in its decision focuses on the interpretation which would make the provision constitutional (*sentenza interpretative di rigetto*) or, conversely, on the one that would make it unconstitutional (*sentenza interpretative di accoglimento*). Particularly in the first case, the Court is likely to get into conflict with the ordinary courts if the provision under review has traditionally been interpreted in a certain way and this interpretation does not correspond to the one required by the *Corte costituzionale* in the *sentenza interpretative di rigetto*.[13]

As a matter of fact, such conflicts between the *Corte costituzionale* and the highest court of the civil and criminal jurisdiction, the Court of Cassation, have occurred repeatedly, with the Court of Cassation refusing on more than one occasion to proceed to the revision of its established jurisprudence which the relevant interpretative rulings of the Constitutional Court would have required. The Act on the Constitutional Court does not provide a solution for these cases. The universally binding effect of its rulings which the Act mandates attaches only to a ruling invalidating a *statute* as unconstitutional, not to a ruling which declares one or several *interpretations* of the statute unconstitutional. The Italian courts were thus left to find a *modus vivendi* among themselves. In general, they have been successful in doing so. On the one hand, the ordinary courts have acknowledged the growing reputation and authority of the Constitutional Court and become more willing to take its interpretative rulings into account when developing their jurisprudence on the interpretation of the provisions concerned. The *Corte costituzionale*, for its part, has refined its interpretative methods to give greater weight to the jurisprudence developed by the ordinary courts, notably by having recourse to the "living law" concept, which means that the Constitutional Court does not review contested legal provisions in the abstract, but with regard to the way they have been applied in the case-law of the superior courts.

While this conciliatory approach from both sides has helped to minimize conflicts, their cooperation remains fragile and subject to sudden

12 See *Corte costituzionale Decision No. 356/1996* in which the Court held that submissions by ordinary courts in the incidental review procedure are admissible only if the referring court has exhausted all possibilities to find an interpretation in conformity with the constitution, and found none.

13 de Visser, *Constitutional Review in Europe*: 381.

outbursts of conflict, as happened in the late 1990s in the controversy concerning the correct reading of the provision of the Code of Penal Procedure governing the calculation of the maximum term of preliminary detention.[14] In such conflicts the *Corte costituzionale* cannot expect to retain the upper hand, as it is dependent on the ordinary courts for both the referral of constitutional questions in the incidental review procedure and the implementation of the interpretative ruling handed down in that procedure in the ultimate judicial resolution of the case. Unlike the German Constitutional Court, the *Corte* lacks the means to impose it views directly on the courts of general jurisdiction via a constitutional complaints procedure which would allow it to review the final judgments adopted by the other jurisdictions and, where necessary, to overturn them.

4.3. Spain

The Italian case seems to suggest that an express regulation of the powers of the constitutional jurisdiction in relation to the ordinary judiciary is a central and indispensable element in any constitutional and legal framework designed to allow the constitutional court to discharge its task as the ultimate guardian of the constitution effectively. Nevertheless, the Spanish case demonstrates that such a regulation in itself is not sufficient to prevent major conflicts between the constitutional court and the ordinary judiciary. In most aspects that are of interest here, the regulation of the powers of the Spanish Constitutional Court is similar to the one analyzed in the German case. Among its competences is the incidental review procedure in which the courts and judges of general jurisdiction may – and in certain circumstances must – submit the question of constitutionality of a provision or rule having the force of law to the Constitutional Court. The Spanish Constitutional Court is also competent to decide in the *amparo* procedure on petitions lodged with the aim of preserving or restoring the rights and freedoms protected by the Constitution against acts of public authority allegedly infringing those rights, including decisions by the ordinary judiciary. If the Court arrives at the conclusion that the petition is well-founded, it can annul the decision or judgment which violates the rights and freedoms in question.[15] More generally, the Organic Law of the Judicial Power obliges all courts and tribunals to apply the statutes and

14 Garlicki, "Constitutional Courts versus Supreme Courts": 56.
15 *Act on the Constitutional Court*, art. 55.

regulations in accordance with the rules and principles of the Constitution as the latter have been interpreted by the Constitutional Court, regardless of the procedure in which this interpretation has been issued. Thus, it should be clear that the Constitutional Court enjoys supremacy in all matters concerning the interpretation of the constitution, which shall also guide the courts in the interpretation and application of the ordinary law.[16]

Despite this clear-cut delimitation of functions, the Spanish Supreme Court has repeatedly refused to accept the jurisprudence of the Constitutional Court on important points, e.g. regarding the statute of limitations in criminal law. This conflict escalated in 2004 when the Supreme Court sentenced eleven judges of the Constitutional Court to pay damages because they had in its view wrongly and negligently dismissed a petition brought by the plaintiffs for a violation of their fundamental rights in the *amparo* procedure. As has been noted, such an extreme confrontation is quite unique in the history of constitutional courts in Europe.[17] The Constitutional Court could find no other way to defend itself against the transgression of the Supreme Court than the filing of a constitutional complaint by the aggrieved constitutional judges in the *amparo* procedure against the decision of the Supreme Court for violation of their constitutional right to effective judicial protection. The Constitutional Court had to wait several years until the aggrieved judges had retired from the court before it could hand down a judgment in their favor.

However, the authority of the Spanish Constitutional Court never fully recovered from this blow. In a timid response to the grave constitutional crisis triggered by these events the Spanish legislature has tried to mollify the ordinary judiciary by inserting an express provision into the Constitutional Court Act which provides that in *amparo* proceedings against judicial decisions, the Constitutional Court shall focus on the determination of whether the allegedly infringed rights and freedoms have indeed been violated by the challenged decision, and, if this is the case, to preserve and restore those rights, but "shall abstain from any other observation on the

16 *Ley Organica del Poder Judicial*, art. 5.1: "La Constitución es la norma suprema del ordenamiento jurídico, y vincula a todos los Jueces y Tribunales, quienes interpretarán y aplicarán las leyes y los reglamentos según los preceptos y principios constitucionales, conforme a la interpretación de los mismos que resulte de las resoluciones dictadas por el Tribunal Constitucional en todo tipo de procesos."

17 Juan Luis Requejo Pages, "Das spanische Verfassungsgericht", in: *Handbuch Ius Publicum Europeum* 6, edited by Armin von Bogdandy, Christoph Grabenwarter and Peter M. Huber. Heidelberg 2016: 687.

activities of the judicial bodies." Whether this rather meek reminder of the need to observe courtesy among courts is sufficient to redress the harm which has been done to the authority of the Constitutional Court by the aggression of the Supreme Court remains doubtful.

4.4. France

The final example of inter-court relations which shall be discussed here is France. As mentioned above (2.), the model of constitutional review originally implemented in the 1958 Constitution corresponded most comprehensively to the ideal of a strict separation of constitutional from ordinary jurisdiction. This is already indicated by the constitutional terminology which refers to the body of constitutional review as a *conseil*, not as a tribunal or a court. But it is also evident from the powers which were initially assigned to the *Conseil constitutionnel.* These powers limited the Constitutional Council to a preventive review of the constitutionality of statutes that had to take place in the short period between the final adoption of the law by the legislature and its promulgation and entry into force. Thus, the *Conseil* had no possibility to pronounce on the constitutionality of a law once it had entered into force, and thus neither directly or indirectly on the interpretation and application of that law by the judiciary.

Matters did not rest here, however, as the same factors which pushed the dynamic development and expansion of constitutional jurisprudence in other West European countries in the 1950s and 1960s were also felt in France. In 1971, the *Conseil constitutionnel* took the bold step of affirming the legally binding character of the Preamble to the 1958 Constitution, and thus of the Declaration of the Rights of Man and of the Citizen of 1789 and the Preamble to the 1946 Constitution with its guarantees of social and economic rights to which it refers, and started to use them as yardsticks against which the constitutionality of new legislation had to be measured in the constitutional review procedure. Together with the constitutional reforms of 1974, which extended the right to initiate a preventive control of the constitutionality of legislation to 60 members of the National Assembly or 60 Senators, and thus in effect to the political opposition, this increased the practical impact of the preventive review exercised by the *Conseil* greatly. Its jurisprudence now also started to have an impact on the jurisprudence of the ordinary courts. In the 1970s and the 1980s, the *Conseil* developed comprehensive case law on fundamental rights, not limiting itself to the determination whether the legislation

under review was consistent with the constitution or not. Instead, like other constitutional courts the Council developed more refined techniques of interpretation which allowed it to uphold a statute if an interpretation in conformity with the constitution was at all possible. These rulings of "déclaration de conformité sous réserves" required the ordinary judiciary to play along to have any practical effect, since the *Conseil* had, and still has, no procedural means at its disposal to impose its views on the courts: the viability and practical impact of the Council's interpretations entirely depend on the voluntary compliance of the other jurisdictions.

It is a testimony to the quality of the Conseil's decisions and its growing reputation, as well as to the efforts of the French doctrine to explain and systematize its jurisprudence, that its rulings have found widespread adherence in both the civil and administrative law jurisdictions.[18] This successful practice of cooperation has paved the way for a further constitutional reform which finally freed the *Conseil* from the narrow limits of a merely preventive control of legislation by giving it the power to review the constitutionality of statutory provisions that have already entered into force in an incidental review procedure, called *question prioritaire de constitutionnalité* in French. This new procedure, which was introduced into Article 61 of the Constitution in 2008 and implemented through the necessary amendments to the Act on the *Conseil constitutionnel* in 2010, allows courts both of the general and of the administrative jurisdiction to submit questions concerning the consistency of a statutory provision they have to apply to a case before them with the constitutionally protected rights and freedoms to the *Conseil constitutionnel* for a preliminary ruling. However, unlike the incidental review procedures in the other constitutional systems discussed so far, the lower courts may not circumvent the established judicial hierarchy by presenting the constitutional issue directly to the Constitutional Council. Instead, the motion of referral has to pass compulsorily through the highest court of the respective jurisdiction, i.e. the *Cour de Cassation* in the case of civil and criminal courts, and the *Conseil d'Etat* in the case of administrative courts. The competent supreme court then takes the final decision on whether the constitutional question is referred to the Constitutional Council or not. If it declines to do so, no appeal is possible, neither by the lower court which has submitted the motion for referral, nor by the party to the pending court case which has asked for the referral in the first place. The solution implemented in France thus fully preserves the filter function of the supreme courts as well as the integrity

18 Garlicki, "Constitutional Courts versus Supreme Courts": 63.

of the respective judicial hierarchy, in line with the positive experiences with the system of voluntary cooperation between the judiciary and the *Conseil contitutionnel* made prior to the reform.

5. Conclusion

The survey has shown that conflicts and tensions between constitutional courts and supreme courts are no longer isolated events or accidental in nature. Rather, they are the inevitable consequence of the rise of constitutional adjudication and the increasing impact of that adjudication on the development of the legal system as a whole, and especially on the interpretation and application of the ordinary law by the judiciary. The relationship between constitutional and ordinary jurisdiction thus constitutes a structural problem which has to be addressed effectively if the overarching goal, the strengthening and effective enforcement of the supremacy of the constitution, is to be realized.

The preceding analysis has revealed the existence of three main approaches to this problem. The first is institutional design, which means that permanent and stable institutional links between the constitutional court and the ordinary judiciary are established. An example for this approach is provided by Germany, where three members of each of the two Senates of the Federal Constitutional Court have to be selected from among the judges of the (other) federal supreme courts, thus creating a solid basis for dialogue between the constitutional and the ordinary jurisdictions within the Constitutional Court itself. The second instrument which may, and perhaps should be used, is the establishment of clear procedural rules for the interaction and cooperation between the jurisdictions in the Act on the Constitutional Court or the General Act on the Judiciary, or in both. Such provisions are useful in increasing the awareness on both sides, and particularly among the ordinary judges, that a close cooperation of the ordinary judiciary with the constitutional court is needed to give practical effect to the supremacy of the constitution in all areas of law, and that that leading role of the constitutional court on all constitutional matters has to be accepted if this important goal is to be achieved. Thirdly, a constant dialogue between the different jurisdictions is needed, which can and should take place also outside formalized avenues, e.g. through regular meetings, joint seminars, etc. This dialogue should increase mutual understanding and the awareness of the need for self-restraint where the other jurisdiction is better placed to assess the adequacy of a statutory interpretation or a certain practice of the law.

These approaches are not alternative, but cumulative. As the Spanish example shows, constitutional or statutory regulation of the relationship is not sufficient if it is not backed up by mutual respect and understanding which can only result from constant dialogue. On the other hand, the French experience seems to suggest that fruitful cooperation between a constitutional court and the supreme courts can also develop in the absence of any formal rules governing their relationship or establishing formal institutional links. However, while this model has functioned well in the French context, it may be inadequate in other constitutional systems where the judicial features of constitutional adjudication are more fully developed and the scope and need for interaction between the constitutional court and the ordinary judiciary, and for formal rules providing direction to that interaction, is accordingly greater.

Part II:
Constitutional Review Procedures

Constitutional Review in Algeria Following the 2016 Reform: With Particular Reference to the "Exception of Unconstitutionality"

Francesco Biagi

Abstract
The constitutional reform adopted in Algeria in February 2016 has introduced – *inter alia* – major innovations in the field of constitutional review. The most important novelty concerns a procedural gateway to the Constitutional Council, namely the "exception of unconstitutionality", which vests the ordinary courts (and in particular the Supreme Court and the Council of State) with the power to challenge the constitutionality of legislative acts before the Constitutional Council. This chapter aims to set out some preliminary remarks on this new procedural gateway, discussing its major characteristics, as well as its main strengths and weaknesses. It will also show that Algerian lawmakers have relied considerably on the system of concrete constitutional review introduced in France in 2008, namely the *question prioritaire de constitutionnalité*. In order to better understand the relevance and scope of the exception of unconstitutionality mechanism, this chapter also examines the origins, developments and weaknesses of constitutional review in Algeria, then going on to analyze the most important novelties introduced by the 2016 reform in the field of constitutional review.

1. Introduction[1]

The constitutional reform adopted in Algeria in February 2016 has introduced – *inter alia* – major innovations in the field of constitutional review. The Constitutional Council – which is an "independent institution responsible for monitoring the observance of the Constitution" (*Constitution*, art. 182) – has been strengthened in terms of its status and powers, whilst ac-

1 I would like to express my gratitude to Islam Mohammed for his invaluable suggestions and comments on previous drafts of this chapter. The usual disclaimers apply.

cess to the Council has been significantly broadened. The most important novelty concerns a procedural gateway to this body, namely the "exception of unconstitutionality" (*exception d'inconstitutionnalité*), which vests the ordinary courts (and in particular the Supreme Court and the Council of State) with the power to challenge the constitutionality of legislative acts before the Constitutional Council. This new mechanism came into effect only recently, i.e. following the entry into force, on March 7, 2019, of Organic Law 18-16 on the Exception of Unconstitutionality.

This chapter aims to set out some preliminary remarks on this new procedural gateway to the Constitutional Council, discussing its major characteristics, as well as its main strengths and weaknesses. It will also show that Algerian lawmakers have relied considerably on the system of concrete constitutional review introduced in France in 2008, namely the *question prioritaire de constitutionnalité*. In order to better understand the relevance and scope of the exception of unconstitutionality mechanism, this chapter examines the origins, developments and weaknesses of constitutional review in Algeria. Based on this, the most important novelties introduced by the 2016 reform in the field of constitutional review will be analyzed.

2. *Constitutional review of legislation in Algeria: Origins, developments and weaknesses*

Constitutional review of legislation dates back to the first post-colonial Algerian Constitution, namely the Constitution of 1963, which provided for a Constitutional Council with responsibility for verifying the constitutionality of laws and legislative ordinances upon request of the President of the Republic and the Speaker of the National Assembly (art. 64). This body was composed of the First President of the Supreme Court, the presidents of the Civil and Administrative Chambers of the Supreme Court, three deputies selected by the National Assembly and one member appointed by the President of the Republic (art. 63). However, the Constitutional Council was never established as the 1963 Constitution was suspended less than one month after its promulgation, and was subsequently repealed in 1965 following the *coup d'état* led by Hourari Boumédiène.

The second post-colonial Algerian Constitution, i.e. the Constitution of 1976, continued to be inspired (like the previous 1963 Constitution) by Socialist principles and was modeled around the idea of the concentration of powers (see Brown 2002: 72-74). Indeed, the Socialist model was defined as an "irreversible option" (art. 10), and the single-party system

was confirmed (arts. 94–95). There was no scope within this constitutional framework for the constitutional review of legislation. Article 186 of the Constitution only provided for "political control" by the "governing bodies of the Party and of the State," which was carried out "in accordance with the National Charter and the provisions of the Constitution."

The introduction of a constitutional review mechanism was discussed in December 1983 during the fifth Congress of the National Liberation Front, the single party that ruled over the country until 1989 when a multi-party system was established. It called for the creation of a "supreme body under the authority of the President of the Republic, the Secretary-General of the Party, responsible for deciding on the constitutionality of laws, with the aim of guaranteeing respect for and the supremacy of the Constitution, enhancing the legitimacy and sovereignty of the law, as well as asserting and consolidating responsible democracy in our country."[2] This recommendation was however not implemented.

Constitutional review was reintroduced in Algeria by the 1989 Constitution, which represented one of the major outcomes of the October 1988 revolts. The country was experiencing difficult economic circumstances as a result of the collapse in the price of oil on the international market, and there were increasingly pressing calls for a democratic turn. This Constitution marked a genuine watershed in Algerian history, with the single-party system being abandoned in favor of a multi-party system. All references to the Socialist model were eliminated, and although the President of the Republic remained the fulcrum around which the entire system rotated, the principle of the separation of powers was reinforced. With the aim of fostering the rule of law in the country, the 1989 Constitution also provided for a Constitutional Council, the powers and prerogatives of which were broader than those granted to this institution by the 1963 Constitution (see Ben Achour and Lachaal 1993: 637 et seq.). However, as early as 1992 the social and political circumstances in the country (i.e. the cancellation by the political and military leadership of the second round of parliamentary elections after the victory of the Islamic Salvation Front in the first round, followed by the proclamation of a state of emergency, and the outbreak of civil war) prevented the Council from continuing to perform its functions. During the mid-nineties, a period of relative stability favored the resumption of the work of the Constitutional Council.

2 See http://www.conseil-constitutionnel.dz/index.php/fr/la-constitution/presentation-generale.

Moreover, in 1996 the status and the functions of this body were further enhanced following the adoption of a new Constitution.

Under the 1996 constitutional framework, the Constitutional Council was composed of nine members (art. 164): three (including the president) appointed by the President of the Republic, four elected by Parliament (two by the People's National Assembly and two by the Council of the Nation), and two selected by the judiciary (one by the Supreme Court, and one by the Council of State). Although all three branches of government were involved in the appointment process, the views of the President of the Republic – also in the light of his leading role in the political and institutional system – was predominant (see Magnon 2011: 619 et seq.). One of the most evident demonstrations of the extremely close link between the executive branch and the Constitutional Council occurred in 2012, when Abdelaziz Bouteflika appointed the then Minister of Justice Tayeb Belaiz as President of the Council. Belaiz did not resign from his position of Minister of Justice and retained both positions for a few months, thus clearly violating the principle of the separation of powers and the most basic rules on incompatibility of office.

As regards the form of review conducted by the Constitutional Council, it must be recalled that Algeria was for a long time the only country in the Maghreb in which abstract review of the constitutionality of legislative acts was possible not only *ex ante* (which was typical of the other countries from the region), but also *ex post*, thus departing from the "original" French model of constitutional review.[3] In fact, Article 165 of the 1996 Constitution stipulated that the Council was required to rule by an *avis* in relation to laws, treaties and regulations that were not yet in force ("si ceux-ci ne sont pas rendus exécutoires") (*ex ante* review), and otherwise to rule by a *décision* (*ex post* review). In addition, the 1996 Constitution also provided for mandatory *ex ante* review of organic laws as well as the internal regulations of each of the Houses of Parliament (arts. 123 and 165).

One of the main weak points of the Algerian system of constitutional review concerned the procedural gateways to the Constitutional Council (see Laggoune 1996: 18–19; Graëffly 2005: 1399). Indeed, only the President of the Republic and the Speakers of the two Houses of Parliament had standing to apply to the Council (art. 166). This drastically reduced the overall number of legislative acts on which the Council could rule. This

3 As is well known, before the constitutional revision in 2008 France only contemplated *ex ante* review.

body ruled on the constitutionality of laws only in a handful of cases, and moreover was never seized in order to review the constitutionality of regulatory acts or of legislation ratifying international treaties.[4] In the vast majority of the cases the Council verified the constitutional legitimacy of organic laws and the internal regulations of the Houses of Parliament, namely the legislative acts for which the Constitution stipulated a requirement of mandatory (*ex ante*) review.

In the light of this "stranglehold" on access, the bulk of the Algerian Constitutional Council's action did not involve the constitutional review of legislation, but consisted rather in ruling on the regularity of legislative elections, presidential elections and referendums, as well as proclaiming the results of these electoral processes (*Constitution*, art. 163(2)). In other words, the role of the Algerian Council – as was also the case in Morocco[5] – was mainly that of an "arbiter of electoral life" (Graëffly 2005: 1403) of the country.

It should be noted, however, that the Council was also vested with many other "ancillary" functions (on the "ancillary" functions performed by Arab constitutional review bodies see Biagi, in this volume). Indeed, the 1996 Constitution granted this body the power to verify the incapacity of the President of the Republic and to rule that this office is permanently vacant (art. 88), as well as the power to postpone the holding of presidential elections in exceptional circumstances (art. 89). Moreover, the Council had to be consulted by the President of the Republic concerning any declaration of a state of emergency or a state of siege (art. 91), a state of exception (art. 93), general mobilization (art. 90(5)), and war (art. 90(5)). Furthermore, in certain extreme circumstances (e.g. if the office of President of the Council of the Nation is vacant at the time of the resignation or death of the President of the Republic), it was provided that the President of the Constitutional Council should assume the duties of Head of State (art. 88). Finally, the Council also had the power to review the constitutionality of constitutional amendments. In particular, the 1996 Constitution provided for two different procedures for constitutional amendment: on the one hand, Article 174 stipulated that proposed constitutional amendments,

4 See http://www.conseil-constitutionnel.dz/index.php/fr/les-attributions-du-cc.

5 With reference to the constitutional review of legislation, the Moroccan Constitutional Council was compared to the "sleeping beauty castle" (a metaphor used by Robert Badinter, cited by Bernoussi 2012: 211). Indeed, in the period 1994–2013, the vast majority of its decisions (724 out of 913) concerned electoral justice (see Benabdallah 2013: 19). See more generally, on the role of the Moroccan Constitutional Council in the electoral processes, Moussebbih 2017: 437 et seq.

which could be presented on the initiative of the President of the Republic, had to be approved by both houses of Parliament and thereafter subject to a referendum within 50 days of their adoption; on the other hand, Article 176 provided for a different procedure under which, if the proposal was considered to be constitutional by the Constitutional Council, the President was able to promulgate the amendment directly, provided that it had been approved by Parliament by a majority of three-fourths of the members of both houses. It should be noted that this latter procedure has been followed in relation to all three reforms of the 1996 Constitution, namely in 2002, 2008 and 2016.

The Algerian Constitutional Council – like most constitutional review bodies in the region before the Arab Spring (Brown 1998: 89; Biagi, in this volume) – only rarely stood up as an effective defender of constitutionalism. In most cases the Council displayed a high degree of deference towards the ruling regime, thus confirming the concerns of those who had questioned the neutrality of this body (see Graëffly 2005: 1398 et seq.). It is sufficient to consider several judgments in the field of electoral justice[6] or on the constitutionality of constitutional amendments,[7] which threw into considerable doubt the effective independence of the Council from the executive branch. Thus, those few decisions in which the Council acted as a real protector of constitutional principles and fundamental rights and freedoms seem to have been the exceptions that confirmed the rule.[8] Several reasons explain the difficulties encountered by the Algerian Constitutional Council in playing a "counter-majoritarian" role, including the strong grip of the executive on this institution, the "stranglehold" on access, the political, social and cultural context (characterized by a weak separation of powers and a poor constitutional culture), as well as certain factual circumstances (such as the civil war that broke out during the 1990s).

6 E.g. *Proclamation 1-P-CC-2 of June 3, 2002*; *Decisions 12, 14 and 15 DCC of March 1, 2004*. See Graëffly 2005: 1400–1401.

7 *Avis 01/08 A.RC/CC of November 7, 2008*; *Avis 01/16 A.RC/CC of January 28, 2016*. See Biagi 2017: 5–6.

8 E.g. *Decision 1 – D.L.CC-89 of August 20, 1989*; *Decision 1 – D.O.CC-95 of August 6, 1995*; *Avis 02/A.LO/CC/04 of August 22, 2004*. On these and other decisions see Mallat 2007, 186–188; Gallala-Arndt 2012: 252–254.

3. *The 2016 reform and the strengthening of the Constitutional Council's position*

Following its announcement by Abdelaziz Bouteflika in April 2011, the reform of the 1996 Algerian Constitution – which had previously been amended in 2002 and 2008 – was finally adopted in February 2016. It was a broad-sweeping reform, both to the preamble and to all four titles comprising the Constitution (see Philippe 2016; Biagi 2016; Biagi 2017). On the one hand, this reform was characterized by a high degree of continuity with the past. Specifically, it did not alter the excessive concentration of power in the hands of the President of the Republic, with the consequence that the principle of separation of powers – which is now explicitly provided for in the Constitution (art. 15) – remains more theoretical than substantive. Indeed, the President continues to be the *dominus* of the political and institutional system, occupying a position that is undoubtedly much more powerful than that of the Prime Minister and Parliament. On the other hand, however, this reform introduced several important novelties, which effectively pointed towards greater democratization. A crucial aspect was the reintroduction of the two-term limit for the President of the Republic (art. 88), a limit which had previously been included in the original version of the 1996 Constitution but was removed by the constitutional reform of 2008 in order to enable Bouteflika to stand for a third (and subsequently a fourth) term in office. Another significant change was the recognition of Tamazight as a genuine "official" language, and no longer only as a "national" language (art. 4). Furthermore, the recognition and protection of fundamental rights and freedoms were strengthened, whilst the independence of the judiciary was (partially) reinforced.

The 2016 reform introduced some major innovations also in the field of constitutional justice. It would appear that the main aim of the drafters was to remedy the weaknesses (discussed above) that characterized the system of constitutional review by introducing a full range of provisions which, considered overall, appear to have reinforced the Constitutional Council's role (at least on paper).

First, the number of members of the Council was increased from 9 to 12. The President of the Republic continues to play a key role in the selection process with entitlement to appoint one-third (four) of the members of the Council, including the President and the Vice-President (which latter position was established by the 2016 reform); a further one-third are elected by Parliament (two judges by the People's National Assembly and two by the Council of the Nation), whilst the remaining one-third are appointed by the judiciary (two members by the Supreme Court and two

by the Council of State) (art. 183). All three branches of government thus continue to be involved in the appointment process, although in contrast to the past the proportion of members appointed by the judiciary has increased. With regard to incompatibilities, Article 183(3) stipulates that as soon as they are selected, the members of the Council must cease to hold any other mandate, function, task or mission or to carry out any other activity or practice any profession. Moreover, according to Organic Law 12-04 on Political Parties, members of the Constitutional Council must not be members of any political party whilst in office (art. 10(3)).

The 2016 reform also established for the first time the appointment criteria for members of the Constitutional Council. Specifically, its members must be at least 40 years of age and must have experience of at least 15 years in the field of higher legal education, as a judge, as a barrister with rights of audience before the Supreme Court or the Council of State or in a senior position in the state apparatus (art. 184). These requirements based on merit and expertise are extremely important as they can help to foster the Council's independence. Moreover, it should be noted that – as is the case in other countries in the region (such as Morocco and Tunisia) – a *legal* background has become an essential requirement for appointment to the bench, which confirms the shift towards the "judicialization" of many Arab constitutional review bodies (see Biagi, in this volume).

The 2016 reform also expressly stipulates that the Constitutional Council enjoys administrative and financial autonomy (art. 182(4)). Furthermore, with the aim of limiting external interference or pressure, the reform introduced some very important innovations with respect to immunity. Indeed, Article 185 provides that the members of the Constitutional Council enjoy judicial immunity in respect of criminal matters during their term in office. In particular, they may not be prosecuted or arrested for committing a crime or an offense unless an explicit waiver has been granted by the individual concerned or with the authorization of the Constitutional Council.

The form of constitutional review has also undergone profound changes. Indeed, *ex ante* and *ex post* review have been maintained, although they now take on a different form. As regards *ex ante* review, the Constitution provides that the Council rules by an *avis* on the constitutionality of treaties, laws and regulations (art. 186(1)). In addition, the Constitution continues to provide for mandatory *ex ante* review of specific legislative acts (art. 186(2) and (3)): in particular, the Council is required to verify the constitutionality of organic laws prior to their promulgation (*Constitution*, art. 141(3); *Rules of Procedure of the Constitutional Council*, art.

2)[9] and the constitutionality of the internal regulations of each house of Parliament prior to their implementation (*Rules of Procedure of the Constitutional Council*, art. 3).

It is important to stress that the calls made within the literature (see Graëffly 2005: 1399; Kaïs 2014: 247) and by former President of the Constitutional Council Tayeb Belaiz (see Belaiz 2013: 52) to broaden the grounds for access were accepted by the lawmakers who adopted the 2016 constitutional reform: indeed, in addition to the President of the Republic and the speakers of the two houses of Parliament, the right to apply to the Council (on an *ex ante* basis) was also granted to the Prime Minister and the parliamentary opposition (in particular to 50 members of the People's National Assembly and to 30 members of the Council of the Nation) (art. 187). As much as it may be of major importance, the success of *saisine parlementaire* must not be taken for granted: indeed, whilst the introduction of that mechanism in France in 1974 resulted in a significant increase in the number of applications to the Constitutional Council (see Morton 1988: 91), the same cannot be said, for example, in relation to Morocco, where by contrast the opposition forces have only rarely applied to the Constitutional Council (see Gallala-Arndt 2012: 254–255).

With regard to *ex post* review, the Constitution no longer vests political authorities with the power to apply to the Constitutional Council. Thus, abstract review can now only take place before the legislative act concerned is enacted (*ex ante* review), whereas the only permitted form of *ex post* review is concrete review. Indeed, as will be discussed in greater detail below, the constitutionality of legislative acts that are already in force can now only be challenged before the Constitutional Council by the ordinary courts (and in particular by the Supreme Court and the Council of State) through the "exception of unconstitutionality" mechanism (art. 188).

The 2016 constitutional reform also continues to vest the Constitutional Council with extremely significant "ancillary functions". Interestingly, some of these functions have been crucial in regulating the transition process following the decision by Abdelaziz Bouteflika not to run for a fifth term in office and to resign on April 2, 2019. This decision was made in the wake of several weeks of mass protests throughout the country (known as the *Hirak* Movement), in which the Algerian people not only demanded an end to Bouteflika's twenty-year rule, but also, more generally, called for

9 *Rules of Procedure of the Constitutional Council of May 12, 2019*, as amended on October 17, 2019.

the dismantling of the "system" (*le Pouvoir*, comprised of the military, the President of the Republic and the National Liberation Front) (see Burchfield 2019; Mezran and Neale 2019; L'Année du Maghreb 2019). In the first place, following President Bouteflika's resignation, the Constitutional Council ruled that the office of President of the Republic was definitively vacant, and gave notice of this fact to Parliament (*Constitution*, art. 102(4) and (5)).[10] The duties of the Head of State were then assumed by the President of the Council of the Nation, Abdelkader Bensalah, who was entitled to remain in office for a maximum of 90 days, during which presidential elections were to be organized (art. 102(6)). These were scheduled for July 4, 2019, although due to a lack of eligible candidates they had to be postponed. Indeed, the Constitutional Council – which continues to be vested with the task of deciding on the regularity of electoral processes (art. 182(2) and (3)) – rejected applications by the two candidates due to the lack of a sufficient number of signatures endorsing them as candidates, as well as irregularities when collecting them,[11] with the consequence that the election could not be held on July 4, 2019 and had to be postponed.[12] With the aim of guaranteeing the continuity of state institutions, the Constitutional Council clarified that it was for the provisional Head of State – whose 90-day term expired on July 9, 2019 – to call a new election and to complete the process of electing a new President of the Republic.[13] These rulings attracted harsh criticism, and the Constitutional Council was accused of giving a "constitutional veneer" to decisions made by the political and military leadership (Boumghar 2019: 69 et seq.).

The presidential elections were eventually held on December 12, 2019, and saw the victory in the first round of former Prime Minister and Minister of Housing Abdelmadjid Tebboune. In the meantime, in September 2019 an electoral commission (*Autorité nationale indépendante des élections*) had been set up and Organic Law 16-10 of August 25, 2016 on the electoral system had been changed. In spite of the fact that their constitutionality was questionable on various grounds (see Hammadi 2019), the Constitutional Council upheld both the Organic Law establishing the electoral commission and the Organic Law reforming the electoral system. Only minor aspects of these laws were struck down as unconstitutional.[14] Further-

10 *Declaration of April 3, 2019.*
11 *Decisions 18/D.CC/19* and *19/D.CC/19 of June 1, 2019.*
12 *Decision 20/D.CC of June 1, 2019*.
13 *Communication of June 2, 2019*.
14 See *Avis 01/A.L.O/19 of September 14, 2019*, and *Avis 02/A.L.O/19 of September 14, 2019*.

more, on November 9, 2019, the Council validated the list of candidates for the presidential elections (after rejecting nine appeals by candidates who had been excluded by the Electoral Commission),[15] and on December 16 proclaimed the final results of the elections.[16]

In addition to the powers mentioned above, some other important "ancillary functions" of the Constitutional Council include the power to verify the incapacity of the President of the Republic (art. 102(1)), and the power to extend the timeframes for holding new presidential elections up to a maximum period of 60 days in the event that any of the second round candidates dies or is subject to a lawful impediment (art. 103(3)). Furthermore, the President of the Council must be consulted by the President of the Republic concerning any declaration of a state of emergency or a state of siege (art. 105), a state of exception (art. 107(2)), war (art. 109), or in the event of the dissolution of the People's National Assembly (art. 147), whilst the Council as a whole must be consulted in the event of general mobilization (art. 104(4)) or the extension of the parliamentary term (art. 119(5)). Furthermore, under certain extreme circumstances (e.g. if the office of President of the Council of the Nation is vacant at the time of the resignation or death of the President of the Republic) the President of the Constitutional Council assumes the duties of the Head of State (art. 102(8)). The 2016 Reform also maintained the provision enabling the Constitution to be amended without any popular referendum. In fact, if the proposed constitutional amendment is upheld as constitutional by the Constitutional Council, the President of the Republic may promulgate the amendment law directly, provided that it has been approved by Parliament by a majority of three-fourth of the members of both Houses (art. 210).

4. The "exception of unconstitutionality"

The most significant innovation in the field of constitutional justice introduced by the 2016 reform is undoubtedly the "exception of unconstitutionality" mechanism. Article 188(1) of the Constitution provides that the Constitutional Council has the power to examine "an exception of unconstitutionality pursuant to a referral by the Supreme Court or the Council of State in the event that one of the parties to a trial claims before a judicial authority that the legislative provision on which the dispute

15 *Decision 36 /D.CC/19 of November 9, 2019*.
16 *Proclamation 03/P.CC/19 of December 16, 2019*.

depends violates the rights and freedoms guaranteed by the Constitution." This Article also stipulates that the conditions and arrangements governing the implementation of this form of access to the Constitutional Council must be laid down in an organic law (art. 188(2)), which was adopted on September 2, 2018 (*Organic Law 18-16*; hereinafter: Organic Law), and entered into force on March 7, 2019. The Constitutional Council ruled (on an *ex ante* basis) on the constitutionality of this Organic Law in the *Avis 3/A.L.O/C.C/18 of August 2, 2018*.

At the time of writing, the Council has delivered two judgments concerning an exception of unconstitutionality, namely *Decision 01/D.CC/EI/19* and *Decision 02/D.CC/EI/19 of November 20, 2019*. Since these two cases concern the same provision, i.e. Code of Criminal Procedure, art. 416-1, the Council ruled on the merits only in the first case (as provided for under *Rules of Procedure of the Constitutional Council*, art. 29bis). One more case is currently pending before the Council, namely *Exception 2020-01/EI*, which concerns the Code of Criminal Procedure, art. 496(6).

In the following text, I shall make some preliminary remarks concerning five aspects of this new procedural gateway to the Constitutional Council, namely 1) the introduction of a "double-filter" system; 2) those with standing to raise an exception of unconstitutionality; 3) the parameter for constitutional review; 4) the conditions that must be met in order to raise an exception of unconstitutionality; 5) the effects of the Constitutional Council's decisions. I shall also show that Algerian lawmakers have relied considerably on the system of concrete constitutional review introduced in France in 2008, namely the *question prioritaire de constitutionnalité*.

4.1. The introduction of a "double-filter" system

As is well known, the French legal model has traditionally exerted a strong influence over the Maghreb countries (Le Roy 2012: 109 et seq.), including in the field of constitutional review (Gallala-Arndt 2012: 239 et seq.). The decision made by Algerian constitutional lawmakers in 2016 to introduce the exception of unconstitutionality represents a further example of the continuation of this tradition, as well as being the outcome of frequent and intense exchanges among the members of the French and Algerian

Constitutional Councils.[17] In 2008 France adopted an extremely important constitutional reform, which – *inter alia* – introduced *ex post* constitutional review for the first time, in the form of concrete review (*question prioritaire de constitutionnalité*) (see Fabbrini 2008: 1297 et seq.; Pouvoirs 2011). A peculiarity of the French system is that not all courts have the authority to challenge a legislative act before the Constitutional Council. Indeed, when any *lower* court concludes that a law violates any rights and freedoms guaranteed by the Constitution, it must stay the proceedings and refer the matter to the highest courts – specifically the Court of Cassation or the Council of State – which then decide whether or not to refer the question of constitutionality to the Constitutional Council. This mechanism, which may be described as a "double-filter" system, clearly departs from the most common model of concrete constitutional review, i.e. the "single-filter" system. Indeed, under the latter system, all courts – including lower courts – can refer questions of constitutionality *directly* to the Constitutional Court. The single-filter system can be found in a number of European countries, including Italy, Germany and Spain, as well as many central and eastern European states.

As discussed in greater detail elsewhere in this volume (see Biagi 2021), some Arab countries, including Egypt, Kuwait, Palestine, and Tunisia, have adopted the single-filter system. Algeria, together with Jordan, has by contrast followed the French model and opted for the double-filter system. Thus, when a lower court concludes that the legislative act that has to be applied to the specific case violates a fundamental right or freedom recognized by the Constitution, it cannot raise an exception of unconstitutionality directly before the Constitutional Council, but is required to refer it to the Supreme Court or the Council of State, and it is for these apex courts to decide whether or not to submit the exception to the Constitutional Council (*Constitution*, art. 188; *Organic Law*, arts. 7 et seq. and 13 et seq.). All three exceptions of unconstitutionality raised thus far before the Constitutional Council originated from the Supreme Court.

As has been pointed out also by former President of the Algerian Constitutional Council Mourad Medelci, the aim of the double-filter system is to prevent the Constitutional Council from being overloaded by cases (Medelci 2016: 31). However, comparative examples show that this mechanism can be rather problematic, especially at the outset, as it can foster

17 The journal of the Algerian Constitutional Council has often included a report of these exchanges and meetings. See, for example, *Revue du Conseil Constitutionnel* 2, 2013, and 8, 2017.

tensions between the highest courts and the Constitutional Court, and it can hinder access to constitutional justice. For example, between 1951 and 1956 Germany adopted an access route that had some similarities with the double-filter system. Specifically, courts could only refer a question of constitutionality to the *Bundesverfassungsgericht* via the supreme courts. These courts did not have the power to block the referral, but had the right to submit to the Constitutional Court their own opinion concerning the question referred by the lower courts. However, within the practice of the *Bundesgerichtshof* (the supreme court in civil and criminal matters),

"such opinions began to take the form of all but complete judgments on constitutionality and were published in the official collection of the *Bundesgerichtshof*'s decisions, sometimes before the Constitutional Court had rendered its decision. In 1955, the Constitutional Court declared that the supreme courts were not allowed to submit their opinions. In response, all five supreme court presidents addressed a note of protest to the President of the Constitutional Court. Finally, in July 1956, the Federal Constitutional Court Act was amended and the participation of supreme courts in the procedure of judicial referrals was abolished" (Garlicki 2007: 51).

In Jordan, where the double filter system was introduced by the 2011 Constitutional Reform, the extremely low number of judgments issued thus far by the Constitutional Court would appear to be related – amongst other things – to a certain degree of reluctance on the part of the Court of Cassation to refer questions of constitutionality to the Constitutional Court (Biagi 2019: 652-653). Even in France, during the first years of operation of the *question prioritaire de constitutionnalité*, the Court of Cassation (but not the Council of State (see Stefanini 2013: 1 et seq.) displayed a certain level of resistance when referring cases to the Constitutional Council (see Molfessis 2011: 83 et seq.; de Montalivet 2018: 927) – as was also recalled by the President of the French Constitutional Council Laurent Fabius during a visit to the Algerian Constitutional Council in February 2017 (see Fabius 2017: 118–119).

In the light of the above-mentioned examples, extremely close cooperation between the highest courts (i.e. the Supreme Court and the Council of State) and the Constitutional Council will be of the utmost importance for the exception of unconstitutionality to be successful in Algeria. Without such a dialogue, the double-filter system risks creating contrasts between the apex courts and the Constitutional Council, as well as to hindering access to constitutional justice, thus reducing the ability of the Council to guarantee effective protection for fundamental rights and freedoms.

4.2. Who is entitled to raise an exception of unconstitutionality?

In Algeria, the exception of unconstitutionality can be raised upon request by one of the "parties to a trial" (*Constitution*, art. 188; *Organic Law*, art. 2). Although it will have to be clarified within the case-law of the ordinary courts and the Constitutional Council, this notion seems to suggest that *all* parties to a trial are entitled to raise an exception of unconstitutionality, thus both natural and legal persons, whether the plaintiff, the defendant or the prosecutor. It has also been argued within the literature that not only Algerian citizens, but also foreign nationals should be entitled to raise an exception of unconstitutionality (see Bousoltane 2017: 15).

It must be stressed that *only the parties* to a trial have the ability to raise an exception of unconstitutionality, whereas the judges are not entitled to do so *ex officio* (*Organic Law*, art. 4). Thus, Algeria, together with other countries in the region (including Jordan and Tunisia) (see Biagi, in this volume) has decided to follow the French model (see Articles 23-1 et seq. of the *Ordinance 58-1067 of November 7, 1958*, as amended by *Organic Law 2009-1523 of December 10, 2009*, regulating the *question prioritaire de constitutionnalité*, hereinafter: *Organic Law QPC*). It is evident that preventing judges from raising an exception of unconstitutionality *ex officio* risks further hindering access to constitutional justice – as was also pointed out by the Venice Commission in its opinion on the draft Organic Law on the Constitutional Court of Tunisia (see Venice Commission 2015: 8).

As is the case in France (*Organic Law QPC*, art. 23-2(6)), a decision by a lower court to raise an exception of unconstitutionality cannot be appealed, whereas the refusal to do so can only be challenged within an appeal lodged against the decision in respect of all or part of the trial (*Organic Law*, art. 9). Furthermore, it seems that in Algeria (as is the case in France) a refusal by the highest courts to raise an exception of unconstitutionality before the Constitutional Council cannot be appealed. It should be noted, however, that if the Supreme Court or the Council of State does not comply with the two-month deadline for deciding whether the exception of unconstitutionality should be raised before the Constitutional Council (as provided for under *Organic Law*, art. 13), the exception is raised *ex officio* before the Council (*Organic Law*, art. 20). A similar provision can also be found in France (*Organic Law QPC*: art. 23-7(1)).

4.3. The parameter for constitutional review

The parties to a trial can raise an exception of unconstitutionality if they consider that the legislative provision on which the dispute depends violates "the rights and freedoms guaranteed by the Constitution" (*Constitution*, art. 188(1); *Organic Law*, art. 2). This means that – as is the case in France (*Constitution*, art. 61-1) – the parameter for constitutional review (*bloc de constitutionnalité*) is not comprised of all constitutional provisions (as is usually the case for concrete constitutional review mechanisms), but only comprises the provisions that refer to rights and freedoms.

The Organic Law on the exception of unconstitutionality has not provided any clarification with respect to the actual meaning and scope of this provision, thus leaving this task to the case-law of the ordinary courts and the Constitutional Council. In any case, it should be noted that Chapter IV of Title I of the Constitution dedicated to "Rights and Freedoms" (arts. 32 to 73) was significantly modified following the 2016 Constitutional Reform: new rights were constitutionalized, and the protection of others was reinforced (see Biagi 2017: 5–7). Furthermore, the preamble, which continues to refer to "individual and collective rights and freedoms", is now defined as an "integral part" of the Constitution. This expression appears to establish the normative status of the preamble and its eligibility as a parameter for constitutional review. These novelties are likely to strengthen the exception of unconstitutionality mechanism, by indirectly favoring access to the Constitutional Council.

In *Decision 01/D.CC/EI/19* the Constitutional Council opted for a broad interpretation of the expression "rights and freedoms guaranteed in the Constitution", since it used as a parameter for constitutional review a provision that is *not* included within Chapter IV of Title I of the Constitution on "Rights and Freedoms". Indeed, Article 416-1 of the Code of Criminal Procedure (hereafter: CPP) – the provision to which the exception of unconstitutionality related – was ruled partially unconstitutional, as it was deemed to be in contrast with Article 160(2) of the Constitution, which provides for a second instance of proceedings within criminal trials. The Council accepted the arguments made by the applicant, who stated that Article 416-1 of the CPP – which stipulated, *inter alia*, that only judgments within criminal trials imposing a prison sentence or a fine exceeding 20,000 Algerian dinars on natural persons could be appealed – violated the right to a two instances of jurisdiction in criminal offences ("double degré de juridiction en matière pénale") (*Constitution*, art. 160(2)), and consequently hindered the possibility to prove one's innocence.

Interestingly enough, in this case the Constitutional Council also ruled on the constitutionality of parts of Article 416 of the CPP, which the exception of unconstitutionality did not mention.[18] Indeed, Article 29(2) of the Rules of Procedure of the Constitutional Council states that the Council may verify the constitutionality of "other legislative provisions when the latter are linked to the legislative provision which was the object of the exception". In the light of their "evident link", the Council decided to strike down also the provisions of Article 416 of the CPP stipulating that only the judgments within criminal trials imposing a fine exceeding 100,000 Algerian dinars on legal persons, as well as judgments relating to minor infractions ("en matière de contravention") imposing a prison sentence, could be appealed. These provisions were (again) held to violate Article 160(2) of the Constitution.

The possibility or reviewing the constitutionality of legislative provisions other than those to which the claim relates seems to depart from the French model. In *Judgment 2010-1 QPC of May 28, 2010*, for example, the Constitutional Council stated that it could not rule on the constitutionality of certain provisions since they "do not appear in the question referred by the Council of State to the Constitutional Council." The Council thus followed the rule of *non ultra petita* (a court may not decide beyond what has been asked of it) (see Conseil constitutionnel français 2012). On the other hand, however, Article 7 of the Rules of Procedure on the *question prioritaire de constitutionnalité* stipulates that the Council has the power to review the constitutionality of the contested legislative provisions on grounds other than those identified by the parties (Jacquelot 2013: 14–15; Severino 2014: 493–494).[19]

18 The French version of CPP, art. 416 reads: "Sont susceptibles d'appel: 1 - les jugements rendus en matière de délits lorsqu'ils prononcent une peine d'emprisonnement ou une peine d'amende excédent 20.000 DA pour la personne physique et 100.000 DA pour la personne morale et les jugements de relaxe. 2 - les jugements rendus en matière de contravention lorsqu'une peine d'emprisonnement avec ou sans sursis a été prononcée."

19 See for example *Judgment 2010-28 QPC of December 16, 2010*, and *Judgment 2010-33 QPC of September 22, 2010*.

4.4. *The conditions that must be met in order to raise an exception of unconstitutionality*

According to the Organic Law on the exception of unconstitutionality (arts. 8 and 13(2)), three conditions must be met in order for the courts (both the lower and the apex courts) to raise an exception of unconstitutionality. In other words, if these three conditions are met, lower courts must raise the exception before the Supreme Court or the Council of State; similarly, if also the Supreme Court or the Council of State concludes that these conditions are met, then they must raise the exception before the Constitutional Council.

In the first place, "the contested legislative provision" must "determine the outcome of the dispute, or constitute the ground for the proceedings underway" (*Organic Law*, art. 8). This provision clearly recalls Article 188(1) of the Constitution, according to which an exception of unconstitutionality may be raised in the event that one of the parties to a trial claims that "the *legislative provision on which the dispute depends* violates the rights and freedoms guaranteed by the Constitution" (emphasis added). These provisions seem to indicate that the contested legislative provision must be essential in order to resolve the dispute. From this viewpoint, the Algerian system in part departs from the French model, under which courts can raise an exception of unconstitutionality if the contested provision "is *applicable* to the litigation or proceedings underway" (emphasis added) or constitutes the basis for such proceedings (*Organic Law QPC*, art. 23-2(1)). This provision seems to be less "stringent" compared to its Algerian counterpart, as it only requires the existence of a link between the contested provision and the dispute;[20] in Algeria, by contrast, the contested provision must determine the *outcome* of the dispute.

The second requirement – which is almost identical to its French counterpart (see *Organic Law QPC*, art. 23-2(1)) – provides that "the legislative provision has not already been declared consistent with the Constitution by the Constitutional Council, except in the event of a change of circumstances" (*Organic Law*, art. 8). Therefore, as a general rule, if the provision has already been upheld as constitutional, an exception of unconstitutionality cannot be raised. It may only be raised "in the event of a change

20 It should be noted, however, that the Court of Cassation (unlike the lower courts and the Council of State) usually requires the existence of a link between the contested provision and the outcome of the dispute (see for example *Judgment 10-13616 of September 14, 2010*; *Judgment 12-12356 of July 5, 2012*).

of circumstances". In the light of this ambiguous expression, it will be up to the Constitutional Council to clarify the meaning and scope of the provision, as the French Constitutional Council did in 2009 when reviewing (on an *ex ante* basis) the Organic Law on the *question prioritaire de constitutionnalité*.[21] In particular, in that decision the French Council specified that "a change of circumstances" refers both to circumstances of "law" and circumstances of "fact".[22]

The third condition provides that the question must be "of a serious nature" (*Organic Law*, art. 8). The Constitutional Council held – in its ruling (recalled above) on the Organic Law on the exception of unconstitutionality[23] – that vesting ordinary courts with the competence to verify the seriousness of the question does not mean that "the type of scrutiny [*pouvoir d'appréciation*] of these courts is similar to that vested exclusively in the Constitutional Council", which is the only body responsible for reviewing the constitutionality of legislative acts. Despite this clarification, the notion of seriousness remains open to different interpretations, thus raising a number of questions. For example, do the ordinary courts have to be convinced that the legislative act is unconstitutional, or is a mere doubt as to the constitutionality of the act sufficient in order to raise an exception of unconstitutionality? What standard of scrutiny are ordinary courts supposed to apply: loose scrutiny or strict scrutiny? Only the jurisprudence of the Algerian courts will be able to answer these questions.

As regards this third requirement, it should be noted that the Algerian lawmaker has partially departed from the French model. Indeed, in France, lower courts can raise an exception of unconstitutionality if the question "is not devoid of seriousness" (a negative requirement) (*Organic Law QPC*, art. 23-2(1)), whereas the Court of Cassation and the Council of State can raise an exception if the question is "new" or "of a serious nature" (a positive requirement) (*Organic Law QPC*, art. 23-5(3)). This different formulation has considerable implications for the standard of scrutiny: while the lower courts usually apply quite a loose standard of scrutiny (i.e. they ascertain that the question is not absurd, frivolous, or seeking to postpone the final decision), the Court of Cassation and the Council of State are required to apply a stricter standard of scrutiny (i.e. they raise an exception of unconstitutionality only if they cannot

21 *Decision 2009-595 DC of December 3, 2009*.

22 For specific examples see *Judgment 2010-14/22 QPC of July 30, 2010*, and *Judgment 2011-125 QPC of May 6, 2011*.

23 *Avis 3/A.L.O/C.C/18 of August 2, 2018*.

interpret the contested provision in a manner that is consistent with the Constitution (constitution-conform interpretation))[24] (see Roblot-Troizier 2013: 58 et seq.; Severino 2014: 489–491). In Algeria, the Organic Law on the exception of unconstitutionality does not provide for any difference as regards the type of scrutiny between the lower courts and the highest courts (since both must establish that the question is "of a serious nature"); however, this does not seem to prevent the case-law of the lower and apex courts from evolving in different ways.

4.5. The effects of the Constitutional Council's decisions

Finally, it is worth recalling that Article 191 of the Constitution provides that a legislative or regulatory provision that is ruled unconstitutional will normally cease to apply on the day on which the Constitutional Council issues its decision, whilst legislative provisions that are ruled unconstitutional pursuant to an exception of unconstitutionality cease to have effect "from the date specified in the decision of the Constitutional Council." Similarly, in France a provision that is declared unconstitutional pursuant to a *question prioritaire de constitutionnalité* ceases to have effect "as of the publication of the […] decision of the Constitutional Council *or as of a subsequent date determined by said decision*" (*Constitution*, art. 62(2)) (emphasis added) (see Deumier 2015: 65 et seq.).

Generally speaking, the possibility of deferring the date on which the invalidation of a legislative act takes effect is intended not only to give the legislature time to intervene so as to avoid any gaps in the law, but also to reduce the impact of decisions of unconstitutionality on political institutions and the legal order as a whole (as, for example, in cases involving the invalidation of laws dealing with taxation matters, which may give rise to some forms of redistribution of the state budget) (see de Visser 2014: 318–320).

5. Concluding remarks

This chapter has shown that, since its establishment in 1989, the status, role and prerogatives of the Algerian Constitutional Council have been

24 On constitution-conform interpretation, from a comparative perspective, see de Visser 2014: 378–384.

significantly reinforced over time. In most cases, however, this body has focused its action on the resolution of electoral disputes, and has acted as a real "counter-majoritarian" institution only in a few cases. The 2016 constitutional reform introduced several important innovations in the field of constitutional review which, considered overall, have strengthened the position of the Council within the institutional architecture. In particular, the widening of access, especially through the introduction of the exception of unconstitutionality, has increased the possibilities (at least on paper) for this body to play a more effective role in protecting fundamental rights and freedoms. This essay has made some preliminary remarks concerning this new procedural gateway, discussing its major characteristics, its main strengths and weaknesses, and showing the strong influence exerted on it by the French *question prioritaire de constitutionnalité*. However, it is important to stress that it is only after this new mechanism has been operating in practice that it will be possible to fully understand its impact not only on the system of constitutional review, but also on the Algerian legal system as a whole. In particular, the case law of the ordinary courts and the Constitutional Council will be crucial in answering a number of questions that are as yet unresolved. *Avis 3/A.L.O/C.C/18 of August 2, 2018*, on the Organic Law on the exception of unconstitutionality, as well as *Decision 01/D.CC/EI/19* and *Decision 02/D.CC/EI/19 of November 20, 2019*, of the Constitutional Council have started to clarify some of these issues; obviously however, this is still just the beginning of the process.

There is also another variable that must be taken into account. Algeria (as mentioned above) is currently experiencing a period of transition following the resignation of Abdelaziz Bouteflika on April 2, 2019, and since then a large number of protesters have been calling for the adoption of a new Constitution (see Veysset 2019). In an attempt to calm down protest demonstrations, soon after he was elected President of the Republic, Abdelmadjid Tebboune announced his intention to reform the 1996 Constitution. He thus charged a commission of experts (mainly comprised of university professors) with preparing a draft constitutional reform. Interestingly, these draft amendments, which were released in May 2020 (see Al-Ali 2020), also envisaged some significant changes to the system of constitutional review. In particular, as occurred in Morocco and Tunisia, the Constitutional Council has changed its name and will now be called the Constitutional "Court". Its functions have been expanded, as the Court, for example, has been vested with the power to resolve disputes between constitutional "powers" upon request by the President of the Republic, the Speakers of the two houses of Parliament, the Prime Minister or the Head of Government, 40 members of the Lower House or 25 members of the

Upper House. As regards the Court's jurisdiction, the draft provides for *ex ante* review of laws and international treaties, as well as mandatory *ex ante* review of organic laws and the internal regulations of each house of Parliament. The Court is also responsible for verifying that laws and regulations are consistent with international treaties. Furthermore, the draft makes provision for *ex post* abstract review of ordinances and regulations. With respect to concrete review, the draft maintains the double-filter system, but unlike the current model it provides that not only a legislative provision but also a provision of a *regulation* may be the object of an exception of unconstitutionality. It remains to be seen whether this constitutional reform will be confirmed in the referendum that has been recently scheduled for November 1, 2020.

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Lebanon's Constitutional Council: Access Blocked to Protect the Consensus System?

Nizar Saghieh

Abstract
The Lebanese Constitutional Council is vested with the power of assessing the constitutionality of laws and annulling unconstitutional ones. All the other bodies of the State are obliged to apply the laws as long as they have not been declared unconstitutional. From the perspective of strategic litigation on questions of fundamental rights, in view of the limited competences of the Lebanese Constitutional Council to decide on constitutionality of laws, this chapter discusses the historical background and reasons for the current situation of very limited control of the laws' constitutionality. It sheds light on the prevailing political characteristics and perception of the Council's role at his creation and shows the Council' stance by examples of various political, legislative and its' own Council's decisions, arguing for the need not just to reform Lebanon's Constitutional Council, but the perception and role it is driven into by the current political system of consensus.

1. Introduction

Up to now, the scope of the Lebanese Constitutional Council's work has remained very limited. The ability to challenge the constitutionality of laws before it is restricted to a number of officials and a timeframe of just fifteen days from a law's publication in the Official Gazette. Once this deadline elapses, a new law becomes effective, like all laws that were issued before the Constitutional Council's establishment or went unchallenged, without anyone having the ability to challenge it before any authority, nor any regular court.

We may see this relative closure as an indicator of the level of development of Lebanon's legal system and expect that gradually opening-up is inevitable as the system develops, and as has occurred in several countries, including France (which inspires Lebanon's laws) and many Arab countries, such as Egypt, Jordan, Tunisia, and Morocco.

However, the Lebanese experience is distinct from the other mentioned experiences, because it is embedded in a system that is based, in principle, on consensus democracy. This distinguishing feature may be explained by the course which the Lebanese system took after the 1975–1990 war, when the performance of the institutions and rule of law declined, and, most importantly, when the ability of non-governmental social forces to exert influence collapsed. Consequently, Lebanon's consensual system - based on observing sectarian quotas – slid from being one being predominantly democratic in character and striving to build shared spaces and institutions and to foster cross-sectarian cooperation among the various social forces (the state), to being one with a charismatic and comprehensive character.

The current consensual system characterized, firstly, by the rallying of the various Lebanese groups (the sects) around *zuama* (elite political leaders) who monopolize representation and negotiation in their name. Secondly, by the comprehensiveness of the sectarian consensus principle, to the extent that it expands to incorporate the vast majority of public decisions and that consensus is, in practice, valued more highly than all other considerations, including constitutional ones. Usually, this unconditional rallying around the sectarian *zuama* is reminiscent, to one degree or another, of the ritualistic alignment (occasionally with the *zuama* themselves) that occurred during war. The best evidence of this transformation is the amnesty law issued in the wake of the war (1991). While this law pardoned political crimes, including major massacres, war crimes, and crimes against humanity, thus retrospectively exempting war-protagonists from legal liability for all crimes committed beforehand, it excluded several crimes, the most important as far as civil society is concerned being crimes committed against political and religious leaders. This indicated that the paramount principle in Lebanon's post-war system is not the human being, as in Europe after the Second World War, but the leader or *zaim*. This orientation was confirmed in the overall legislative policy after the war,[1] for which there is no room to detail in this essay.

Because of this transformation, the priorities of public policies changed: While interest in building and fortifying shared institutions and spaces declined, interest in consolidating the *zuama*'s influence and each leader's own ability to divide and attract the populace like magnetic poles increased enormously. This is what the sociopolitical discourse has dubbed

1 Nizar Saghieh, "Beyond Sectarianism: Whom Does the Lebanese State Serve?" *The Legal Agenda* 32, October 2015, in Arabic under the title "Li-Man/Didd Man Yanbid Qalb al-Madina."

muhasasa ("quota-sharing"), which, at its core, means shifting from the principle of power-sharing to the principle of sharing resources, posts, and public goods. For example, in Lebanon, judges and officials are chosen not based on their competence, but on their loyalty to a certain *zaim*. This new system paved the way not just for expanding the scope of the bartering (the "package deal" logic whereby one service is provided in exchange for another, or a person affiliated with a political faction is appointed in a certain position in exchange for the appointment of a person affiliated with another faction in an equivalent position), but also for propagating the logic of negotiation and bargaining, including bargaining over the application of the law and occasionally the Constitution.

Hence, to apply the scientific terms related to consensus systems, it can be said that since 1990, Lebanon has witnessed a shift from the centripetal approach, which is based on directing the social forces towards a common center, towards approaches based on deepening the divide between groups by directing the social forces toward more polarization and sectarian division (the consociational approach).[2]

Consequently, it was natural for the political actors in Lebanon to behave according to the rule that any decision they agree upon takes precedence over any other consideration, including constitutional rules, and therefore with the conviction that virtually the only check on their actions is consensus. Hence, any assessment of the Constitutional Council's role, composition, or power in the Lebanese system would be incomplete if not accompanied by a correct understanding of Lebanon's polarizing consensus system; not just the checks therein, but also the slides it has witnessed.

In this light, how can a judicial institution be given the ability to overturn agreements that the political factions reached, even if unconstitutional, when the general perception of these agreements is that they are more important to the system's stability and continuity than the Constitution itself? Does the existence of a Council of this kind not constitute, if its powers were expanded and it were granted the ability to settle the constitutionality of laws, and hence whether these laws are in effect, a threat to the stability of the comprehensive, polarizing consensus system which the political forces maintain to consider the ideal system for Lebanon?

More gravely, what if the Council annuls part of the law that one faction insisted upon without annulling other parts that another faction

2 Benjamin Reilly, *Democracy in Divided Societies*. Cambridge University Press, 2001: 20–21.

insisted upon, potentially giving the upper hand to one side and disturbs the delicate equilibrium between the political forces? Subsequently, what checks would the above change in the understanding of the Lebanese system impose with regard to the composition and powers of this Council and with regard to access for challenging laws? Furthermore, and in light of the above questions, how do we perceive this Council? Do we consider it a public institution outside the system of sharing power and positions, because its fundamental function is to check this system? Or, to the contrary, do we consider it a part and extension of this system, assuming that the system frames its work and that it is governed by considerations identical or at least similar to those that govern the ruling authority?

While these questions can be posed in regard to all the judicial bodies, posing them in regard to the Constitutional Council is more pressing because it is the only institution suited to and charged with assessing the constitutionality of laws and annulling unconstitutional ones. All other bodies are obliged to apply the laws, the laws as long as they have not been declared unconstitutional.

This is what shall be addressed throughout this chapter. Starting off by covering the political authority's perception of this Council's role, the chapter will then covers the Council's interpretation of this role via its rulings and stances.

It must be mentioned that in Lebanon, this Council was established not in the circumstances of a natural development of the laws and institutions, but by the 1991 Constitutional Amendment. This agreement reflected the most important content of the Taif Agreement, i.e. the foundational agreement paving the way out of the 1975–1990 war. Lebanese citizens then had to wait several years for the legal framework for the Council's establishment to be enacted (1993), to be appointed entirely in its first form (1994), and for its internal statue to be adopted (1996).[3] The Council

3 The Constitutional Council developed its internal statute in accordance with the provisions governing its establishment and deposited it with the General Secretariat of the Council of Ministers on December 19, 1994. The secretariat kept the statute for approximately one year, and Parliament did not adopt it until June 13, 1996. When describing the obstacles that faced the Constitutional Council's establishment, former council member Antoine Khair adds that "At one of the stages of legislation, an article discussing the members' compensation was deleted. This put them in a difficult position as if they addressed this issue, they would appear to be begging for compensation, and if they didn't, they would be subject to working for free after a full-time commitment had been imposed upon them. In reality, I'm sad to say that my colleagues and I, after approximately two years of work, don't know what compensation we might receive. This matter has persisted

was also suspended at several stages thereafter, most importantly during the period from 2005 to 2008. This period witnessed the repositioning of Lebanon's political forces following the Syrian army's withdrawal from the country and the return of the dominant Christian political leaders to participation in the political arena.

2. The Constitutional Council established in the image of the consensus system

The general characteristics and of the Constitutional Council and its perception may be discerned not only from a series of checks that govern its composition, powers, and how it adopts decisions, but also from the taboos that the constitutional legislators included in the Constitution's Preamble, i.e. the reference that governs it. These taboos have flexible meanings, which, if interpreted broadly, could keep the entire legal system subject to the consensus system and its comprehensive and polarizing tendency.

2.1. Constitutional taboos to immunize the comprehensive consensus system

It is true that the Taif Agreement included, in its opening section, an explicit declaration of Lebanon's commitment to public liberties and that the constitutional amendment in 1990 introduced into the Constitution's Preamble a commitment to the Universal Declaration of Human Rights and the international conventions that Lebanon has ratified. However, in parallel, this preamble also enshrined constitutional axioms (or perhaps taboos, as I refer to them) aimed at securing the exigencies of the consensus system.

The first, extremely important taboo appeared in Paragraph J, which stipulated that "There shall be no legitimacy for any authority that contradicts the pact of coexistence". As the post-war settlement had reformulated the conditions of power-sharing, this text aimed to reassure the various minorities, particularly the Christians, that the formula, which had previously

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for approximately two years from the date of their appointment. We also work without an office, phone, or usher, and we make do with a single staff member to assist us and he is not full-time. We implore some private offices to print and copy the decisions." Antoine Khair, *al-Majlis al-Dusturiyy wa-Dawruhu fi al-Raqaba 'ala Dusturiyyat al-Qawanin* (*The Constitutional Council and Its Role in Monitoring the Constitutionality of Laws*): 97 and beyond.

granted them predominance (the six-Christians-to-five-Muslims formula), became an even split between them and Muslims.

The second and equally important taboo appeared in Paragraph I, which rejects permanent settlement (*tawtin*) in Lebanon. It aims, in particular, to prevent the naturalization of Palestinian refugees and stateless persons and, in practice, any deepening of the demographic disparity between the sects as a result of such settlement (the overwhelming majority of these refugees are Sunnis).

Via the inclusion of these two taboos in the Constitution's Preamble, these axioms gained constitutional value, which the ruling authority can cite to justify infringing many fundamental rights or adopting many discriminatory measures that might be considered unconstitutional in other constitutional systems.

This issue was exacerbated by the flexible nature of the phrases "permanent settlement" and "the pact of coexistence", which allowed and continues to allow for their effects to be expanded – and therefore the danger they pose to ensuring fundamental rights without discrimination. This shall be explained below by examining some of the Constitutional Council's works related to these two concepts.

2.2. The Constitutional Council's composition and the means of appointing its members

Another check that can be discerned from the law establishing the Constitutional Council is the means of appointing its members. Half of the ten members are appointed by Parliament and half by the Council of Ministers. Their appointment in Parliament requires that they obtain an absolute majority in the first round and a plurality in the second round, and their appointment in the Council of Ministers requires that they obtain a two-thirds majority. This means that the Constitutional Council's members appointed by the Council of Ministers are appointed in accordance with the principle of quota-sharing by the main forces participating in government. Hence, these forces (should they be able to gather a "disrupting third" of the ministers) have the right to veto if they are unsatisfied with the appointments that occur in Parliament or do not agree to the candidates in the Council of Ministers.

Here, attention must be draw to three matters:

- Firstly, the Constitution did not stipulate any condition regarding the sectarian affiliation of the Constitutional Council's members. Article 95 explicitly excluded the judicial bodies from the sectarian representation rule. The law establishing the Constitutional Council, issued in 1993, and its amendments in 2006 and 2008 went in the same vein. Nevertheless, the customs adopted since the appointment of the Council's first form involved the imposition of an equal split between Christians and Muslims. Additionally, the principle of a split according to denomination prevailed, meaning that the Council came to be composed on the basis of two Maronites, two Orthodox, one Catholic, two Sunnis, two Shia, and one Druze. The sectarianization was officially consecrated in the 2017–2019 period via the emphasis on the aforementioned sectarian formula in the mandating reasons of two laws issued in 2018 and 2019 to extend the deadline for submitting candidatures for positions in the Council. These reasons explicitly stated that none of those who had submitted their candidatures in 2015 before the legal deadline fulfilled the condition of membership in the Roman Catholic sect. It also stated that sects, customarily represented by two Council members, were only represented by two candidates, which "makes election in Parliament and appointment in the Council of Minister pointless". Hence, the mandating reasons consisted in the need to reopen the door for candidatures to guarantee the representation of certain sects or provide a choice between the candidates from others.
  This custom was exacerbated by the fact that the principle of consensus on the candidates has not consisted in choosing consensus candidates in the sense that they are accepted by all the various political actors. Rather, in most instances, particularly in the latest appointments in 2019, it resulted in enabling every political force preponderant within its sect to name the member belonging to this sect. Subsequently, the sectarian representation of the Council's members transformed into a tool to ensure quota-sharing within the Council between the participants in government. This ensures that these members are subject to considerations that are identical or at least similar to the consensus-related considerations that drive the ruling authority. In 2019, the quota-sharing reached a high degree of crudity, particularly when one political faction–namely the Lebanese Forces, the second-largest Christian force in Parliament and the Council of Ministers–accused the others of violating the quota-sharing conditions and consequently depriving it of its agreed-upon share. That share went, via the appointments by the Council of Ministers on August 22, 2019, to the strongest Christian party.

- Secondly, the rules of appointment have been amended over the past three decades. Initially, appointment occurred without prior submission of candidature (the 1993 law). Then it occurred following candidature submission and an interview conducted by Parliament's Administration and Justice Committee (the 2006 amendment law). Later, it occurred based on candidature submission but without an interview (the 2008 amendment law). This resulted in customs whereby the candidates conduct visits to the political forces, particularly those that appoint the members from these candidates' sects, in order to convince those forces to appoint them.
- The third matter is the 2012 legislative intervention (the law of October 28, 2012) to abolish a rule stipulated in the 2008 Amendment whereby half the members of the Council's first form under that law would be selected by lot and replaced three years after swearing the legal oath. Hence, all members of the Constitutional Council remained in office, which allowed the ruling authority to appoint an entirely new membership in 2019, four years after the term of all the members had expired.

  In practice, this amendment reinforces the quota-sharing principle and the package-deal principle in appointments, as otherwise it would be unpredictable who would have to leave the Council due to the means of expulsion by lot. More importantly, the abolishment of the rule of 2008 tends to exclude the possibility that the Constitutional Council would include members appointed by forces that had lost their positions in government. By abolishing rotation, all the members are appointed at one time by the same ruling forces, which has occurred in 2019. The abolishment of the lot constituted another example of the Lebanese system's ability to circumvent best practices in appointing the Council Members adopted in many countries in order to establish the practices that serve its interests. The remarkable aspect of this law is not just its content but also its mandating reasons, the point of which was to prevent the disruption of the Council that could occur if members were expelled by lot while the ruling class could not agree on their replacements. The mandating reasons for the bill explicitly mention that Lebanon's democracy is weak and the obligation to elect a new membership for the Constitutional Council constantly went unfulfilled.

Consequently, the Constitutional Council has appeared, in its composition, to be more of an extension of the political system than a check to confirm that this system respects the Constitution. The best example

of this, and of the ties between the political *zuama* and the Council's members, is the challenge to the law extending Parliament's term in 2013. The said challenge failed because of the Constitutional Council's inability to adopt a decision on it within the legal timeframe as its quorum was disrupted by the absence of three members. In an issue on June 11, 2013, Lebanese daily *Al-Akhbar* interpreted their absence with the statement that "Parliament Speaker Nabih Berri [the prominent Shia *zaim*] and MP Walid Jumblatt [the prominent Druze *zaim*] are in agreement to disrupt the Constitutional Council's quorum by commanding the two Shia members and the Druze member not to attend the sessions". *Assafir*, another daily, chose to give its editorial published the same day a more expressive headline: "The Constitutional [Council] Challenges Itself: Command is for the Sects' Kings".

While from a legal perspective it is possible to view this action as merely a denial to administer justice for which the absent judges are responsible and to consider them as having resigned from their positions, things appear completely different when read via the lens of the political situation: Considering them resigned would, in practice, reduce the Council's members to seven, which would prevent it from convening at all. This would mean to totally suspend it, especially as the forces supporting those judges could, in principle, prevent the appointment of their replacements by Parliament or the Council of Ministers, which in practice only occurs via consensus.

From this angle, the disrupted quorum incident can be read in a totally different manner, namely as adapting the Constitutional Council system to the exigencies of the prevailing system. The Council's inability to examine a challenge because of the intentional absence of three members entails, in practice, not just propagating and legitimizing the culture of political interference in the judiciary. Before else, it is opening the door for the spread of the culture of consensualism within the judiciary (or at least, as far as we are concerned here, the Constitutional Council) such that there can be no judicial decision or resolution of disputes in the event of the so-called "disrupting quarter". In this sense, the action of those judges is an indication of the development of a different understanding of the principles of judicial work and the judicial function, an understanding that forges this function in the crucible of the Lebanese system and exploits it so that it serves that system, rather than checks or develops it.

2.3. The Constitutional Council's powers

The Constitutional Council's powers have also been influenced by the polarizing consensus system's considerations as the possibility of appealing to the Council, which threatens the orientations or laws on which the ruling political powers might reach a consensus, has been constricted. This can be discerned from two angles:

Firstly, the ability to challenge the constitutionality of laws was restricted to the President of the Republic, the Prime Minister, Parliament Speaker, and ten MPs, as well as the heads of the legally recognized sects when it comes to matters of personal status, freedom of belief, the practice of religious rites, and freedom of religious education (Article 19 of the Constitution). The law establishing the Constitutional Council (1993) also constricted this ability by limiting it to laws issued recently and requiring that the challenge be submitted within fifteen days of their publication. Besides the fact that this immunized all old laws, it also ensured that new laws are immunized if the forces wanting to challenge them fail to obtain the signature of the President, the Prime Minister, or the Parliament Speaker or the signatures of ten MPs. One of the most important and dangerous laws that was passed recently and that the MPs did not succeed in providing the number required to challenge is the law settling building violations committed between 1971 and 2018, i.e. over approximately half a century. This settlement severely impacts the environment and the aesthetics of the cities. It also rewarded the parties that violated the construction laws, which, via this law, overcame the legal challenges still pending against them at the time of its issuance.

This immunization peaked with the prohibition of all other judicial bodies from examining the constitutionality of laws, contrary to the situation before the Constitutional Council's establishment (Article 18 of the 1993 law).

Accordingly, in some instances Parliament has had no qualms about explicitly declaring that it is in the process of adopting an unconstitutional law because of its confidence that the number required to challenge it is not present. This occurred, in particular, with the adoption of the law extending the effective period of the provisional twelfth principle (which allows the government, in the absence of a budget, to continue spending in accordance with the previous budget) in 2019.[4]

4 "al-Nuwwab Yastajibuna li-Da'wat Wazir al-Maliyya bi-Mukhalafat al-Dustur: Lubnan tahta Hukm Qa'idat al-Ithnay 'Ashariyya Mujaddadan" ("The MPs Respond to

The second angle consists in an issue settled with the constitutional amendment in 1990, namely stripping the Constitutional Council of the power to issue opinions interpreting the Constitution separate from any dispute (a power stipulated in the Taif Agreement) on the pretext that Parliament alone many interpret the Constitution. This issue witnessed extensive debates within Parliament and clearly reflected Parliament's apprehension toward interpretations that could preemptively restrict its ability to legislate and subsequently limit the scope of potential bargaining.[5] The desire to strip the Constitutional Council of the power to interpret the Constitution has reached surreal levels whereby Parliament Speaker Nabih Berri went so far as to deny the Council's power to interpret the Constitution even when examining one of the challenges filed to a law's constitutionality.[6]

3. *The Constitutional Council's perceptions of its role under the consensus system*

How have the Constitutional Council's members interacted with this reality? Have they succeeded in distancing themselves from the political system? Have they succeeded in curbing abuse of authority or at least formulating principles or guidelines that could fortify rights gains or consolidate them in future?

Answering this question definitively is difficult for several reasons, including the large discrepancy between the Council's three forms, whose members were appointed in different political circumstances. The first two forms were appointed under the so-called Syrian tutelage and in the absence of the most popular Christian leaders, whereas the third form was appointed after the decline in Syrian influence and the Christian leaders' return to participation in political life.

Another, equally important factor preventing any general theory is the small number of law challenges brought before the Constitutional Coun-

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the Call by the Minister of Finance to Violate the Constitution: Lebanon Under the Rule of the 12th Once Again"), *The Legal Agenda* website, March 25, 2019.

5 Minutes of Parliament, 17th legislative cycle, first exceptional convention, third session, held on August 21, 1990.

6 Wissam Lahham, "Lebanese Ruling: The Constitution is Sovereign, not Parliament." *The Legal Agenda* website, September 28, 2017, in Arabic under the title "Siyadat al-Dustur La Siyadat Majlis al-Nuwwab: Ta'liq 'ala Qarar al-Dusturiyy bi-Sha'n Ibtal al-Ziyadat al-Daribiyya".

cil.[7] Hence, I will merely mention some stances that can be seen as indicative, and comment on them without claiming any general conclusions in this regard. Thus, here the Council's orientations shall be addressed with regard to situations, where laws have been challenged before it that could be considered sensitive; sensitive, either because of their connection to one of the aforementioned constitutional taboos (the prohibition of permanent settlement and the pact of coexistence) or because they were adopted by consensus even though they obviously contradict the Constitution.

3.1. The taboos before the Constitutional Council

For understanding what has developed as taboos before the Constitutional Council, two laws that the Constitutional Council addressed should be mentioned in particular:

- The first is the law on property ownership by foreigners issued in 2001. This law included an explicit clause stating that "No right *in rem* of any kind may be owned by any person who does not have the nationality of a recognized state, nor by any person if the ownership conflicts with the Constitution's provisions concerning permanent settlement".
  This text is understood as prohibiting stateless persons and, implicitly, Palestinian refugees from owning real estate in Lebanon, whether obtained via sale, gift, or inheritance.
  A challenge was filed against this law before the Constitutional Council for discrimination, citing the Constitution and several international conventions. In 2001, the Council dismissed the challenge, arguing that "The constitutional authorities have sovereign rights reserved on Lebanese territory, so they may prohibit ownership if it contradicts their supreme policy of rejecting permanent settlement". These grounds reflect an expansion by the Council in applying the taboo against settlement from two angles. Firstly, they expand the taboo's definition and scope: the "prohibition on permanent settlement" enshrined in the Constitution's Preamble encompasses not only granting Palestinian refugees Lebanese nationality but also granting them any civil rights that could facilitate or pave the way for obtaining nationality or enhance its legitimacy (as is the case with the right to ownership)

7 Twenty-five decisions between 1994 and 2005 and ten decisions between 2008 and 2014.

with no exceptions, not even for refugees who have strong ties to Lebanon, such as those married or born to Lebanese women.
Secondly, and perhaps more gravely, it put the prohibition on permanent settlement within the category of "supreme policy". This means the adoption of a certain hierarchy among the constitutional provisions and ultimately giving this principle precedence over the whole human rights system enshrined in the same preamble.

- The second law in this area is the renaturalization law, which aimed to ease the administrative procedures enabling the descendants of Lebanese emigrants to recover Lebanese nationality. The law excluded the descendants of female emigrants, thereby repeating the provisions of the Lebanese nationality law, which still deprives Lebanese women of the ability to bestow their nationality onto their children. It also excluded Lebanese who had chosen the nationality of a country that separated from the Ottoman Empire, the goal being to avoid renaturalization requests coming from the surrounding countries, particularly Syria and Palestine. This law, with what it permits and withholds, clearly touches another taboo, namely the pact of coexistence, from two angles. Firstly, when the law was developed, the Christian political forces assessed that facilitating the renaturalization of emigrants' descendants would increase Christians' numbers and reduce the demographic disparity between them and Muslims. Secondly, they succeeded in ruling out abolition of the gender discrimination in granting citizenship after it became evident that most of the children of Lebanese women who could benefit from the discrimination's abolishment are Muslims.[8] While the MPs of the Democratic Meeting bloc filed a challenge against this law on the basis of the discrimination against the descendants of people who chose the nationality of a former Ottoman Empire state, "The Legal Agenda", together with the "My Nationality is a Right for Me" and "My Family campaign", promptly composed a memorandum drawing the Constitutional Council's attention to a graver form of discrimination that the challenger had disregarded,

8 Saada Allaw, "Siyada Jadida bi-Ism al-Maslaha al-'Ulya: 'al-Dawla al-Dhukuriyya' Tadfan Haqq al-Mar'a al-Lubnaniyya bi-Manh Jinsiyyatiha li-Awladiha Niha'iyyan" ("New Sovereignty in the Name of Paramount Interest: 'the Patriarchal State' Buries the Lebanese Woman's Right to Bestow Her Nationality on her Children For Good"), *The Legal Agenda* website, January 15, 2013.

namely the gender discrimination.[9] On January 7, 2016, the Constitutional Council dismissed the challenge on the basis that "The law did not discriminate whatsoever on the basis of race, religion, or affiliation but instead enshrined an inclusive general principle from which Lebanese benefit", totally neglecting to examine the gender discrimination. The Council thereby seemed, contrary to its previous jurisprudence, to be voluntarily limiting its comprehensive power to exercise oversight over all the law's clauses and not just those related to the challenge's arguments, all for the sake of preserving this law despite its blatant gender discrimination because of its connection to coexistence considerations.[10]

Only the Council's Vice President, Judge Tareq Ziade, differentiated himself in this case. He recorded a dissenting opinion deeming that the law should be annulled because it totally contradicts the principle of gender equality,[11] adding that "No new law may contravene the Constitution"[12] and "The council, while examining a petition, cannot ignore a text that contravenes the Constitution".

3.2. Consensus laws that obviously contravene the Constitution

In this regard, the most important laws that have been challenged include the 2014 law to extend Parliament's term and the 2018 State budget law. Note that the Constitutional Council was unable to examine the challenge

9 Memorandum by The Legal Agenda and the My Nationality is a Right for Me and My Family campaign challenging the renaturalization law, *The Legal Agenda* website, December 22, 2015.

10 "al-Mufakkira al-Qanuniyya Tanshur al-Qarar fi Qadiyyat al-Ta'n bi-Qanun Isti'adat al-Jinsiyya: al-Majlis al-Dusturiyy Yudi' Fursa Tarikhiyya li-Insaf al-Nisa'" ("*The Legal Agenda* Publishes the Decision in the Case of the Challenge to the Renaturalization Law: the Constitutional Council Wastes a Historical Opportunity to Do Women Justice"), *The Legal Agenda* website, January 8, 2016.

11 "Mukhalafat Ziyada 'ala Qarar al-Dusturiyy 1/2016: Rafd li-Imtina' al-Majlis 'an Ihqaq al-Haqq" ("Ziade's Dissent to Constitutional [Council] Decision 1/2016: A Rejection of the Council's Abstention from Doing Justice"), *The Legal Agenda* website, January 11, 2016.

12 See also Mirai Najm Shukrallah and Paul Morcos, *al-Majlis al-Dusturiyy al-Lubnaniyy fi al-Qanun wa-l-Ijtihad* (*The Lebanese Constitutional Council in Law and Jurisprudence*), the UNDP's Lebanese Elections Assistance Project (LEAP) in cooperation with the Constitutional Council, 2014: 106.

filed against the law to extend Parliament's term for the first time in 2013 because of the absence of three of its members, as previously explained.

The decisions in these two cases reveal that the Council merely performed a guiding, advisory role. This role consisted of recalling the Constitution's provisions and warning the political authority of the seriousness of infringing them without going so far as to annul either law.

In the first case, the Council dismissed the challenge on November 28, 2014, on grounds that appeared contradictory. The decision not only emphasized all the constitutional principles that prohibit extending Parliament's term in this manner but also explicitly declared multiple times that extending it for two years and seven months conflicts with the Constitution. Thus, the decision declared that "the periodicity of elections is a constitutional principle that may absolutely not be infringed", that rendering the holding of elections contingent on agreement on a new election law is an act that contravenes the Constitution, and that while the exceptional circumstances might justify postponing the elections for a limited time, "they do not justify extending Parliament's term for two years and seven months". Yet all this did not prevent the Council from ultimately dismissing the challenge "to prevent further occurrence of a vacuum in the constitutional institutions". Some deemed that the Council had put a constitutional goal (preventing a vacuum) before annulling the constitutional violation without any attempt to weigh the two matters against each other in light of the principle of proportionality.

Thus, by refusing to annul the law, the Constitutional Council complied with consensus occurring in contravention of the Constitution and allowed Parliament in future to practice the same blackmail by forcing a choice between an extension and a vacuum. This would, in fact, later happen: Parliament extended its own term for the third time in 2017 in the body of the new parliamentary elections law such that its total extended term reached approximately nine years.

The Constitutional Council's stance in the second case was no clearer. To understand the significance of this decision, we must recall that Lebanon witnessed an unusual situation from 2005 to 2017: it was one of the few countries wherein governance continues without annual budget laws and without closure of accounts laws (i.e. laws that certify the outcome of the annual budget's implementation) in clear violation of the Constitution. Article 87 of the Constitution details the procedures that the enactment of a budget law for the following year should follow, including prior certification of the previous year's accounts–i.e. the so-called "closure of accounts" law. This is an important measure as it provides an idea about the budget's credibility and transparency and the correspondence between

the estimated budget and the budget's implementation. In 2017, it was decided to enact a budget for that year (albeit late) but without a closure of accounts. In 2018, the same scenario reoccurred: the government was again unable to certify the accounts of the past years.

A challenge was filed against the 2018 budget law, and on May 14, 2018, the Constitutional Council issued a decision to annul seven of its articles for reasons that there is no room to dwell on here, the most important being that they were off-topic (*cavaliers budgetaires*). On the other hand, it rejected the argument concerning the unconstitutionality of adopting a budget in isolation from a closure of accounts law for the previous year. It did so to avert an outcome in which Lebanon has no budget law. Here, the Council's grounds closely resembled its grounds in the decision to dismiss the challenge to the law extending Parliament's term.

Although the Council emphasized that adopting the budget without a closure of accounts law for the previous year is a breach of the Constitution and the separation of powers principle and an encroachment on the powers of the judiciary and Parliament and their role in overseeing how the state budget is implemented, it opted not to annul the law on account of this breach because of the country's need for a budget. Hence, the Council seemed to be saying that having a lame state budget lacking credibility is better than not having a state budget at all. To reach this conclusion, the Council adopted unfamiliar reasoning rather than deeming a closure of accounts law a precondition for the validity and credibility of the State budget law, as Article 87 requires, it gave the duty to adopt a state budget exceptional constitutional value higher than the value of adopting a closure of accounts law, for not adopting a budget has negative consequences for the state and leads to chaos in public finance. The Council thereby deduced that the more important law cannot be abolished because of the absence of a less important law. The closure of accounts "was established ... for the sake of the state budget; the budget was not established for the sake of the closure of accounts".

Once again, the first criticism of this stance came from the Vice President of the Constitutional Council Tareq Ziade, who composed a dissenting opinion concluding that the law should be annulled because of the absence of the closure of accounts law. One of the most prominent parts of this dissent stated that the principle of public interest is, according to constitutional jurisprudence, a secondary principle that acts as a supplement in the absence of a text. In other words, it should not be taken into account when there is an explicit, clear, definitive, and binding text (namely Article 87 of the Constitution). Ziade also criticized the Constitutional Council's use of the concept of an "abnormal situation" to describe the

absence of a state budget. After noting that this concept is vague and has not appeared in constitutional science and jurisprudence, he opined that it "is another term for exceptional circumstances that should not be taken into account when there is a text and that are not present to begin with".

4. Conclusion

As has been underpinned by the arguments laid out in this chapter, the Constitutional Council of Lebanon up to now did not manage to take a role in the post-1991 developments, by which it would emerge from rather than succumb to the problematics of the consensual system. Merely attributing additional competences and power to it would not solve the problem. To disrupt the constant threat of a culture of consensualism spreading within the judiciary and to the Constitutional Council, with long-lasting consequences, one would have to reconsider the appointment mechanisms, the axioms or taboos and with them the scope of the Council's jurisdiction and accessibility. This may only be achieved by a change of understanding of the principles of judicial work and the judicial function, away from the one that forges this function in the crucible of the Lebanese system and exploits it so that it serves the current system, but towards an understanding that develops it.

The Kuwaiti Constitutional Court and its Role in Protecting the Fundamental Liberties

Fawaz Almutairi

Abstract
The chapter relates to the Kuwaiti constitutional judiciary and deals with the issue of how the cases reach the court, and the most important legislations governing the court's formation and works. The chapter also analyzes some cases that dealt with the issue of Islamic law and its impact, whether directly or indirectly, on women in the rulings of the Constitutional Court of Kuwait. We will address some cases that were brought before the court because they contained legislation that affect women's rights in different aspects, whether their political right, or their right to be treated equally, or their right to free movement. The chapter finds how the constitutional court faced such challenges by providing pro-women interpretations through reconciling the Islamic law with the constitutional principles.

1. Introduction

The Constitutional Court has been endowed with a developed degree of monitoring and control over laws, bylaws and regulations that violate fundamental rights, including the right to equality, the right to litigation, the right to assemble and gather, and other constitutional and fundamental rights. The Constitutional Court, in its early stages, was rarely rendering decisions of unconstitutionality even if a violation of constitutional provisions by the legislation in question was evident. This may be due to a misconception by some of its members of the role played by the Constitutional Court, or to the fact that the majority of the members of the court are graduates of the Faculty of Sharia, whose views of basic rights differs from their colleagues that graduated from the Faculty of Law. With fierce criticism directed to the Constitutional Court on this matter, the court successively issued decisions that declared some laws or regulatory provisions unconstitutional. Especially in the period from 2006 to 2009, the Court took course to confront legislation contrary to the Constitution

and began to take its natural place to address such violating legislation as the protector of constitutional provisions against infringement.

2. *Procedures of filing constitutional motions concerning fundamental liberties*

The jurisdiction of the Constitutional Court – the scope of authority and competences to hear cases and interpret the constitution – enables it to review a wide range of constitutional motions or complaints. It carries out the process of examining questions of constitutionality as an inherent competence wherein it examines constitutionality of laws, decree-laws and regulations.

International treaties have the binding force of ordinary law whether, similar to what applies for Egypt. With regard to Kuwait, it is established by Article 70 of the Constitution[1]. This poses the question of what will happen if there is a conflict between a law and an international treaty. In Egypt, the constitutional court considered that the law is repealed and gave preference to the treaties in its ruling issued on March 18, 1995. The text of the Egyptian State Council Law stipulates that no member of the Council of State may be married to a foreign woman, which the Egyptian Supreme Constitutional Court considered contrary to the agreements signed by Egypt, deeming this part of the law repealed (Article 73 of the State Council Law 47 of 1972)[2].

The Constitutional Court of Kuwait also has the authority of interpreting constitutional text through requests submitted to it by either the government or National Assembly. The Court cannot protect fundamental rights and liberties through these interpretative decisions, as most of these decisions are related to the limits of legislative and executive authorities and their relations to each other.

Under the Court's jurisdiction also falls the competence to examine electoral appeals associated with the National Assembly. These are, in general terms, mostly related to the electoral process, but the Court may, through these appeals, adjudicate an important constitutional issue as it has done in the case of the *hijab* of MP women in 2009.

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1 The Emir/Prince concludes treaties by decree and transmits them immediately to the National Assembly with the appropriate statement. A treaty has the force of law after it is signed, ratified, and published in the Official Gazette.

2 Naguib Bouzid, *Supervision of Constitutionality of International Treaties*, MA Thesis, Mansoura: House of Law and Thought, 2010.

The fundamental role played by the Constitutional Court lies in protection of fundamental liberties when hearing the appeals related to the constitutionality of laws and regulations. The Constitutional Court does not have the right to issue direct orders to various authorities, but it can, by examining the legislation submitted by the aggrieved party, repeal or invalidate a law or regulation that violates fundamental liberties prescribed by the Constitution.

Individuals may bring cases before the Constitutional Court through number of ways and procedures. When doubts about the constitutionality of a decisive law or regulations are planted in an ongoing court case, the ordinary court (e.g. criminal court, administrative or labor court) that has the case before it, shall suspend adjudicating this case until the Constitutional Court decides on the constitutionality of the law or a regulation related to the case. In this first situation, there are two ways for the case to be filed to the Constitutional Court, either through a referral from the trial court or through a referral by the Appeals Review Committee.

We will address the different ways of bringing the constitutional case before the Constitutional Court.

2.1. The body concerned with hearing the appeal of unconstitutionality

Constitutional motion belongs to the group of corporeal lawsuits in which the dispute is directed to challenge legislative texts in order to reach a ruling on unconstitutionality, or to render a decision of its constitutionality and being acquitted of all defects and appeals[3].

The constitutional legislator has identified one body that oversees the process of reviewing laws, decree-laws and regulations that contain a suspicion of unconstitutionality. He called it the "judicial authority" The constitutional legislator has selected the centralized judicial review. The law on the establishment of the Constitutional Court was passed in 1973. It contained regulations that may be deemed contrary to the desire of the constitutional legislator in more than one aspect. The law constituted this body as a court, its members being a group of judges[4], while the constitu-

3 Adel Omar Sharif, "Constitutional judiciary." *Constitutional Judiciary in Egypt*, 1988: 459 and the following pages; Sha'ban Ahmed Ramadan, *Controls and Effects of the control over the Constitutionality of Laws: A Comparative Study.* PhD Thesis, Dar Al-Nahdah Al Arabiya: Assiut Faculty of Law, 2000: 565.

4 There were draft laws closer to the constitutional orientation, one of these draft laws stipulated the following: "*The Constitutional Court shall be composed by a decree*

tional legislator had a clear desire to have members from the judiciary as well as others representing the government and the National Assembly. The law also deprived individuals of direct appeal before that court and granted individuals the right to resort to collateral plea before ordinary courts[5]. In contrast, the law granted both government and National Assembly the right to appeal directly to the Constitutional Court, and also granted the ordinary courts, during the hearing of a case, to refer to the Court in case of suspicion of unconstitutionality.

2.2. Referral by ordinary trial courts

Referral by ordinary courts takes place when the case is at bar before an ordinary court to adjudicate thereon, but the judge believes, on his own initiative or on the basis of a plea submitted by litigants, that the law governing the case contains an unconstitutional suspicion of violating the provisions of the Constitution or its principles. He then decides to suspend the hearing of the case and refers it to the Constitutional Court to decide on the constitutionality of the legislation or regulation in question. Accordingly, the constitutional motion shall be registered and heard before Constitutional Court and it shall be obliged to adjudicate the constitutionality of the law or regulation. In case the Constitutional Court declares it unconstitutional, then the case, subject matter of the first lawsuit, shall be expired as a result of this decision according to the degree of text revocation associated with the motion.

The plea of unconstitutionality is not one of the formal or subjective pleas; it is aimed at sublimity of constitutional rules and therefore may be filed as it is and before any court[6].

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as follows: three advisers chosen by the Judicial Council by secret ballot. Their choice may be by delegation and the senior of them shall be the President of the Court as well as two lawmen or Islamic jurists from the Kuwaiti universities elected by the Council of Ministers and two members of the National Assembly with high qualification chosen by the National Assembly and the Head of the Public Law Department of Kuwait University ex officio..." see Othman Abdul Malik, "Constitutional Organization for the Judicial Supervision of the Work of Administration in Kuwait and Attempts to put it into Practice." *Journal of Law*, 10.2.

5 Othman Abdul Malik Al-Saleh, *The Constitutional System and Political Institutions in Kuwait*, Part I. Kuwait: Dar al-Ketub, 2003: 661.

6 *Case 23 of the 14th Constitutional hearing* of February 12, 1994 C6, Ruling 18: 174; Munir Abdul Majid, *The Origins of Judicial Control over the Constitutionality of Laws and Regulations*. Al Maarif Establishment, 2001: 14.

As long as the trial court has the power to refer the constitutional motion on its own initiative, this means that the plea of unconstitutionality is a part of public order[7].

Article 4 (Para, B) of the Constitutional Court Establishment Law provides that,

> "*disputes shall be referred to the Constitutional Court in one of the following two ways: (b) If one of the courts, in the course of considering a case, whether by itself or on the basis of grounded plea submitted by one of the parties to the dispute, holds that adjudicating the case is based on constitutionality of a law, a decree-law or regulation, then it shall suspend considering the case and shall refer the matter to the Constitutional Court to decide thereon...*"

This is a right of all courts of all degrees, whether before Court of First Instance, Court of Appeal or Court of Cassation[8].

2.3. Appeal before the Appeals Review Committee

The Constitutional Court Establishment Law of 1973 has established a committee emanating from the Constitutional Court called the Appeals Review Committee. This committee consists of three members of the Constitutional Court and is responsible for examining the seriousness of the appeals filed before it. In this way, one of the parties to the dispute before Trial Court has to sustain a plea on the grounds of unconstitutionality of a law, decree-law, or regulation. The Court then rejects such a plea, and the appellant impugns the decision of the trial court rejecting the plea before the Appeals Review Committee. The Appeals Review Committee shall examine the seriousness of the plea only, without examining other elements related to the case. If the Committee decides that the plea is serious, the case shall be registered before the Constitutional Court to examine the constitutionality of the law, decree-law, or regulation. If the Committee decides that the plea is not serious, it shall issue its decision of refusal and return the case to trial court for adjudication with the constitutional presumption in favor of the legislation governing the subject matter of the dispute.

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7 Yousri Al-Assar, *The Term of Interest in the Case of Revocation and in the Constitutional Motion*, 1994: 49.

8 Turki Sattam Al-Mutairi, *Procedural Pleas in the Constitutional Motion*, 2012: 230.

The Appeals Review Committee's final decisions cannot be appealed, not even by the Constitutional Court[9]. It is a judicial committee emanated from the Constitutional Court that examines the seriousness of pleas that have already been rejected by the trial court. This is a mechanism created by the legislator to assist the Court in settling appeals submitted to the Constitutional Court[10].

The Appeals Review Committee is an associate apparatus of the Constitutional Court, not a court of appeal in relation to trial court. It is formed of members of the Constitutional Court itself, organized by the Constitutional Court Rules in Article 8, which states that,

> "*the Appeals Review Committee shall be constituted chaired by the President of the Court and membership of Court's senior advisers and shall follow proceedings prescribed before the Constitutional Court.*"

This Committee, despite the nature of its formation, differs from the Constitutional Court in terms of nature, jurisdiction and formation. The Constitution did not refer to the formation of the Committee, but its fundamentals are found in the Constitutional Court Establishment Law[11].

Sub-appeal is a right entitled to any of the litigants with respect to substantive case, before a court, to raise the constitutional issue in this case to plea unconstitutionality of legislation which shall be applied in the case brought before the court.

This has been the only means for individuals since promulgation of the Constitutional Court Establishment Law until 2014 when a provision allowing individuals to appeal directly to the Constitutional Court was added.

The Constitutional Court Establishment Law in Article 4 paragraph B stipulates that,

> *"...the concerned parties may appeal the decision of plea non-seriousness before the Appeals Review Committee in the Constitutional Court within one month of issuance of the said decision. The Committee shall promptly adjudicate this appeal*"[12].

In case the trial court holds that seriousness of plea is lacking, the appeal against this decision shall be before the before-mentioned Appeals Review

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9 Muhammad Al-Muqati, *A Study in the approaches of Kuwaiti Constitutional Judiciary*. Kuwait: Kuwait University Press, 1999: 47.
10 Al-Muqati, *Kuwaiti Constitutional Judiciary*: 50.
11 Al-Muqati, *Kuwaiti Constitutional Judiciary*: 57.
12 Al-Mutairi, *Procedural Pleas*: 384.

Committee in the Constitutional Court within one month. During this period, the appeal notice shall be submitted to the Committee in addition to a notification to be served to litigants during this period[13].

2.4. Direct complaint before the Constitutional Court

In 2014, a law on direct complaint before the Constitutional Court was passed, known as Law 109 of 2014 On Allowance of Direct Appeal before the Constitutional Court. Thus, it became possible for any person harmed by any legislation that restricts any fundamental liberties to resort to the Constitutional Court to demand the repeal of a law, a decree-law or regulation containing a constitutional violation, even if the direct resort to the Constitutional Court is very expensive and a burden on the appellant more than the said traditional method.

The appellant here shall obtain the signature of three lawyers registered with the Constitutional Court in addition to the payment of a guarantee amount of 5,000 Kuwaiti dinars. The Court shall examine the complaint in the chamber and shall examine whether it is serious or not, in addition to the formal requirements of the complaint, and the element of jurisdiction. If the Court holds that the complaint meets all these requirements, the appeal shall be accepted and registered and the hearing shall be scheduled to hear the complaint.

The terms that must be satisfied for the acceptance of the motion are general conditions, namely the existence of interest and capacity. The interest means the interest taken by the plaintiff as a result of his requests for the subsequent review of texts by the Constitutional Court. The requirement of direct personal interest is of importance and is one of the conditions for accepting a constitutional motion.

Existence of interest is necessary for motion acceptance. No motion without interest. The nature of this interest is to be interrelated with the interest existing in the substantive case and that the ruling on the constitutional issue would affect the requests of the complaint.

The capacity merges with the interest whenever the person has an interest, only then he enjoys capacity. It is not sufficient that the text in question is contrary to the Constitution, rather its application to the plaintiff must represent a violation of one of the rights guaranteed by the Constitution in a way that is directly prejudicial to plaintiff. The

13 Al-Mutairi, *Procedural Pleas*: 385.

constitutional matter shall not be considered separately if the appealed text has not been originally applied to the plaintiff, if he is not governed by its provisions, has benefited from its advantages, or if the violation of the rights he alleges is not related to him. So, the nullification of the legislative text will not bring to the plaintiff any benefit other than being null and void.

Requirement of direct personal interest is determined by two elements:

1. The plaintiff shall provide evidence that real or other economic damage has been inflicted upon him, whether or not he is at risk of such damage or if it is already occurred. The alleged harm must be direct, and separate from the mere violation of the appealed constitutional text, and independent with its elements.
2. Such harm shall be a result of the appealed text, not intentional, fraudulent, impersonated or presumptive harm.

The interest is an original condition in the sense that the plaintiff must have a personal interest directly at the time of filing his constitutional motion and interest will continue until the motion is adjudicated. Accordingly, in case of a criminal lawsuit that ends with acquittal of the accused by virtue of a final court ruling before decision is rendered by the Constitutional Court, the interest shall be void and the Court shall decide to remand the motion.

The court's examination of interest requirement for individuals is confined to the sub-appeals cases and referral by a trial court and direct appeal, since the amendment by the Law on Direct Appeal in 2014.

The court accepted the potential interest in addition to moral interest in the constitutional motion.

The capacity requirement must be fulfilled so that a person who has the capacity to bring it up must claim a right or legal status for himself[14]. Some argue that the element of capacity is merely a description of the interest and that they unite with each other, but the most prevailing opinion in the constitutional judiciary holds that the capacity is different from interest. Such distinction becomes self-evident when the stakeholder is incapacitated, so the motion is initiated by a person who has the capacity

14 Ahmed Hindi, *Origins of Civil and Commercial Procedure Law*. New University House, 2002: 311.

to represent this person such as his/her guardian or custodian, hence, the capacity is a requirement to initiate the constitutional motion[15].

The Kuwaiti Constitutional Court decided that there must be a correlation between the constitutional motion and the substantive case for which the plea of unconstitutionality is raised[16]. The Court holds that,

> "*the trial court does not refer the matter to the Constitutional Court unless adjudicating the dispute is subject to adjudicating the constitutionality of a law, decree-law or regulation ..., Adjudicating the constitutional issue is necessary for possibility of substantive adjudication of the dispute…*"[17].

It is not sufficient that the appealed text is contrary to the Constitution, but its application to the plaintiff has violated one of the rights guaranteed by the Constitution in a way that is directly prejudicial to the plaintiff[18]. The constitutional matter shall not be considered separately. If the appealed text originally has not been applied to the plaintiff, if he/she is not governed by its provisions, has benefited from its advantages or if violation of the rights he alleges is not related to him, hence, the invalidity of the legislative text will not bring the plaintiff any benefit by which his legal status may change after the decision in the constitutional case from what it was upon when the appeal was submitted.

2.5. Direct appeal by government and National Assembly

The law on the Constitutional Court's establishment of 1973 has granted both government and National Assembly the right to lodge a constitutional complaint directly before the Constitutional Court, without requiring the existence of a substantive case before a judicial body, as stipulated in Article 4 of the Constitutional Court Establishment Law "disputes are submitted to the Constitutional Court in accordance with one of the following two ways: A. At the request of the National Assembly or the Council of Ministers ...".

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15 Salah Al-Din Fawzi, *The Constitutional Motion*. Cairo: Dar al-Nahda al-Arabiya, 1998: 128.

16 Yousri Al-Assar, *The Role of Practical Considerations in Constitutional Judiciary*. Cairo: Dar Al-Nahda Al-Arabiya, 1995: 85.

17 A decision rendered on Appeal No. 25/1085, see Dhuheban Al-Ajmi, *Constitutional Court Rulings from 1973 to 1995*: 148.

18 *Case 25 of 6th Constitutional*, Group 5: 122.

In the event that the National Assembly desires to submit the request, the majority must approve[19]. Similarly, the government must take its decisions with the approval of the majority of the Council of Ministers (the Cabinet) in accordance with provisions of Article 128 of the Constitution[20].

Jurisprudence has been criticizing this method as favoring accessibility by the government and the National Assembly, in spite of them having tools to amend various legislations through legal channels, without a need to resort to the Constitutional Court, while individuals were denied the right to direct resort while they have to be prioritized in this matter[21].

2.6. Binding force of the decision rendered by Constitutional Court

Binding force of the constitutional decision refers to that if a decision is rendered, it shall have a binding force on rights adjudicated, it has to be respected and followed even before other courts, in order to prevent dispute with respect to the of adjudicated matter again.

As for the binding force of the decision rendered by the Constitutional Court, many questions are posed, e.g. does the decision of unconstitutionality mean that the law is null and void, or does it merely giving an assignment to the trial court judge to neglect the law and refrain from applying it to the dispute before him/her only among the same litigants?

In Article 173 of the Constitution the constitutional legislator had settled the dispute in this matter, where it decided to consider the appealed text null and void as it possesses a general and absolute binding force, binding to all, including rest of the ordinary courts[22].

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19 Othman Abdul Malik Al-Saleh, *Judicial censorship before the Constitutional Court of Kuwait*: 46.

20 Article 128 of the Constitution: "Deliberations of the Council of Ministers are secret. Resolutions are passed only when the majority of its members are present and with the approval of the majority of those present. In case of an equal division of votes, that side prevails on which the Prime Minister has voted."

21 Abdul Malik Al-Saleh, *Judicial censorship*: 83; Ramzi Al-Shaer. *The General Theory of Constitutional Law*. Kuwait: Kuwait University Press, 1972: 653.

22 "The law shall specify the judicial authority which is competent to adjudicate disputes relating to the constitutionality of laws and regulations, and shall specify its powers and procedures, and in the event that the said body decides unconstitutionality of a law or regulation, it shall be null and void. The law guarantees the right of both the government and the concerned parties to appeal to that body in terms of the constitutionality of laws and regulations."

The problem may not arise in the case a law, decree – law or regulation is declared unconstitutional, where the text shall be null and void as has been indicated. The dispute arises when the court issues its ruling to dismiss the appeal or the case – which is more than a probability. If the case is rejected for formal reasons, such as the time requirement default, the requirement of interest or the absence of a lawyer signature on the statement of claim, the cases do not cause significant problems. The binding force in these cases is relative in the sense that the binding force applies only on the parties of the litigation. These cases shall not prevent reconsideration of the appeal before the Court in the event that the conditions and dates are met.

However, the problem arises if the appeal is rejected in terms of merits. In other words, when the court confirms constitutionality of the appealed text, a dispute arises concerning the binding force of these decisions. Some argued that in this case the binding force shall be relative according to the parties in dispute, in the sense that this would not preclude further review of constitutionality of the same text before the Court once again[23].

The Supreme Constitutional Court of Egypt rejected this approach in one of its rulings and held that in this case the ruling binding force is relative and limited to the parties to the dispute, in this regard. The Court stated that,

> "*this ruling does not affect the legislation that has been challenged as unconstitutional. The legislation remains valid after the decision is rendered. The said decision only holds relative binding force between the parties to the dispute, so the appeal of unconstitutionality may be revoked as per this valid legislation again ...*"[24].

However, some scholars opposed the judicial approach as stated in the previous ruling on the grounds that the legal texts governing the actions of the Supreme Constitutional Court did not differentiate between the decisions of unconstitutionality and the rulings issued to dismiss the lawsuit[25]. This approach is supported in a later ruling of the Supreme Constitutional Court itself where it decided the following:

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23 Mohamed Seid Zahran, "Control over the Constitutionality of Laws in Italy." *Journal of Government Issues Management* 14.1, January–March 1970: 142.

24 *Decision of the Supreme Constitutional Court of 11 December 1976*.

25 Amr Hassabo, *Implementation of the Decisions of unconstitutional legislative texts*, Cairo: Dar al-Nahda, 2002: 29.

> "*The binding force of the rulings issued by this court in constitutional matters are not confined to the adversaries of the constitutional motion, but extend to the state with all its branches and organizations, and include all the people subject to a safe application of the constitution and abidance with the peremptory norms*."[26]

Jurisprudence supports this approach of the Supreme Constitutional Court, where jurisprudence believes that binding force of decisions is alike, both in terms of the substantive acceptance or rejection[27].

3. *Positive constitutional decisions with respect to the protection of fundamental liberties*

Under this topic, we will discuss the constitutional decisions positively addressed by the Constitutional Court in relation to the protection of fundamental liberties. There are numerous decisions, but we will have to select among them:

3.1. *Decisions of the Constitutional Court relating to the application of Islamic sharia*

The Court has dealt with several decisions regarding the mechanism of applying the provision derived from Islamic *sharia*. It has answered several questions about whether *sharia* is self-executing or whether it needs to be mediated by the legislator to put into it a legislative form in order to be applied. We will select some decisions concerning attitude of the Constitutional Court towards Islamic *sharia*.

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26 *Decision in Case No. 22* of 18th Constitutional, Session of 30 November 1996, Group, Part VI: 76.

27 See Ramzi Taha Al-Sha'er, *The General Theory of Constitutional Law*, Cairo: Dar al-Nahda al-Arabiya, 3rd edition, 1983: 608; Taima Al-Jarf, *Constitutional Decision, Comparative Study in Constitutional Control*. Cairo: Dar al-Nahda, 1993: 289.

3.1.1. The decision of the Constitutional Court regarding hijab of two members of the Kuwaiti National Assembly

Kuwaiti women had been deprived of the right to stand for election since the establishment of the Constitution in 1962 until 2005, when the Law on Granting of Women's Political Rights was promulgated, and a special provision was added to women alone. Law 17 of 2005 amending the Law on the Election of the Members of the National Assembly (Law 35 of 1962) was issued amending the article through adding the following statement: "women are required to adhere to the rules and provisions adopted in Islamic law when running for election and electing".

In fact, the terms used in the legislation are loose and vague, what does this phrase mean? Are only women obliged to abide by the rules and provisions adopted in Islamic law? Are there rules for men's dress and appearance in Islamic law? Does the provision mean formal or behavioral obligation? The legal assessment element in the mentioned article is not clear, and therefore it is difficult for women to abide to something because of ambiguous texts in the previous article.

It is noted that the text did not address the dress and appearance of women. When the elections of the National Assembly were held in 2009, four women won in various constituencies, but there were two members, namely Aseel al-Awadhi and Rola Dashti, who did not wear the *hijab*. Thus, a voter challenged the validity of their membership for violating Article 1 of the Electoral Law. The Court dismissed the appeal and we summarize what was discussed in this case as follows[28]:

The facts are summarized that the plaintiff challenged the validity of the 2009 National Assembly elections. In his lawsuit, he claimed invalidity of the candidacy of Mrs. Aseel Al-Awadhi and Rola Dashti, as the first and second appellees violate the Electoral Law of National Assembly Members 35 of 1962 as amended by Law 17 of 2005. The first Article required the candidate women to abide by the rules and provisions of Islamic law; these rules and provisions stipulates to wear the *hijab*, to bring down over themselves (part) of their outer garments, to hide the adornment from men, and that only the face and hands can be discovered since the woman's body is' *awrah* (private part). This ruling is established as per the Holy Quran, Prophetic *sunna* and agreement of the Imams.

Since the first and second defendants do not wear the *hijab* and have won parliamentary seats by election, this is contrary to the said article of

28 *Decision of the Constitutional Court 20 of 2009* issued on 28 October 2009.

the Electoral Law, according to the plaintiff's statement and therefore the Court must declare invalidity of their membership for violating conditions of candidacy.

In its interpretation of Article 1 of the Electoral Law, the Constitutional Court stated that this Article has been drafted in a collective form, without specifying holistic cross-cutting definition to clarify the meaning. It used the minutes of National Assembly to determine the meaning of the text, but was unable to determine the meaning, thus it decided that,

> "*in the field of figuring out the denotations from legislative texts, if the text is loaded with more than one meaning, it must be interpreted according to the meaning that makes it more compatible with higher legislation, and as reflects its correct meaning, avoids contradiction, even if this meaning is less apparent. The interpretation of this text shall be within the framework of governing principles and fundamentals contained in the Constitution in letter and spirit*".

The Court highlighted that Islamic law is not the sole source of legislation[29]. The Constitution does not prohibit legislators from adopting other sources according to the public interest. The decision also indicated that the Constitution also "*guarantees personal freedom and made freedom of faith unrestricted, for it is within the scope of belief or the inner thoughts which shall be ordained by Allah, but no distinction between people in rights and duties or because of religion or sex*."

Moreover, the Court stipulated that:

> "*Islamic law rulings do not have the binding force like the legal rules unless the legislator intervenes and codifies the Islamic principles. It does not have the power of self and direct execution, but it must be molded in specific legislative texts and a specific legislative content that can be adhered to by both governed persons and those who execute and apply thereof. Accordingly, it is not possible to equalize it to substantive texts. The substantive text is self-executing in its substantive rulings, and therefore the text referred to cannot be described as containing a specific substantive rule. This text, in accordance with its content, is guiding provisions, which are provided for control and guidance, not intended to be binding and obligatory. This is reflected in the explanatory note of the law in this regard, it is inconceivable that the will of the legislator has been directed - within the framework of this existing text - to leave those responsible for implementation and execu-*

29 The Constitution of Kuwait deviates from the terminology of the Egyptian Constitution, which stipulates Islamic law as "the" source of legislation.

tion thereof to investigate such undetermined rules and provisions, which may lead to confusion and contradiction between these rules and provisions according to the different views of jurisprudence".

The Court interpreted Article 17 of the Electoral Law in accordance with the Constitution, specifically Article 2, Articles of rights and liberties, such as personal freedom, freedom of belief, through reconciling them. It tried to reconcile between the view that *sharia* was a source of legislation and freedom of belief. In the end, the Court rejected the appeal and validated their membership.

3.1.2. The ruling of the Constitutional Court regarding the right of a woman to travel and extract a passport without the consent of her husband[30]

In the case to be discussed, the plaintiff filed her case before the Supreme Court and specifically before the Civil Commercial Circuit. In this case there are four adversaries; these are the plaintiff's husband, the two representatives of Ministry of Interior and Health in their personal capacity, and the Director General of the Public Authority for Civil Information in his personal capacity.

The first defendant, namely the husband refrained from handing over the passport to the plaintiff and also refrained from handing over identity documents to her children. In her case, she requested to oblige her husband, the first defendant to hand over all the required papers. In case of his refusal, she requested to be allowed to extract these identity documents as her passport, her children's passport and the rest of the papers from the Ministry of Interior, the Ministry of Health and the Public Authority for Civil Information.

During the proceedings, the Trial Court held that the legal provision of Article 15 of Law 11 of 1962 Regarding Passports which stipulates that a wife may not be granted an independent passport without the consent of husband, is vitiated by the constitutional suspicion of violating Articles 29. 30 and 31 of the Kuwaiti Constitution, and therefore the court decided to suspend the case until constitutional issue is resolved.

The Constitutional Court then examined the current appeal. The first defendant submitted his statement of claim requesting to dismiss the lawsuit and confirmed that there was no conflict between the challenged

30 *Ruling of the Constitutional Court in Case No. 56 of 2008* "Constitutional" issued in the hearing of 20 October 2009.

article and the Constitution. He also stated that the appealed text complied with the provisions of Islamic *sharia* originally considered by the Constitution as a main source of legislation.

After the Court heard the requests and pleadings, it ruled that:

> "*every Kuwaiti – male or female – has the right to extract and hold the passport, since this right is not only a title to his belonging to the State of Kuwait, the source of our proud and pride ... rather, it is also a manifestation of personal freedom that the Kuwaiti Constitution has made a natural right to safeguard and protect though its principles*."

It is stipulated in Article 30 that "personal liberty is guaranteed", Article 31 states that:

> "*No person shall be arrested, detained, searched, or compelled to reside in a specified place, nor shall the residence of any person or his liberty to choose his place of residence or his liberty of movement be restricted, except in accordance with the provisions of the law…*"

The Court also stated in its ruling that Islam has already preceded the positive constitutions in recognizing the right of movement for every individual as he/she wishes. Islamic law has made freedom of movement the general rule and restricting it is an exception, which is only a necessity that shall be valued according to the circumstances and in favor of the public interest and Islamic ruling. The ruling also states that Islamic law does not prevent women from traveling as long as they are with a *mahram*[31], a husband or a trusted companion, or - according to the view some scholars have adopted – if women committed themselves to respect the limits of legality and ethics of Islam[32].

The Court also stated that:

> *"personal liberty is the basis of other public liberties and an inherent right of the individual; it represents self-independence of each individual. The will to choose represents a scope for personal liberty without which the individual's personality is not integrated; among its foundations is the freedom of movement and the right to travel branched out of it. It is one of the categories of*

31 In Islam, *mahram* means "unmarriageable kin with whom marriage or sexual intercourse would be considered unlawful".

32 Asma Al-Sairafi. *Effectiveness and Effect of Amendment of Article 2 of the Kuwaiti Constitution. Comparative Study with the Egyptian Constitution of 1971*. MA Thesis, Kuwait University.

> *public liberties that cannot be restricted without cause, fight against them without justification, or restrict them without necessity*."

The Court then explained that the Kuwaiti Constitution had entrusted the legislature to assess this requirement, but it was not permissible for the legislature to place restrictions on this right to the extent that the limitation comes close to revoking, derogating, or nullifying this right. The Court also stated as important principle that "the legislator must not violate the balance between the provisions of the Constitution and his rules which are integrated within one framework".

Finally, the decision drew from the said principle in the area of legislating laws and the necessity of respecting the balance between provisions of the Constitution and the enacted legislations. It stressed that rendering a decision of unconstitutionality of the previous text

> *"does not violate the right of husband according to the general rules to prevent his wife from traveling when well-established evidence is provided that the use of this right shall harm her and her family. Revocation of the text also does not prejudice the right of the legislator to regulate the extract and renewal of the wife's passport and withdraw thereof, striking a parallel between the freedom of movement… and what is stipulated by Article 9 of the Constitution guarantees the reconciliation of women duties towards the family ... and being of equal rights with men in accordance with Article 29 of the Constitution, and without prejudice to the provisions of the lofty Islamic* sharia *and the provisions of Article 2 of the Constitution that states that* 'The religion of the State is Islam, and the Islamic *sharia* shall be a main source of legislation'".

3.2. The Court's position on legislation affecting the right to equality

The courts in Kuwait have had several opportunities to interpret the equality guarantee, where the court has recognized disparate impact on women as violation of equality.

3.2.1. The Court's ruling regarding the equality of women in the housing allowance with men

In Article 8 of Cabinet decree 14 for the year 1977, regarding the salaries and degrees of judges, prosecutors, and the employees of the Fatwa and

Legislation department, which was modified by Cabinet degree 124 for the year 1992, states:

> "*Judges, members of the prosecution department, and members in 'Fatwa and Legislation' shall be given an appropriate domicile commensurate with their position, and further order shall be issued by the Cabinet*."

On the basis of this article, the cabinet issued Order 142/1992, modified by Orders 1162/1992 and 734/seventh/1992, which state:

> "*Judges, members of the prosecution department, and members of 'Fatwa and Legislation' shall have the option between the allocation of government housing or receive a housing allowance of: 200 for singles, 300 for married.*"

Article 3 of this order states that "the allocation of government housing and receiving a housing allowance shall not be provided for the following categories; 1-…2-…3-…-4…5- females unless if married."

As a result, Hend Al-Bin Ali, a single woman who is a member of Fatwa and Legislation department, sued all the following: 1) the President of Fatwa and legislation in his capacity; 2) Minister of the State for Cabinet Affairs in his capacity; 3) the Prime Minister in his capacity, for violating the Constitution. In this case, the single male member was provided with 200 K.D, but not the single female, and Al-Bin Ali alleged that this unjust treatment based on gender without any legal justification is a violation of the Constitution, especially Articles "7[33], 8[34], 18, 20[35], 22[36], 29, 41[37], 50, and 163[38]." She filed Case 5/2008 before the Constitutional Court of Kuwait demanding to be paid the same amount as her male fellows and

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33 Justice, Liberty, and Equality are the pillars of society; cooperation and mutual help are the firmest bonds between citizens.

34 The State safeguards the pillars of society and ensures security, tranquility, and equal opportunities for citizens.

35 The national economy shall be based on social justice. It is founded on fair co-operation between public and private activities. Its aim shall be economic development, increase of productivity, improvement of the standard of living, and achievement of prosperity for citizens, all within the limits of the law.

36 Relations between employers and employees and between landlords and tenants shall be regulated by law on economic principles, due regard being given to the rules of social justice.

37 (1) Every Kuwaiti has the right to work and to choose the type of his work.
(2) Work is a duty of every citizen necessitated by personal dignity and public good. The State shall endeavor to make it available to citizens and to make its terms equitable.

38 In administering justice, judges are not subject to any authority. No interference whatsoever is allowed with the conduct of justice. Law guarantees the indepen-

to disburse any financial differences by alleging the unconstitutionality of the fifth part of Article 3 of Cabinet Order 142/1992, modified by Order 743/1994. She claimed that it contains discriminatory and differential treatment for males and females in receiving housing allowances, which constitutes a violation of the equality principle of the Constitution.

In this case, the Constitutional Court began its examination by stating that the appellant merely asked that the constitutionality of part five of the said order be examined; therefore, the Court could not take any further action beyond the request. It stated:

> *"The appellant had alleged the unconstitutionality of part five based on its denial to provide a single female member with the housing allowance that is given to her male counterpart, which constitutes a breach of the equality principle since the Constitution has confirmed and assured the necessity of respecting the equality principle in many of its articles, such as Article 29, which explicitly prohibits any distinction based on gender, origin, language, or religion, and is a complement to Article 7 that assures that justice, freedom, and equality are pillars of society, as well as Article 8, which states that 'The State safeguards the pillars of society and ensures security, tranquility, and equal opportunities for citizens.' Not surprisingly, the content of Article 29 is a general provision directed to all the government's branches and authorities, committed by the legislative branch in its enactment, as well as by the executive branch in its regulations and regulatory decisions; the judicial branch is committed by it in when it handles the organization of judicial affairs and when it decides the cases of the people. Equality in its essence means to equalize and to treat similarly situated people as the same, and to differentiate between unlike people or categories as different in their legal situations. Therefore, equality before the law means that all people are equal before the law without any distinction or discrimination, since the rights and privileges, which are provided by the law and enjoyed by the targeted people who are covered uniformly by its provision, are ensured by the protection of the law to the same degree. People are compelled by legal obligations and requirements equally and without any distinction, and when the government classifies a group to whom an order or legislation applies or upon whom a benefit is conferred, the classification must be reasonable and must rely upon the fact that the difference has a just and considerable relation to the legislation's goals.*

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dence of the judiciary and states the guarantees and provisions relating to judges and the conditions of their irrevocability.

> *Judges, members of the prosecution department, and members of 'Fatwa and Legislation' are among the Cabinet members who are given an option between an allocation of governmental housing or receiving a housing allowance in Order 1162/1992 and Order 734/seventh/ 1994, Article 2, and yet in part five of Article 3, it clearly states that women are not eligible for this privilege except if married, despite the fact that their male colleagues enjoy this privilege. As a result, the challenged Cabinet order wrongfully differentiated between similarly situated persons without any legal reason or purpose, which constitutes an arbitrary prohibited discrimination that violates the principle of equality assured by Article 29 of the Constitution, and based upon the foregoing, the court has held the unconstitutionally of part five of Article 3 in Cabinet Order 142/1992 about the governmental housing for judges, members of the prosecution department and members of 'Fatwa and Legislation', which was modified by Cabinet Order 734/ seventh/ 1994*."

The Constitutional Court has not explicitly acknowledged or chosen between models of equality when deciding equality cases, except in pronouncing that persons in similar circumstances be treated alike. From the language of the decision, it would seem that the Court has adapted the formal model; nonetheless, the holding in this decision is compatible with both formal and substantive models because the regulation that was struck down violated both models. It is unclear which one was intended, and hence it leaves the final choice open.

The Court did not examine whether it would follow a similar interpretation even if the outcome of identical treatment were severely unjust for a specific group. Thus, this formal interpretation has not answered the question of whether the application of equality should fulfill the requirements of justice.

Moreover, the Constitutional Court has not developed a theory of scrutiny that should be used regarding the governmental classification cases. Thus, the Court's method in deciding who is alike and who is different is ambiguous, and it is unclear whether it uses the levels of scrutiny or the Canadian scale of scrutiny. As a result, when any legislation classifies persons, how do we ensure that these classifications are products of rational analysis and not automatic applications of traditional assumptions about the appropriate role for specific groups in society?

3.2.2. Ruling on depriving women of housing allowance because of the husband's benefit by housing care

In another case that was decided by the Constitutional Court in Kuwait, the appellant (Suaad Al-Bustan) filed Complaint 18/2006 (Constitutional) against the government and sued all of the following: 1) the Manager of Kuwait University in his capacity; 2) the Chairman of the Board of Civil Service in his capacity; and 3) the Minister of Higher Education in his capacity as the Head of Kuwait University, alleging that the refusal to pay her the housing allowance violates her constitutional right of equality.

The appellant was a lecturer in the linguistics department at Kuwait University. She was initially paid the housing allowance, but the university stopped the payment, contending that her husband at the time had government housing.

The regulation of residential care that was issued by the Minister of Higher Education in Order 30/2001 stipulated in part (E) of Article 2 that in order to receive the housing allowance, either husband or wife should not enjoy residential care of any kind by Kuwait University or by any other entity. However, the appellant's husband had a governmental house that was occupied by him and his first wife and their daughters, but not by the appellant, and so she brought this action claiming that the fact that her husband enjoys residential care should not justify preventing her from receiving the housing allowance, since she does not enjoy the residential care. The housing allowance that she was supposed to be receiving was the result of her prestigious position as a teacher at the university. Because most women employees do not receive this housing allowance, and because she was receiving it as a privilege in this unique position, she alleged that the university could not deprive her of any employment privilege based on reasons that were not related to the employment. As a result, she asked the court to decide the unconstitutionality of part (E) in Article 2 because it deprived her of her right to housing merely based on her husband's enjoyment of housing services, which constitutes unconstitutional discrimination and violation of the equality principle and Articles 7, 8, and 29.

The Constitutional Court in the last part of its holding stated:

> "*The article's requirement that each of husband or wife should not be covered by the residential care as a condition to receive the housing*".
> *However, part (E) of Article 2 does not prevent the wife from receiving the allowance, even if her husband enjoys the residential care, if it is shown that she does not benefit from her husband's house. As a result, this law*

> *was wrongfully applied to the appellant, and this fact does not render the article to be unconstitutional because it serves governmental interest in maintaining the structures of the family and strengthening its ties and unity. As a result, there is no legitimate interest on the appellant's side to decide the constitutionality of the article since her allegation and the damages were based on an incorrect application and interpretation of the article by the department; thus, it removes this issue from the scope of the constitutionality claim, and the claim is denied."*

The Court in this case has rightfully applied the substantive model in its interpretation by moving beyond the language of the regulation. The court has found that this regulation is facially neutral because it applies to both husbands and wives, but it found that this regulation has a disparate impact on women. The impact is disparate because the practice of polygamy means that only wives will lose their housing allowance when their husband's housing is shared with a different wife.

4. Conclusion

The Constitutional Court has played a pivotal role in protecting the fundamental liberties, although it believed that it could have a greater role in that regard. However, the Court sometimes relied on conformities and on maneuvers at other times. This does not preclude acknowledgement that it had recognized several human rights principles and contributed to the establishment of constitutional principles in some areas, and participated in the consolidation of constitutional principles in some fields such as principles of equality and freedom of litigation. Other institutions also protect liberties, albeit slowly, like the Human Rights Committees of the National Assembly, and the Committee of petitions and complaints in the National Assembly. However, the fundamental role to review legislation must be played by the Constitutional Court, especially since the court cannot direct the government to carry out a specific act or abstain from a certain conduct. The role of the Constitutional Court lies only in the orbit of legality and examination of legislations that violate the Constitution, although it possesses some sort of directing capacity when interpreting constitutional texts through requests for interpretation by the government or National Assembly. However, these requests often focus on the relationship of the legislature with the government and their mutual means.

In our point of view, a legislative intervention must first be made in order to allow individuals to resort directly to a court without overcharg-

ing individuals with excessive fees, which is contrary to the inherent right to litigation. Also, the Constitutional Court must grant all the means to direct the authority to act or refrain from acting if such acts were not based only on a legislative basis, but comprise a clear constitutional violation or violation of the spirit of Constitution.

Constitutional Review after the Arab Spring: Reforms, Challenges and Perspectives

Francesco Biagi

Abstract
One of the most significant trends following the Arab Spring has been the emergence and strengthening of constitutional review bodies. Jordan and Palestine established a constitutional court for the first time in their history, respectively in 2012 and 2016; the latest draft constitution of Libya provides for a constitutional court; Morocco, Tunisia, Algeria and Kuwait have reinforced the position and powers of their respective constitutional review bodies; in Egypt the Supreme Constitutional Court continues to be one of the most powerful and influential institutions in the country. The aim of this chapter is to discuss whether these new constitutional review bodies have acquired the potential to subject the executive branch to adequate checks and thus contribute to the processes of democratization more effectively compared to the past. In order to do so, I shall first briefly identify the reasons why constitutional courts and councils before the Arab Spring rarely acted as "counter-majoritarian" bodies. I shall then discuss the major novelties introduced by the recent constitutional reforms in the field of constitutional review. Finally, I shall examine some of the main challenges that constitutional courts and councils will have to face in order to fulfill their role of guardians of the constitution.

1. Introduction[1]

One of the most significant trends following the Arab Spring has been the emergence and strengthening of constitutional review bodies. Jordan and Palestine established a constitutional court for the first time in their history, respectively in 2012 and 2016; the latest draft constitution of Libya (adopted in July 2017) provides for a constitutional court; Morocco,

1 I would like to express my gratitude to Gertrude Lübbe-Wolff and Islam Mohammed for their precious comments on a previous draft of this chapter. The usual disclaimers apply.

Tunisia, Algeria and Kuwait have reinforced the position and powers of their respective constitutional review bodies; in Egypt the Supreme Constitutional Court continues to be one of the most powerful and influential institutions in the country.

The aim of this chapter is to discuss whether these new constitutional review bodies have acquired the potential to subject the executive branch to adequate checks and thus contribute to the processes of democratization more effectively compared to the past. In order to do so, I shall first briefly identify the reasons why constitutional courts and councils before the Arab Spring rarely acted as "counter-majoritarian" bodies. I shall then discuss the major novelties introduced by the recent constitutional reforms in the field of constitutional review. Finally, I shall examine some of the main challenges that constitutional courts and councils will have to face in order to fulfill their role of guardians of the constitution.

2. *Constitutional review bodies before the Arab Spring: Weak defenders of constitutionalism*

Constitutional review was a common feature in North Africa and the Middle East (MENA region) even before the Arab Spring. In fact, after obtaining their independence, or over the following decades, a number of Arab countries established a system for reviewing the constitutionality of legislative acts. In most cases, a "centralized" model was adopted, in which constitutional review was carried out by a specialized, *ad hoc* constitutional court or council (as in Morocco, Mauritania, Algeria, Tunisia, Egypt, Syria, Lebanon, Kuwait, and Bahrain). Other countries, by contrast, granted the power to review the constitutionality of legislation to the Supreme Court: this was the case, for example, in Iraq, Yemen, the United Arab Emirates, and Libya. Jordan adopted a hybrid system of constitutional review: on the one hand, the Constitution vested a High Court with the power to interpret the provisions of the Constitution pursuant to a request by the Council of Ministers and the Houses of Parliament; on the other hand, according to settled case-law, ordinary courts were not entitled to apply any laws or regulations that violated the Constitution.[2]

2 One of the very few exceptions to this established case law was the judgment delivered by the Court of Appeal of Jerusalem in 1953 (*Case 312/53*). This occurred during the period (1950–1967) in which Jordan controlled the West Bank and East Jerusalem, including the Old City. In this decision the Court of Appeal held that it did not have jurisdiction to review the constitutionality of legislation ("It is not

However, constitutional review bodies rarely guaranteed respect for constitutional principles or protection for fundamental rights and freedoms – the Egyptian Supreme Constitutional Court being (at least during certain periods) one of the very few exceptions (see Brown 1998: 89). A number of different reasons explain the inability of these institutions to act as effective defenders of constitutionalism. First of all, it must be considered that constitutional review bodies usually enjoyed limited independence vis-à-vis the executive branch. This was partly due to the fact that the head of state often dominated the system for appointing the members of constitutional courts and councils (as was the case in Egypt, Syria, Tunisia, and Morocco). In Egypt this was even more evident due to the fact that neither the 1971 Constitution nor *Law 48 of 1979 on the Constitutional Court* specified the number of members of the Court. Due to this lack of provision, there could be an infinite number of justices. As a result, "if a Chief Justice and President both dislike[d] the decisions of majority on the Court, they [could] collude to pack the court with justices sympathetic to their views" (Lombardi 2008: 242). This is precisely what happened in the early 2000s, when President Mubarak decided to appoint additional "loyal" members in order to shift the balance in his favor (as will be discussed in greater detail below).

The eligibility for reappointment of the members of constitutional review bodies represented another serious threat to the independence of these institutions. In Syria, for example, the four-year term could be renewed, whilst in Tunisia the three-year term was renewable twice. The shortcoming regarding the renewability of the term of office is evident: since court's members "rely on continued executive support for their tenure [they] have little incentive to exercise any measure of judicial independence" (Choudhry and Bass 2014: 30).

Another reason explaining the weakness of constitutional courts and councils concerned the nature of their decisions. Indeed, while their binding status was proclaimed (in more or less explicit terms, depending on the country) in the vast majority of pre-2011 Arab constitutions, there were still a few exceptions, such as Tunisia. For a long time, (i.e. until 1987) the country did not have any constitutional review mechanism in the form of a constitutional court or council, as it was the President of the Republic who was responsible for guaranteeing respect for the 1959 Constitution.

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the Court's right to verify the constitutionality of these laws […] as long as they are adopted by Parliament and ratified by His Majesty the King"). I am grateful to Professor Numaan Elkhatib for bringing this judgment to my attention.

A Constitutional Council was established in 1987 by presidential decree (*No. 87-1414 of December 16, 1987*), and was subsequently granted a constitutional status in 1995. The Council was mainly a political body, and was in fact responsible for reviewing the constitutionality of legislation only prior to enactment (*ex ante* review). Moreover, for the first eleven years of its existence, the Council was only able to issue *advisory opinions*, which were *confidential* and *communicated exclusively to the President of the Republic*, who was the only authority entitled to refer bills to the Council (see Gallala-Arndt 2012: 252). Therefore, intervention by the Constitutional Council was much more akin to involvement within an auxiliary procedure to the decision-making process than to genuine constitutional review (see Ben Achour 2008: 18). Although following a series of reforms in 1998 and 2004 it ceased to be a purely advisory body, the Council never fully acquired full decision-making or judicial powers (see Ben Achour 2008: 23).

The procedural gateways to constitutional courts and councils represented another major weak point of these institutions. Indeed, in a number of countries constitutional standing to refer cases to constitutional review bodies was significantly limited, which had the obvious consequence of drastically reducing the overall number of legislative acts on which these institutions could rule. This "stranglehold" on access was very evident in the Maghreb countries. Indeed, with the exception of Algeria (which also contemplated *ex post* abstract review), constitutional councils in the Maghreb were only empowered to review the constitutionality of legislation before its promulgation (*ex ante* review). Moreover, only (usually very few) political authorities had standing to refer a case to the constitutional council. In Tunisia, for instance, as already mentioned above, the President of the Republic was the only authority entitled to refer bills to the Constitutional Council. Another example is Algeria, where only the President of the Republic and the Speakers of the two Houses of Parliament could apply to the Constitutional Council.

It should be noted that, even when the procedural gateways were broader, still very few cases were referred to constitutional review bodies. It is sufficient to consider the case of Morocco, where the Constitution granted the power to appeal to the Constitutional Council not only to the King, the Prime Minister and the speakers of the two Houses of Parliament, but also to the parliamentary opposition (i.e. one-quarter of the members of either House of Parliament). However, over the period 1994 – 2013 the opposition only referred a matter to the Constitutional Council *four* times (see Benabdallah 2013: 20), despite considerable doubts as to the constitutionality of a whole series of laws. It has been argued that "the opposition's

lack of trust in the Moroccan Constitutional Council can be explained by its perceived bias in favor of the government", since the Council "has been firm in the defense of government prerogatives" (Gallala-Arndt 2012: 254). This approach comes as no surprise, especially if one considers that the Constitutional Council was considered as the "*chien de garde de l'exécutif*"[3] (Bendourou 2004: 37), and "the protector of royal prerogatives" (Fassi Fihri 2014: 154). There is also another important reason which explains this passive stance on the part of the opposition, a reason which concerns a more general attitude amongst Moroccan political parties. Indeed, in some cases constitutionally controversial bills were not referred to the Council, having attracted a "consensus" among the different political parties represented in Parliament.[4] This confirms the "politics of consensus", which has characterized Morocco for many decades. According to this notion, the role and absolute powers of the sovereign are not a matter for discussion or difference of opinion among the parties. Regardless of their ideological orientations, political parties "seem comfortable with not taking the initiative and leaving the palace full control of the political game and orientations of the country" (Maghraoui 2013: 182).

The weakness of constitutional review bodies was also closely related to their deference towards the political authorities, and in particular towards the executive branch. A clear demonstration of this deference is apparent in the doctrine whereby "acts of sovereignty" fall outside the jurisdiction of the judiciary, a doctrine that recalls the "political question doctrine" typical of the United States. However, the notion of acts of sovereignty is quite vague. In general terms, an act of sovereignty is something that states – and in particular the holder of executive authority – do by virtue of their status as sovereign actors, encompassing measures taken both at the domestic and the international level. Thus, these acts often refer to matters of internal security, public order, and foreign policy. Clearly, the aim of acts of sovereignty is to allow the executive branch to exercise broad discretionary power (see Abouelenen 2008: 181 et seq.). Not surprisingly, in some cases constitutional courts (especially in Egypt and Kuwait) abused the doctrine of acts of sovereignty in order to avoid striking down laws that were clearly unconstitutional (see Brown 1997: 121; Brown 2002: 157–

3 As is well known, this expression was originally used by Michel Debré to describe the French Constitutional Council.

4 This occurred, for example, in relation to Law May 28, 2003 on combatting terrorism, and Law November 11, 2003 on the entry and residence of foreign nationals in the Kingdom of Morocco, emigration and illegal immigration (see Bendourou 2004: 37).

158). Thus, for example, for a long time the Egyptian judiciary considered declarations of a state of emergency to fall outside the scope of judicial review, as they were considered to result from an act of sovereignty. It should be pointed out that, far from having disappeared, this doctrine continues to be used by constitutional review bodies in the region, especially in the most politically sensitive cases. In 2018, for example, the Egyptian Supreme Constitutional Court relied on this doctrine in order to legitimize the controversial decision of the executive to cede sovereignty over the Tiran and Sanafir islands to Saudi Arabia (see Kebaish 2019: 835 et seq.).[5]

Finally, it is essential to take into account the context within which constitutional review bodies exercised their powers before the Arab Spring. As has been pointed out by Mauro Cappelletti, "no dictatorial or oppressive regime has ever accepted an effective, and not merely nominal, system of constitutional justice" (Cappelletti 1994: 69). North African and Middle Eastern countries – which were characterized by non-democratic regimes – largely confirm this rule. There is only one significant exception, which is the Supreme Constitutional Court of Egypt. During the first phase of its existence (1980–1985), the Court focused on the safeguarding of economic and property rights, thus fulfilling the expectations of Presidents Sadat (initially) and Mubarak (subsequently). However, by the mid-eighties, the Court also started to protect civil and political rights. As a result, the Court directly clashed with the executive, which was opposed to political liberalization. Moreover, from the early 1990s under the presidency of Chief Justice Awad Mohammed El-Morr, adopting an expansive reading of the 1971 Constitution, the Court began to rely on international human rights treaties and conventions in order to guarantee even more effective protection for fundamental rights and freedoms (see Boyle and Omar Sherif 1996; Cotran and Omar Sherif 1997: 1–76; Bernard-Maugiron 1999: 17 et seq.; Bernard-Maugiron 2003: 161 et seq.). Interestingly, the Court often also promoted a liberal and modern interpretation of the principles of *sharia*, always with the aim of safeguarding human rights, as will be discussed in greater detail below. As a result, from 1985 until the late 1990s (a period known as "the golden age" of the Constitutional Court), despite the limits discussed above (such as a strong executive control over the appointment of the Court's members, or the (ab)use by the Court of the doctrine of acts of sovereignty), the Supreme Constitutional Court, which had initially been conceived of as an ally of the Government, turned

5 *Case no. 37 and 49, Judicial Year 38 (March 3, 2018).*

into a body that (at least on occasion) constrained the executive branch. Nonetheless, "there were important limits to [the Court's] activism. At odds with its strong record of rights activism, the [Court] ruled Egypt's emergency state security courts constitutional. It also delayed issuing a ruling on the constitutionality of civilian transfers to military courts" (Moustafa 2008: 95). During the early 2000s President Mubarak put an end to the Court's boldness by packing it with regime-friendly judges. Emblematic of this was his appointment of Fathi Nagib as the new Chief Justice, the person "who had drafted the vast majority of the government's illiberal legislation over the previous decade" (Moustafa 2008: 103). In this way, the regime managed to transform the Court back into a less activist and less liberal institution (see Moustafa 2007: 178–219; Lombardi 2008: 242 et seq.).

3. *Constitutional review in post-2011 Arab constitutions: Reforms, models and external influences*

The new constitutions or constitutional reforms adopted following the Arab uprisings introduced a number of major innovations in the field of constitutional review. As mentioned above, some countries established a constitutional court for the first time in their history (Jordan in 2012 and Palestine in 2016);[6] meanwhile in Libya, although the constitution-making process is still ongoing, the last draft Constitution from 2017 provides for a constitutional court. Other countries (e.g. Morocco, Tunisia, Algeria, and Kuwait) have reinforced the position and the prerogatives of their constitutional review bodies, and in Egypt the Supreme Constitutional Court remains an extremely powerful and influential institution (see Frosini and Biagi 2015: 139 et seq.; Grote 2016: 677 et seq.).

There are various different reasons why these new constitutional review bodies have become such a fundamental element of the new constitutional frameworks. On the one hand, the establishment or reinforcement of these institutions represented a way of addressing demands made by protesters during the 2010-2011 demonstrations – protesters who were calling, *inter alia*, for the creation of a state based on the rule of law and a more effective protection of rights and freedoms. On the other hand, the willingness

6 It should be clarified that in Palestine the Constitutional Court had already been provided for under the Basic Law of 2003, and that the Law on the functioning of the Court had been adopted in 2006 (and was subsequently amended in 2017).

to adopt constitutions that are more closely aligned with international standards (even if only at a formal level) became forcefully apparent, and constitutional review – as is well known – has long been considered as an essential element of a democratic country. In other cases, the establishment of a constitutional court appeared to be linked to political dynamics, including in particular to the need to provide a "constitutional veneer" for the decisions made by the President within a context characterized by a weak separation of powers.

In the following section, I shall examine some of the most significant changes introduced by the recent constitutional reforms, including:

1) the limited strengthening of the independence of constitutional review bodies,
2) the vesting of these institutions with judicial status,
3) the broadening of access, as well as
4) the expansion of their jurisdiction.

3.1. A limited strengthening of the independence of constitutional review bodies

In the wake of the Arab Spring, some countries reinforced the independence of constitutional courts and councils, for example by limiting the excessive influence of the executive branch in the appointment process. This is undoubtedly the case in Tunisia, where the 2014 Constitution involves all three branches of government on an equal footing in the selection of the members of the Constitutional Court: four are appointed by the President of the Republic, four by the Assembly of the Representatives of the People, and four by the Supreme Judicial Council. The independence of the Court is also enhanced by the fact that its members elect its President and Vice-President from amongst its members.

Algeria is another interesting case. First of all, the 2016 Reform of the 1996 Constitution increased the number of the members of the Constitutional Council from nine to twelve. The President of the Republic appoints one-third (four) of the members of the Council, including the President and the Vice-President of the Council; a further one-third are elected by Parliament (two judges by the People's National Assembly and two by the Council of the Nation), whilst the remaining one-third are appointed by the judiciary (two members by the Supreme Court and two by the Council of State). All three branches of government thus continue to be involved in the selection process although, in contrast to what hap-

pened in the past, the proportion of members appointed by the judiciary has increased.

Generally speaking, the involvement of a wide range of actors in the appointments process is extremely important not only because it is likely to strengthen the independence of the constitutional court (especially in countries where the head of state is the *dominus* of the political and institutional system), but also because it "fosters a broad sense of political investment in the court, so that all actors have an incentive to continue supporting the court even when they are on the losing side of its decisions" (Choudhry and Bass 2014: 9).

Other changes have also contributed to the protection of the new constitutional review bodies from political influence. First of all, the countries that still do not provide for a fixed term in office are now clearly in a minority. This is the case, for example, in Syria where the 2012 Constitution continues to provide that the four-year term of the members of the Supreme Constitutional Court can be renewed. Furthermore, a number of countries have enhanced the qualifications that members of constitutional review bodies must hold, such as the level of education and professional achievement which they must have obtained, the minimum or maximum age at the time of appointment, or the list of professions or offices that are incompatible with appointment to constitutional review bodies (usually political positions) (see Choudhry and Bass 2014: 89 et seq.).

However, in several Arab countries the head of state continues to dominate the appointment system. In Syria, for example, the 2012 Constitution still grants the President the power to select all justices on the Supreme Constitutional Court. Similarly, the 1952 Jordanian Constitution (as amended in 2011) states that all the members of the Constitutional Court are appointed by the monarch. In Morocco, the 2011 Constitution continues to vest the King with the power to select half of the members of the Constitutional Court, including the President (while the other half is selected by Parliament). It should be noted that both in Morocco and Jordan (in the latter case following the 2016 Constitutional Amendment) the appointment of the members of their respective constitutional courts by the king does not need to be countersigned by the Government, thus leaving full discretion to the monarch.

Also in Egypt, the President of the Republic continues to be the key figure in the selection process, especially following the adoption of the 2019 Amendments to the Constitution promulgated in 2014. In particular, following this reform the Chief Justice of the Supreme Constitutional Court is no longer selected by the General Assembly of the Court (and then confirmed by the President of the Republic), but is directly appointed

by the President of the Republic, choosing among the five most senior Deputy Chief Justices (i.e. the associate justices) of the Court. The role performed by the Chief Justice is of the utmost importance, since he "controls the [Court]'s docket and oversees the process of writing the Court's decisions" (see Choudhry and Bass 2014: 59). The President of the Republic also appoints the Deputy Chief Justices of the Court, choosing between two nominees: one nominated by the General Assembly of the Court, and one nominated by the Chief Justice.

A very important novelty was introduced by the 2012 Constitution, which stated that the Supreme Constitutional Court was to be composed of the President and ten justices, thus remedying the failure by the previous 1971 Constitution to stipulate the number of justices. However, this change proved to be short-lived, as the 2014 Constitution no longer specifies the number of justices on the Court: it only states that the Court must be composed of a President and a "sufficient" number of justices (art. 193). In a similar vein, even the 2012 Syrian Constitution stipulates that the Supreme Constitutional Court "consists of *at least* seven members" (art. 141) (emphasis added). In order to avoid the risks inherent to court-packing schemes mentioned above, a fixed number of justices would have been preferable.

3.2. The shift towards a "judicialization" of constitutional review bodies

Before the Arab Spring, the strong influence of the French model of constitutional review was largely responsible for the mainly *political* character of constitutional review bodies in the Maghreb countries (and indeed beyond, such as in Lebanon). This political nature was apparent in a series of elements:

a) the name itself: "councils" instead of "courts" clearly indicated the non-judicial status of these bodies;
b) the appointment and composition: members of constitutional councils were mainly appointed by political actors (and in particular by the head of state), and were not usually required to have any legal background in order to be selected;
c) the type of constitutional review: with the sole exception of Algeria (which also provided for *ex post* review), the Maghreb countries only provided for *ex ante* review, as constitutional scrutiny was only allowed during (and not after) the legislative process, i.e. prior to the enactment of the law;

d) constitutional standing: only political authorities (such as the head of state, the prime minister, the speakers of the houses of parliament, and in some cases also the parliamentary opposition) were entitled to apply to constitutional councils (abstract review); ordinary courts, on the other hand, were not granted the power to challenge the constitutionality of legislative acts (concrete review).

Many post-2011 constitutions in the Maghreb have completely overturned this political model, moving towards the "judicialization" of constitutional review, in the form of Kelsenian-style constitutional courts. First, constitutional councils have in some cases changed their name and are now called constitutional "courts" (as in Morocco and Tunisia). In Algeria, the Constitutional Council has maintained its name, although more in form than in practice.[7] Second, in some countries (such as Tunisia and Algeria, as discussed above) all three branches of government – including the judiciary – are now involved in the process of appointing the members of the constitutional review bodies. Thus, political actors are no longer the only institutions empowered to select their members.[8] Third, in most cases a legal background has become an essential requirement for appointment to the bench (as in Morocco,[9] Tunisia,[10] and Algeria[11]). Fourth, in addition to *ex ante* review (which continues to be a distinguishing feature of these bodies), constitutional review bodies have now been vested with the task of reviewing the constitutionality of legislation also *after* its promulgation

7 It should be noted that the draft constitutional reform adopted in May 2020 provides for a constitutional "court" (see Biagi 2021, in this volume).

8 In Morocco, by contrast, half of the members of the Constitutional Court are appointed by the king, and half by Parliament, without any involvement of the judiciary.

9 The 2011 Constitution stipulates that the members of the Constitutional Court are chosen from among those persons with an advanced qualification in law and with judicial, doctrinal or administrative expertise who have exercised their profession for more than fifteen years, and are recognized for their impartiality and probity (art. 130(5)).

10 The 2014 Constitution provides that three-quarters of the members of the Constitutional Court are "legal experts with at least 20 years of experience" (art. 118(1)), and that the President and the Vice-President must be "specialists in law" (art. 118 (4)).

11 The 1996 Constitution (as amended in 2016) states that the members of the Constitutional Council must have experience of at least 15 years in the field of higher legal education, as a judge, as a barrister with rights of audience before the Supreme Court or the Council or State or in a senior position in the state apparatus (art. 184(2)).

(*ex post* review). In particular (as will be discussed in the next section), authority to challenge the constitutionality of legislative acts has also been vested in ordinary courts (concrete review), as is the case for example in Morocco, Tunisia, and Algeria. Fifth, the reinforcement of the judicial character of constitutional courts and councils is also evident if one considers that the binding status of the decisions of these bodies has been further consolidated. In Tunisia, for example, whilst (as discussed above) under the previous constitutional framework the Constitutional Council never fully lost its mainly advisory nature, the new 2014 Constitution specifically stipulates that the Constitutional Court "is an independent judicial body" (art. 118), and that its decisions are "binding on all authorities and published in the Official Gazette" (art. 121).

It is important to stress that the "judicialization" of constitutional review bodies has not been characteristic only of Maghreb countries, but has been a common feature throughout most post-2011 Arab countries. In Egypt, for example, both the 2012 and 2014 Constitutions maintained the judicial status of the Supreme Constitutional Court. In addition, recently established constitutional courts, namely the constitutional courts of Jordan and Palestine, are clearly judicial bodies. This trend represents a significant innovation, which is likely to contribute to a more effective protection of rights and freedoms.

3.3. The broadening of access

Calls within the literature (see Bendourou 2004: 37; Mallat 2007, 196; Gallala-Arndt 2012: 258), and in some cases by the presidents of constitutional review bodies themselves (such as in Algeria: see Belaiz 2013: 52) to broaden access to constitutional courts and councils have been accepted by constitutional framers in most Arab countries. In the first place, they have decided to increase the number of governmental bodies with standing to apply to the constitutional courts and councils (abstract review). In Algeria, for example, only the President of the Republic and the Speakers of the two Houses of Parliament had standing to apply to the Constitutional Council, while the 2016 Constitutional Reform vested this power also in the Prime Minister and the parliamentary opposition (i.e. fifty members of the People's National Assembly and thirty members of the Council of the Nation). In Tunisia, the broadening of access to the Constitutional Court has been even more evident. In fact, the President of the Republic is no longer the only political authority entitled to apply to the Court, as the

2014 Constitution has granted constitutional standing also to the Head of Government and thirty members of the Assembly of the Representatives.

However, a system of constitutional review can hardly be successful if only political actors – albeit increased in number – are entitled to apply to constitutional courts and councils. Therefore, the decision by most Arab framers to include (alongside abstract constitutional review) also *concrete* constitutional review has undoubtedly represented a major step forward. Under this system, when an ordinary judge concludes (either following a request by one of the parties or *ex officio*, depending on the country) that the law to be applied to the specific case violates the constitution, he/she must stay the proceedings and refer a question of constitutionality to the constitutional court, either directly or through the highest courts (as will be discussed below). The system of concrete review is likely to increase the chances of these bodies ruling on the constitutionality of legislative acts that violate fundamental rights and freedoms.

In the past, this procedural gateway was extremely rare in the Arab world, and could only be found in very few countries, including Kuwait and (in particular) Egypt, where it has been very successful: "citizens have been able to bring an enormous number of constitutional claims, both minor and momentous, to the attention of the [Egyptian Supreme Constitutional Court]. As a practical matter, then, courts have […] permitted citizens ample access to the [Supreme Constitutional Court]" (Lombardi 2008: 240).

A distinction must however be drawn between countries that have adopted a "single-filter" system and countries that have adopted a "double-filter" system. Indeed, some states – including Egypt, Kuwait, Palestine, and Tunisia[12] – have followed the system that can be found, for example, in Italy, Germany and Spain, where all courts – including lower courts – can *directly* refer questions of constitutionality to the constitutional court (single-filter system). Other countries – including Jordan and Algeria – on the contrary, have followed the French model – introduced by the 2008 Constitutional Reform (*question prioritaire de constitutionnalité*) (see Fabbrini 2008: 1297 et seq.; *Pouvoirs* 2011) – whereby lower courts must refer the question of constitutionality to the apex courts (e.g. the Court of Cassation and the Council of State), which then decide whether or not to refer the question to the Constitutional Court (double-filter system).

12 It should be noted that the case of Tunisia is highly singular, as will be shown below.

Comparative examples show that the double-filter system can be rather problematic, especially at the outset, as it can foster tensions between the highest courts and the constitutional court, and can hinder access to constitutional justice. For example, between 1951 and 1956 Germany adopted an access route that had some similarities with the double-filter system. Specifically, courts could only refer a question of constitutionality to the *Bundesverfassungsgericht* via the supreme courts. These courts did not have the power to block the referral, but had the right to submit to the Constitutional Court their own opinion concerning the question referred by the lower courts. However, within the practice of the *Bundesgerichtshof* (the supreme court in civil and criminal matters),

> "*such opinions began to take the form of all but complete judgments on constitutionality and were published in the official collection of the Bundesgerichtshof's decisions, sometimes before the Constitutional Court had rendered its decision. In 1955, the Constitutional Court declared that the supreme courts were not allowed to submit their opinions. In response, all five supreme court presidents addressed a note of protest to the President of the Constitutional Court. Finally, in July 1956, the Federal Constitutional Court Act was amended and the participation of supreme courts in the procedure of judicial referrals was abolished*" (Garlicki 2007: 51).

Also in France the introduction of the double-filter system was not without its difficulties. Indeed, during the first years of operation of the *question prioritaire de constitutionnalité*, the Court of Cassation (although not the Council of State, see Stefanini 2013: 1 et seq.) displayed a certain level of resistance when referring cases to the Constitutional Council. The reasons for this initial reluctance on the part of the Court of Cassation include its low willingness to perform this new role, and its hesitancy in altering the judicial equilibrium (see Molfessis 2011: 89 et seq.; de Montalivet 2018: 927).

Similar problems have also arisen (or may arise) in the Arab countries that have adopted this model. In Jordan, for example, eight years after the establishment of the Constitutional Court, the extremely low number of judgments issued by this body would appear to be related – amongst other things – specifically to a certain degree of reluctance on the part of the Court of Cassation to refer questions of constitutionality to the Constitutional Court. For this reason, some justices have recommended switching to a single-filter system (Max Planck Foundation 2016–2017: 19). In Algeria, as discussed in greater detail earlier in this volume (see Biagi 2021), the double-filter system was introduced by the 2016 Constitutional Reform, and is regulated by *Organic Law 18-16* on the "exception of uncon-

stitutionality" (*exception d'inconstitutionnalité*), which entered into force on March 7, 2019.

The risks resulting from the adoption of a double-filter system had previously been emphasized by the Venice Commission, the advisory body on constitutional issues of the Council of Europe (Venice Commission 2011: 18). Indeed, in a document published in 2011 concerning the procedural gateways to constitutional review bodies, the Commission had stressed that "from the viewpoint of human rights protection it is more expedient and efficient to give *courts of all levels* access to the Constitutional Court" (emphasis added). In Morocco, the adoption of a single-filter system had been recommended by the National Human Rights Council, which had pointed out that the double-filter system "is cumbersome and may create intermediate steps between individuals and constitutional justice. Also, the time of the procedure may impact pending cases and make it difficult for individuals to access to constitutional justice" (National Human Rights Council 2013: 5). Parliament, nevertheless, did not follow this recommendation and in February 2018 adopted *Organic Law 86-15* introducing a double-filter mechanism. However, this Organic Law has not yet been promulgated, having been ruled partially unconstitutional by the Constitutional Court in the *Decision 70-18 of March 6, 2018* (see Chentouf 2019).

When assessing the effectiveness of concrete constitutional review, it is also particularly important to consider whether ordinary judges can refer a question of constitutionality only following a request by one of the parties to the case, or also *ex officio*. Whilst some countries have vested judges with the power to refer a question *ex officio* (e.g. Egypt, Kuwait and Palestine), other countries (e.g. Jordan, Algeria and Tunisia) have preferred not to grant such a prerogative to the courts, which can only refer a question following a request by one of the parties to the case. As regards specifically Tunisia, it should be stressed that this exclusion has been maintained in spite of the fact that, in its opinion on the draft Organic Law on the Constitutional Court, the Venice Commission recommended that the ordinary courts be granted the power to refer questions of constitutionality *ex officio* (see Venice Commission 2015: 8).[13] Furthermore, Article 56 of the *Organic Law on the Constitutional Court* (2015-50 of December 3, 2015) *seems* to suggest that ordinary judges are not allowed to assess the merits of the

13 By contrast, in other cases the framers decided to follow the recommendations of the Venice Commission, as for example when increasing the number of the authorities entitled to apply to the Constitutional Court for *ex ante* review (Venice Commission 2013: 30).

request by one of the parties to refer a question of constitutionality to the Constitutional Court.[14] In other words, it would appear that the referral is automatic, and that the ordinary courts are unable to ascertain the seriousness of the issue (see Belguith 2015; Democracy Reporting International 2016, 14). However, this uncertainty will only be clarified within the case law of the ordinary courts and the Constitutional Court once the latter has been established.

As regards access to constitutional justice, consideration must also be given to Kuwait and Palestine, which have recently taken a further step. In these two countries individuals have been granted the right to petition the constitutional court *directly*, in a way that partially recalls the individual constitutional complaints that can be found, for example, in Spain (*recurso de amparo*) and Germany (*Verfassungsbeschwerde*). In Palestine, *Law on the Constitutional Court 3 of 2006*, as amended by *Law 19 of 2017*, provides that the Constitutional Court must review the constitutionality of a legislative act on the basis of an "original direct lawsuit […] raised by the aggrieved person" (art. 27(1)). In Kuwait, *Law 109 of 2014* has granted to any natural or legal person the power to petition the Constitutional Court directly. In order to file an individual complaint against a legislative act, the complainant must have serious reasons to suspect that a provision of the Constitution may have been violated, as well as a direct personal interest. The Law also stipulates that, when submitting the complaint, the person must deposit 5,000 Kuwaiti dinars (around 16,500 USD) as a guarantee (see Aljidie 2018: 186 et seq.). This large amount of money risks excessively impeding access to the Constitutional Court – especially for women, who are usually financially dependent on their husbands.

It should be noted that one of the major differences between the individual constitutional complaint mechanisms introduced in Palestine and Kuwait and the ones existing in Spain and Germany refers to the object of the constitutional courts' review. Indeed, both in Palestine and Kuwait individuals are only entitled to file an individual complaint against a legislative act. On the contrary, in Spain and Germany (and in other European countries), individual complaints usually refer to "fundamental rights infringements committed by the regular judiciary or caused by the administration […]. It is less common for complainants to (be able to)

14 Article 56 stipulates that "when an exception of unconstitutionality is raised before the courts, the latter *must immediately* transmit it to the Constitutional Court" (emphasis added).

assert that the legislature has violated their fundamental rights by passing a particular piece of legislation" (de Visser 2015: 143).

3.4. The expansion of jurisdiction

It is well known that the core function of constitutional courts and councils is to review the constitutionality of legislation. Over the last few decades, however, these bodies have also been granted a number of functions over and above the constitutional review of legislation *stricto sensu*, namely the "ancillary functions" (Ginsburg and Elkins 2008: 1431 et seq.). This has also occurred in the Arab world, where constitutional review bodies – even before the 2011 uprisings – were vested with the task, for example, of reviewing the validity of the elections (e.g. in all the Maghreb countries, Lebanon and Kuwait), verifying the incapacity of the president of the republic (e.g. in Algeria) or the vacancy of that office (e.g. in Algeria and Tunisia), deciding on the impeachment of the president of the republic (e.g. in Syria), resolving conflicts between state authorities (e.g. in Egypt), adjudicating on disputes between the central government and sub-state entities (e.g. in the United Arab Emirates and Iraq), or reviewing the constitutionality of international treaties (e.g. in Algeria and Tunisia).

The constitutional reforms adopted in the wake of the Arab Spring have in numerous cases further expanded the jurisdiction of constitutional courts and councils. The Tunisian Constitutional Court is emblematic of this trend. Among its numerous competences, the Court is responsible, for example, for resolving disputes between the President of the Republic and the Head of Government. In the light of the establishment of a semi-presidential regime in the 2014 Constitution (under which executive power is genuinely split between the President and the Head of Government, see Biagi 2018: 413 et seq.), the Court's power to resolve these disputes will be of the utmost importance. This task, however, will be far from easy. One need only consider the tensions between former President Béji Caid Essebsi and Head of Government Youssef Chahed (see Mekki 2018), or the risk of dealing with situations involving *cohabitation*, i.e. when the President belongs, for instance, to a secular party whereas the Head of Government belongs to an Islamist party, or vice versa.

Another extremely important function of the Tunisian Constitutional Court consists in the power to review presidential declarations of a state of exception. The influence of the 2008 French Constitutional Reform is particularly apparent since (the new) Article 16 of the French Constitution

makes provision for a state of exception in a manner extremely similar to Article 80 of the Constitution of Tunisia. Specifically, thirty days after the entry into force of the emergency measures, and at any time thereafter, the President of the Assembly of the Representatives of the People or thirty of its members may apply to the Constitutional Court with a view to establishing whether or not the circumstances are still exceptional. This prerogative of the Constitutional Court seems to be particularly significant as it helps to prevent the President from abusing the power to declare a state of emergency.

It should also be noted that the Tunisian Constitutional Court is now one of the constitutional review bodies that has the power to review the constitutionality of constitutional amendments not only on procedural grounds, but also on substantive grounds (as is the case also in Algeria (see Biagi 2017: 3 and 12)). The other ancillary functions of the Tunisian Constitutional Court include the power to review the constitutionality of international treaties before the draft law approving them is signed, the power to rule that the office of the President of the Republic is temporarily or permanently vacant, as well as the power to decide on the impeachment of the President of the Republic.

It should come as no surprise that a high number of ancillary functions have been vested in constitutional review bodies. These are, generally speaking, highly reputed bodies, and often "institution[s] with a reputation for success [are] given further tasks" (Ginsburg and Elkins 2008: 1454). However, assigning ancillary functions to constitutional courts and councils comes with its advantages and drawbacks. On the one hand, one of the major advantages – as pointed out by Tom Ginsburg and Zachary Elkins – is that these bodies represent

> "*political insurance in the face of uncertainty. Constitutional designers know there will be political conflict down the road, but they cannot anticipate who will be on what side of the issues and may anticipate that they are not in the majority. This will, ceteris paribus, lead them to empower a downstream actor who can fill gaps in the constitution and resolve disputes so as to maintain the system*" (Ginsburg and Elkins 2009: 1454).

On the other hand, however, ancillary functions also entail disadvantages. First of all, vesting a very high number of powers in constitutional courts risks overloading these institutions, thus hindering the effectiveness of their action. Moreover, granting them the power to resolve issues of extreme political sensitivity risks undermining their image as neutral and independent bodies.

The ancillary functions discussed above can be found in a number of different countries all around the world – and not only in the MENA region. A peculiar function that may be vested specifically within courts in Islamic countries is the power to interpret *sharia*, as is the case, for example, in Egypt. Between 1980 and 2011, the Supreme Constitutional Court took the view, in the light of Article 2 of the 1971 Constitution (which stipulated that "Principles of *sharia* are the main source of legislation"), that Parliament was required to abide by *sharia* principles when drafting laws, and that any legislation at odds with these principles would have to be declared unconstitutional.[15] The Court also clarified that legislation could only be struck down on the basis of "absolute", "definitive" principles of *sharia* (i.e. principles that are absolutely certain with respect to their authenticity and meaning), but not also of "relative" principles (i.e. principles the authenticity and meaning of which are not certain). Moreover, legislation had to be consistent with the "goals" of *sharia*.[16] It is crucial to point out that, when interpreting *sharia* principles, the Court in several cases "reflected liberal modernist sensibilities" (Brown & Lombardi 2016, 254), thus promoting liberal values and the protection of human rights, including women's rights (see Constitutional Jurisprudence on Fundamental Rights 1996, 229 et seq.; Lombardi 2008, 246-249). The Salafists, which were strongly opposed to this understanding of Islam, were able to impose their view during the 2012 Constitution-making process, confirming the power of the Supreme Constitutional Court to review the compatibility of laws with *sharia* principles, but limiting the possibility to interpret these principles in a modernist fashion. Indeed, the 2012 Constitution retained the same wording as Article 2, whilst also including a new provision laying down a specific definition of *sharia* principles, namely Article 219, which stipulated that "The principles of *sharia* include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community". The aim of this Article was to force the Court to depart from its previous jurisprudence and adopt a more traditional interpretation of Islam. Furthermore, again in an attempt to constrain the interpretative authority of the Court, the Constitution

15 See in particular *Case 20, Judicial Year 1 of May 4, 1985*. In this ruling, the Court clarified that only laws adopted after the 1980 amendment of Article 2 of the Constitution had to be consistent with the principles of *sharia*. Following this amendment, principles of *sharia* ceased to be "a" source of legislation, and became "the main" source of legislation.

16 See *Case 7, Judicial Year 8 of May 15, 1993*. See also *Case 8, Judicial Year 17 of May 18, 1996*, available in English in Brown and Lombardi 1996: 437 et seq.

introduced a new provision (art. 4), stipulating a requirement to consult Al-Azhar in matters relating to *sharia* (see Brown and Lombardi 2016: 255-258).

However, the 2012 Constitution did not produce the desired results, as it was suspended a few months later following the fall of President Morsi on July 3, 2013, and was subsequently replaced by the 2014 Constitution. Only two Islamists were represented in the new Constituent Assembly, with the consequence that liberals were able to (re-)establish the authority of the Supreme Constitutional Court to interpret *sharia*. Specifically, the framers maintained the wording of Article 2, but eliminated Article 219, did not confirm the consultative role of Al-Azhar, and included within the preamble a provision stating that, in defining the principles of *sharia*, "the point of reference for the interpretation thereof is the relevant texts in the collected rulings of the Supreme Constitutional Court" (see Brown & Lombardi 2016: 258–259).

4. Challenges and perspectives

As has been pointed out by Clark Lombardi, in the MENA region there is currently "more constitutional review than ever before […], and the institutions empowered to perform it have, at least on paper, new independence and power" (Lombardi 2014: 132). In fact, compared to the past, Arab constitutional courts and councils have significantly strengthened their position within the new constitutional frameworks, not to mention the fact that public opinion now seems to be more aware of the crucial significance of these institutions. From a practical standpoint, the role of constitutional review bodies in the transition processes following the Arab Spring has thus far varied enormously from country to country, making it extremely difficult to identify common trends. In general terms, however, in most cases constitutional courts and councils have displayed a high degree of deference to the political authorities. However, the case law of these bodies has not always been characterized by self-restraint: indeed, in some (albeit quite rare) situations constitutional courts have not hesitated to issue decisions that have clearly been unfavorable to the ruling regime, as was done by the Egyptian Supreme Constitutional Court

during the Morsi regime.[17] Furthermore, in some cases Arab constitutional justices have shown a greater commitment to the protection of rights and freedoms. In Jordan, for example, in 2013 the Constitutional Court recognized the right of public employees to form unions. In Egypt, in 2013 the Supreme Constitutional Court struck down Article 3 of *Law 162/1958*, which granted the President of the Republic the right to issue a verbal or written detention order or search warrant without being constrained by any criminal law procedures and guarantees. Moreover, in 2017 the Court granted Coptic civil servants the right to paid leave for one month in order to make a pilgrimage to Jerusalem, in the same way as Muslim civil servants have the right to paid leave of 30 days for the pilgrimage to Mecca (*hajj*).[18]

However, constitutional review bodies must still overcome numerous significant obstacles in order to contribute more effectively to the processes of democratization. In the first place, it must be pointed out that in several countries the legitimacy of these institutions is often questioned. Indeed, in many cases, due to the "counter-majoritarian difficulty", constitutional courts and councils are not readily accepted by other constitutional bodies and political actors. In Kuwait, for example, some Members of Parliament recently called for the abolition of the Constitutional Court, arguing – *inter alia* – that Parliament was the only institution that reflected the popular will (see Toumi 2019). In Lebanon, most of the political class is unwilling to strengthen the status and powers of the Constitutional Council, since "they don't want to be controlled by any institution" (Sleiman and Poll 2018: 3–4).

Another obstacle results from the fact that in many countries (as discussed above) the head of state continues to dominate the system for appointing the members of constitutional review bodies (such as in Syria, Jordan, Morocco and Egypt). Moreover, access to these institutions (although significantly expanded) is not always easy. As has been shown above, one need only consider the adoption of the "double-filter" system (rather than the "single-filter" system), or the decision to prevent the ordinary courts from referring questions of constitutionality *ex officio*. In Lebanon, the constitutionality of laws can only be challenged within

17 See in particular *Cases 20* and *57, Judicial Year 34 of June 14, 2012*, and *Case 112, Judicial Year 34 of June 3, 2013*. See Brown 2015: 33 et seq.; Brown and Waller 2016: 839 et seq.; Fadel 2018: 936 et seq.

18 For a comparative discussion of the role played by constitutional review bodies and the relevant case law in the transition processes following the Arab Spring see Biagi 2019: 656 et seq.

fifteen days of their publication in the Official Gazette, not to mention the fact that only political and religious authorities are entitled to apply to the Constitutional Council, whereas the ordinary courts are not granted this power.

Poor legislative drafting is another element that must be taken into account. Indeed, ambiguities and gaps within the laws regulating the organization and functioning of constitutional courts hinder the functioning and actions of these bodies, thus weakening the system of constitutional review overall. In addition, in some cases these laws have not been updated, thus giving rise to legal uncertainties. In Jordan, for example, the Law on the Constitutional Court (*No. 15 of 2012*) still refers to the High Court of Justice (art. 11(3)(D)), which was replaced by the Administrative Court (court of first instance) and the High Administrative Court (court of second instance) (*Law 27 of 2014*). Since the Law on the Constitutional Court has not been updated, it is not clear whether the High Administrative Court can refer a question of constitutionality to the Constitutional Court directly, or whether it has to refer the question of constitutionality to the Court of Cassation (see Max Planck Foundation 2016–2017: 17).

Delays in implementing the new constitutional provisions on constitutional review represent another *punctum dolens*. In Morocco, for example, the Constitution was adopted in 2011, although the Constitutional Court was only established in 2017, and the Organic Law regulating the "exception of unconstitutionality" has not yet been promulgated (as discussed above). In Tunisia, where the Constitution entered into force in 2014, the Organic Law on the Constitutional Court was adopted in 2015, although a lack of agreement among the political forces has thus far prevented the majority required for the parliamentary appointment of one-third of the members of the Court from being achieved.[19] Comparative experiences, however, show that postponing the establishment of constitutional review bodies and the enactment of the relevant laws risks weakening the "innovative force" which these institutions have when they are set up in a timely manner (see Biagi 2020: 192–193).

The context represents another obstacle that clearly does not help the action of constitutional courts and councils, since these bodies continue to operate in countries characterized by a weak separation of powers and poor constitutional culture. The only state that has thus far managed to make a clean break with its illiberal past is Tunisia, also thanks to the

19 On the consequences of the absence of the Constitutional Court in Tunisia see Democracy Reporting International 2019.

adoption – on January 26, 2014 – of a profoundly democratic Constitution (see Ben Achour 2014: 783 et seq.; UNDP 2016; Ben Achour 2017; Groppi 2018: 343).

It is evident that, in the short term, the new Arab bodies for constitutional review have only rarely overcome the obstacles mentioned above. However, before jumping to definitive conclusions it must not be forgotten that these bodies are still young – in some cases they are even "newcomers" (as no similar institution previously existed for instance in Jordan or Palestine) – and need time to consolidate their position and prerogatives within the constitutional architecture. Therefore, a more accurate and reliable assessment of the performance of these new courts and councils will only be possible over the medium to long term.

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Integrating or Polarising? How to Promote Integrative Decision-Making in Constitutional Courts

Gertrude Lübbe-Wolff

Abstract
For constitutional courts to be able to activate the integrative function of the constitution they have to interpret and apply, and to avoid the risk of fostering polarization, they must work in a collegial, consensus-oriented, deliberative way. Some courts do better on that score than others. Why is that so? The article draws attention to institutional frameworks explaining the differences in underlying cultures of deliberation. A fundamental difference between courts in common law countries with their historical roots in the tradition of *seriatim* decision-making, and courts outside the common law world with their less individualist decision-making traditions is that the former need a majority only for the outcome of a decision, whereas the latter need a majority for the reasons, as well. Many other institutional features, mentioned in the final section of the article, also matter. The differences with respect to majority requirements, however, provide a particularly telling example of how institutional frameworks shape judicial behavior in unnoticed ways.

1. Integrative courts and polarising courts

The most fundamental function of a constitution is integration, i.e. the creation and maintenance of political unity and peace among citizens. Modern constitutions do so not just by legally establishing ("constituting") the political entity for which they provide the basic legal framework, but also by the way that framework is designed. They provide for democratic structures designed to channel conflict, provide for the production of rules, prevent disruptive violence, protect minorities, restrict the arbitrary use of power and convince people that it is in their enlightened interest to play by the rules rather than overthrow the system, secede, or engage in civil war or genocide, to name just the most atrocious types of disinte-

gration. Constitutions guarantee fundamental liberties and equality rights designed to make coexistence and cooperation of people of different origins, roles, beliefs, convictions, etc. work. They may institutionalise social elements, such as social security systems or financial transfers between regions, designed to mitigate potentially disruptive social cleavages within a society; and they create institutions designed to secure the rule of law with respect to all of this. The integrative function of constitutions thus goes far beyond what has been contemplated in traditional constitutional theories of integration such as *Rudolf Smend´s*, which have tended to concentrate on symbolic expressions of political unity like flags, national anthems, festivities, etc.[1]

If constitutions are to integrate, that purpose should be considered and promoted in interpreting them. However, just as Constitutions differ in their integrative potential, so do Constitutional Courts (in the broader sense, including the non-specialised ones). Some seem pretty well able to activate the integrative potential of the constitution of which they are the guardian. One of them is the German Federal Constitutional Court (FCC). Nobody in Germany is ever perfectly satisfied with the case-law of that court; sometimes, even politicians voice discontent. Well, constitutional courts are inherently frustrating. They would be useless if they weren´t. Nevertheless, the FCC has, so far, managed to distribute frustration evenly across the political spectrum. It has managed to produce even most of its decisions on highly sensitive subjects unanimously, almost never to split exactly along the lines of the political nomination background of the judges, to avoid going to extremes (and, consequently, to avoid frequent overruling of its own decisions), to often find some viable middle ground, and to usually frame its reasoning in such a way that even the party that does not win will feel that it has been understood and that its concerns have been taken seriously. It is therefore highly respected as an impartial arbiter and, what is more, it has secured rather good knowledge of, high

1 For more detail on the the integrative function of constitutions see Gertrude Lübbe-Wolff, "Verfassung als Integrationsprogramm." *Aus Politik und Zeitgeschichte* 69, 2019: 16–17 and 43–48; Gertrude Lübbe-Wolff, "Integration durch Verfassung." *Zeitschrift des Deutschen Juristinnenbundes* 12, 2009: 174–180 (both available online). On Smend´s theory cf. also Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*: *The Theory & Practice of Weimar Constitutionalism*. Duke University Press 1999: 120 et seq.; Werner S. Landecker, "Smend´s Theory of Integration." *Social Forces* 29, 1950/1951: 39–48.

respect for, and high loyalty to the Constitution among the citizenry.[2] In other words: It has done an integrative job.

Other courts have performed less well on that score in recent decades. The best known example is the US Supreme Court. Constantly busy overruling previous, often overly extreme case-law, or defending it against attempts of members at doing so,[3] repeatedly split 5:4, with the dividing

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2 Germans also know the FCC better than citizens in probably any other country in the world know their apex court, see – based on a comparison of 20 states, including the USA – James L.Gibson, Gregory A. Caldeira and Vanessa A. Baird, "On the Legitimacy of National High Courts." *American Political Science Review* 92, 1998: 343–358 (347 f.). This is due to the FCC´s extensive competences and easy accessibility (individual constitutional complaints against any infringement of fundamental rights admissible, no fees, no requirement to be represented by a lawyer), see Gertrude Lübbe-Wolff, "The German Federal Constitutional Court from the Point of View of Complainants in Search of their Constitutional Rights" In: *La giustizia costituzionale ed i suoi utenti*, edited by P. Pasquino and B. Randazzo. Milano: Giuffré, 2006: 61–88.

3 The US Supreme Court is said to have reversed 223 of its own precedents in the period from 1801 to 2004, i.e. more than 1 per year (Melvin I. Urofsky, Dissent and the Supreme Court. Its Role in the Court´s History and the Nation´s Constitutional Dialogue, Pantheon Books, 2015: 408). A list of "Supreme Court Decisions Overruled by Subsequent Decision" issued by the US Government Publishing Office https://www.govinfo.gov/content/pkg/GPO-CONAN-2014/pdf/GPO-CONAN-2014-13.pdf contains 233 overruling cases (and a greater number of overruled ones) up to 2010. In the 2018/19 term alone, at least two precedents were overruled, see Adam Liptak and Alicia Parlapiano, A Supreme Court Term Marked by Shifting Alliances and Surprise Votes, New York Times, 9 June 2019. https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html%20Gerjath%2018/19. I do not know of any statistics on decisions on FCC reversals of its own precedents, but they definitely occur less frequently, and when they have occurred in recent years, the reason was in most cases external, i.e. the FCC departed from previous doctrine in order to adapt to transnational case-law; see, for recent adaptations to case-law of the European Court of Human Rights, *Judgment of 4 May 2011* – 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, 2 BvR 571/10 – *Bundesverfassungsgerichtsentscheidung* (Collection of decisions of the Federal Constitutional Court) 128, 326 (translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/05/rs20110504_2bvr236509.html), concerning preventive detention, and *Judgment of 17 January 2017* – 2 BvB 1/13 -, *Bundesverfassungsgerichtsentscheidung* 144, 20 (translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html), concerning party ban. Another potential source of overrulings which has no equivalent in the US lies in the structure of the FCC as a twin court with two panels (senates). To secure coherence of the case-law, § 16 of the Act on the FCC (*Bundesverfassungsgerichtsgesetz*, *BVerfGG*) provides that if one of the panels wishes to depart from the *ratio decidendi*, it must refer the relevant constitutional

line frequently running precisely between the Republican and Democratic nominees, and hopelessly polarised in itself,[4] the Court has fuelled societal polarisation rather than preventing or mitigating it, and produced not only abundant cynical scholarship, but also loss of confidence among varying great parts of the US-American society.[5]

The reason for these striking differences – all the more striking since it is the court which does *not* operate under a legal principle of *stare decisis* that exhibits more constancy – is simply that the German FCC is better at rational consensus-building. By *rational* consensus-building, I refer to the use of rational techniques to overcome differences of opinion by way of discussion, such as listening to each other carefully, trying to understand each other, evaluating arguments regardless of who forwards them, and being ready to change one´s mind in response to the better argument – as opposed to consensus-building by expectations that juniors will defer to seniors, or expectations that members will give in at some point just because dissensus is disapproved of, or the like. Rational consensus building is about activating the powers of rational argument, not about proscribing disagreement.

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question to the plenary court, which may then overrule the doctrine from which the referring panel wishes to depart. Plenary decisions are, however, extremely rare.

4 For data see Cass Sunstein, "Unanimity and Disagreement on the Supreme Court." *Cornell Law Review* 100, 2015: 769–823; Adam Liptak and Alicia Parlapiano, "Conservatives in Charge, the Supreme Court Moved Right", New York Times, 28 June 2018. https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html. For some surprises (considering gloomiest expectations of partisanship, which turned out correct in fewer cases than the year before), but still high levels of close calls, including partisan splits, in the 2018/2019 term see Adam Liptak and Alicia Parlapiano 2019 (fn. 3). Sharp internal polarization is apparent not only in the voting record data, but also in extremely uncollegial behaviour, see, for a case of voting down a minority´s wish that a decision be taken only after further deliberation, Adam Liptak, "Supreme Court Won´t Stay Alabama Execution After Bitter Clash", New York Times of 30 May 2019 https://www.nytimes.com/2019/05/30/us/politics/supreme-court-alabama-death-penalty.html.

5 The problem with popular confidence in the US Court is not so much general decline but *partisan patterns* of rise and decline. According to polls, overall confidence is even higher now than it was in 2015, due to better satisfaction of Republican voters. Failure to integrate is manifest, however, in that the court has been able to secure (more) confidence only with *either* Liberals *or* Conservatives, one at the expense of the other, see Claire Brockway and Bradley Jones, "Partisan gap widens in views of the Supreme Court", <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/>.

The FCC operates in a much more collegial, deliberative, and, in the sense just explained, consensus-oriented way than the US Supreme Court does[6]. How is that, in turn, to be explained?

2. *Cultures of deliberation and the institutional frameworks that shape them*

Where institutions behave differently, one explanation is always culture. Culture, however, is itself shaped by the framework conditions under which people operate: rules, resources, institutional settings – in short, anything that may influence the tendency of humans to behave in one way or another.

With respect to cultures of deliberation, there is a most influential difference between the rules of decision-making in common-law and civil-law traditions. That difference is, however, usually misunderstood. To understand the relevant difference and the reasons why it generally escapes attention, we must go back to history.

2.1. *Common-law and civil-law rules of decision-making*[7]

2.1.1. *Two historical models: seriatim and per curiam decision-making*

Two different historical models of judicial decision-making in composite courts can be distinguished that shape judicial practices to this day.

The first one, historically the older one, is the *seriatim* model. In the pure, original version of this model, each and every judge produces his own opinion, and each of these opinions is part of *the judgment* of the court. One might even say: In the pure version, there *is* no judgment of "the court" as such. There are just individual judgments by the individual

6 For a more detailed comparison see Gertrude Lübbe-Wolff, "Cultures of Deliberation in Constitutional Courts." In: *Justicia Constitucional. La Justicia constitucional en los diferentes ámbitos del derecho y sus nuevas tendencias*, Vol. 1, edited by Patricio Maraniello. Resistencia, Chaco: Contexto, 2016: 37-52 (37–42).

7 Subsections 2.1.1. to 2.1.3. of this section are an expanded and updated version of Lübbe-Wolff (fn. 6): 42 et seq.

members of the court.[8] What happens with the case at hand is determined either by consensus or by majority.[9]

This was the traditional type of decision-making in common law courts as they have evolved in England.[10] The original procedure of the King´s Bench, for instance (a court that operated from the early 13th century until 1875), is reported to have been that at the close of oral argument, without any interruption by deliberation in camera, each judge on the Bench was called upon to deliver his judgment orally[11]. The *seriatim* model in this historical form was, in other words, absolutely non-deliberative, as far as argument among the judges is concerned.

The pure *seriatim* model is not a common law invention. It was a typical model of composite courts in early societies where the law was non-complex and thought to be voiced rather than developed in adjudication, where judges were usually illiterate, and where orality was therefore without alternative. The specific relationship between the *seriatim* model and

8 Wolfgang Ernst, Abstimmen über Rechtserkenntnis, *Juristen Zeitung* 2012: 637–648 (638). In the common law tradition, this is still reflected in a terminology using "judgment" as synonym of (judicial) "opionion", for instance in terms such as "first judgment" or "lead judgment", see, e.g., Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*, Oxford and Portland, Oregon: Hart Publishing, 2013: 93 and passim, while, on the other hand, "opinion" is used for the "opinion of the court", if any, as well as for dissents and concurrences. By contrast, in Germany, for instance, only a court´s *per curiam* decision is called "judgment" (in German: *Urteil*) or "order" (in German: *Beschluss*; this term is used if no public hearing has been held in the case), whereas "opinion" (*Meinung*) is reserved for dissenting and concurring opinions (in German: *abweichende Meinung,* usually translated as "separate opinion"; literally, "abweichend" means "diverging").

9 According to Chris Young, "The history of judicial dissent in England: What relevance does it have for modern common law legal systems." *Australian Bar Review* 32, 2009: 96–111 (101et seq., with further references), up to about 1450, the norm, based on the idea that the law was to be found in "common learning", was consensus, with adjournment to the Exchequer Chamber, and indecision if no consensus was found there; in the period from 1450–1600, majority decision became the rule.

10 For the historical exception of the Privy Council see Karl M. ZoBell, "Division of Opinion in the Supreme Court. A History of Judicial Disintegration." *Cornell Law Review* 44, 1959: 186–331 (187 et seq.); Michael D. Kirby, "Judicial Dissent: Common Law and Civil Law Traditions." *Law Quarterly Review* 123, 2007: 379–400 (386); Julia Laffranque, "Dissenting Opinions and Legislative Drafting." *Juridica International* VIII/2003, 162–172 (163, with fn. 9).

11 Ernst (fn. 8): 639. In criminal cases, however, the *jury* retired for consultation before pronouncing its verdict, see André Krischer, *Die Macht des Verfahrens. Englische Hochverratsprozesse, ca. 1550–1850* (forthcoming), 66 et seqq.

the common law, which developed along with legal professionalisation and relied on literate judges[12], is therefore not one of origin, but rather one of a higher degree of conservation.

The second model is the *per curiam* model. Here, the court decides as a collegium. In the original, pure version of this model, only the court as such renders a judgment. Individual judges do not appear with their votes or opinions, nor will voting results be communicated to the public. A *per curiam* decision therefore needs to be prepared *in camera*. Historical examples of courts working in this manner, which has been dominant on the European continent from the late middle ages on, are the courts of the Holy Roman Empire – the Imperial Chamber Court (Reichskammergericht, founded in 1495), and the Court Council of the Empire or Aulic Council (Reichshofrat, founded 1497/98). Once the decision was made in camera, it would be published by a court official.

Per curiam decision-making is not automatically associated with internal deliberation. As long as *per curiam* judgments are given without reasons, there is no necessity to deliberate in conference. The Courts of the Holy Roman Empire, for instance, never gave reasons for their judgments up to the very end of the Empire in 1806[13]; their *internal* (in camera) procedure pretty much – although not perfectly – resembled the *seriatim* decision-making in a common law court, the only important difference being that the internal *seriatim* voting would be preceded by a report, or a report and a co-report, drawn up in writing and read in conference by a reporting judge and, in some cases, a co-reporting judge.[14] In the literature of the time, there were discussions about whether or not courts ought to give reasons, but the majority of treatises on the matter found it would be silly to publish reasons, since that would only give the parties reasons to complain, and expose judges to the risk of being criticised, or

12 John P. Dawson, *The Oracles of the Law*, Ann Arbor: University of Michigan Law School, 1968, passim. The earliest royal judges were clerics, i.e. they were literate, ibid. 5.

13 Wolfgang Sellert, "Zur Geschichte der rationalen Urteilsbegründung gegenüber den Parteien insbesondere am Beispiel des Reichshofrats und des Reichskammergerichts." In: *Recht, Gericht, Genossenschaft und Policey*, edited by G. Dilcher and B. Diestelkamp. Berlin: Erich Schmidt, 1986: 97 et seq. (101); for an exception concerning certain interlocutory decisions see Wolfgang Sellert, "Prozessgrundsätze und Stilus Curiae am Reichshofrat." *Aalen* (*Scientia*) 1973: 360.

14 For the Aulic Council see Sellert (fn. 13): 342; for the Imperial Chamber Court Heinrich Wiggenhorn, *Der Reichskammergerichtsprozeß am Ende des Alten Reiches*, doctoral thesis, Münster 1966: 139 et seq.

even exposed to damage claims[15]. On the continent, rules demanding that collegial courts give reasons for their judgments only emerged during the 18th century; the movement in that direction gained momentum from the late 18th century on, and it was not before the late 19th century that reasoned decisions became the rule all over the continent[16]. It is with the emergence of a duty to give reasons that an inescapable need for internal deliberation arose. I will come back to that point.

2.1.2. Mutual approximation of seriatim and per curiam proceedings

Meanwhile, the traditions have approximated to some extent.

Few courts still stick to the tradition of delivering judgment *seriatim*. The Brazilian *Supremo Tribunal Federal*, for instance, basically decides *seriatim*, with the dispositive part of the judgment and the presentation of the facts and a sort of summary (*ementa*) followed by individual opinions of each of the judges. Deliberations are to be held in public, with TV coverage. As a consequence, there is, as a rule, practically no deliberation deserving the name. Instead, the justices each read their prepared opinions, usually without any further discussion.[17] Most of the courts which formerly adhered to the common law *seriatim* tradition, however, have

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15 Stephan Hocks, *Gerichtsgeheimnis und Begründungszwang. Zur Publizität der Entscheidngsgründe im Ancien Régime und im frühen 19. Jahrhundert*, Frankfurt a.M.: Klostermann, 2002: 18–19. On the risk of damage claims: Steffen Wunderlich, *Über die Begründung von Urteilen am Reichskammergericht im frühen 16. Jahrhundert. Schriftenreihe der Gesellschaft für Reichskammergerichtsforschung* 38. Wetzlar, 2010.

16 Sellert (fn.13); Hocks (fn. 15); Tony Sauvel, "Histoire du jugement motivé." *Revue du droit public et de la science politique en France et à l´étranger* 61, 1955: 5–53.

17 *On decision-making in the Brazilian Supremo Tribunal Federal* see Virgilio Alfonso da Silva, "Deciding without deliberating." *ICON* 11, 2013: 557–584; id., "Do we deliberate? If so, how?" *European Journal of Legal Studies* 9, 2017: 209-240; Carolina Cutrupi Ferreira, Natalia Langenegger and Marina Jacob Lopes da Silva Santos, *Construção de ementas das decisões do Supremo Tribunal Federal. São Paulo Law School of Fundação Getulio Vargas, Research Paper Series, Legal Studies* 125, June 2015 https://dadospdf.com/download/construao-de-ementas-das-decisoes-do-supremo-tribunal-federal-elaboration-of-the-syllabus-from-the-brazilian-supreme-courts-decisions-_5a4cec0ab7d7bcab672aaebf_pdf; André Rufino do Vale, *Argumentação constitucional: um estudo sobre a deliberação nos tribunais constitucionais*, doctoral thesis, Universidad de Alicante and Universidade de Brasilia 2015: 222 et seqq. http://repositorio.unb.br/bitstream/10482/18043/3/2015_AndreRufinodoVale.pdf.

meanwhile moved towards more collegiality in the production and presentation[18] of their decisions.

In the mother country of the common law *seriatim* tradition, that tradition no longer lives in its original, pure form, either. In the mid-19th century, Lord Mansfield, Chief Justice of the King´s Bench, introduced the caucusing method there, i.e. the production, after deliberation *in camera*, of a decision *of the court* instead of a series of individual judicial opinions[19]. This departure from the *seriatim* tradition remained a short interlude. After Lord Mansfield retired, the court returned to the *seriatim* tradition. Even in the UK, however that tradition has not survived unabridged.

The House of Lords Appellate Committee, the highest court of the land until 2009, of course, no longer worked in the way the early King´s Bench had. The Lords deliberated in camera, and they produced written decisions, but they still produced them in the individualistic manner of the *seriatim* tradition: as opinions of individual judges, writing in the first person singular, which could then be joined, or joined in part, by one or more colleagues. Along with the transformation of the House of Lords Appellate Committee into a Supreme Court (in 2009), discussions within the Court about working towards more consensus intensified and indeed became practical. This is reflected in a gradually increasing percentage of single judgments (judgments without separate opinions; House of Lords Appellate Committee: 20%, Supreme Court: 55% in 2013[20], well beyond 60% since 2015[21]).

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18 Collegiality of Production and collegiality of presentation must be distinguished. They often coincide, but not always. The Supreme Court of Nigeria, for instance, *presents* its decisions seriatim because it is required to so by constitutional law (art. 294 par. 2 of the Constitution of Nigeria). In producing their decisions, however, the justices seem to go about more collegially: dissents are reportedly rare, see Solomon Ukhuegbe and Chima Cletus Nweze, "Developments in Nigerian Constitutional Law: The Year 2016 in Review." *I-CONnect Blog*, 3 December 2017. http://www.iconnectblog.com/2017/12/developments-in-nigerian-constitutional-law-the-year-2016-in-review/.

19 Todd Henderson, "From ´Seriatim´ to Consensus and Back Again: A theory of Dissent." *University of Chicago Law School Public Law and Tegal Theory Working Papers*, 2007: 8 et seqq., http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1126&context=public_law_and_legal_theory ; Wolfgang Ernst, *Rechtserkenntnis durch Richtermehrheiten*. Tübingen: Mohr Siebeck, 2016: 275, each with further references.

20 Paterson (fn. 8): 94.

21 Robert Reed, "Collective Judging in the UK Supreme Court." In: *Collective Judging in Comparative Perspective: Counting Votes and Weighing Opinions*, edited by

Single judgments, although still written by individualised authors, may even come along as a "judgment of the Court"[22]. A judicial assistant surveyed the first 57 decisions of the newly established Supreme Court. According to Justice (now Chief Justice) Brenda Hale, he "„found that in 20, there was a 'judgment of the court'; and in a further 11, there was either a single judgment (with which all the other Justices agreed), or a single majority judgment (with which all the Justices in the majority agreed), or an "effectively" single or single majority judgment (because separate judgments were simply footnotes or observations)."[23]

In the US Supreme Court, Chief Justice Marshall (1801–1835) abandoned the tradition of *seriatim* decision-making. He made it a rule to produce an "opinion of the court" which he used to write himself ("MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.")[24]. He also rather successfully aimed at consensual decisions. Dissent rates were low during his presidency, and they remained relatively low until Harlan

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Birke Häcker and Wolfgang Ernsted. Cambridge et alii: Intersentia, 2020: 21–35 (32, fn. 35).

22 See, e.g., *Manchester City Council v. Pinnock* [2010] UKSC 45, 2 AC 104, https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0180_Judgment.pdf: "This is the judgment of the Court, to which all members have contributed."

23 Brenda Hale, "Judgment Writing in the Supreme Court." *UKSC blog*, 25 October 2010 (referring to a survey by Richard Reynolds) http://ukscblog.com/judgment-writing-in-the-supreme-court-brenda-hale/; for developments since then see Alan Paterson, "A Scarcity of Dissents?" *UK Supreme Court Blog* 6, 6 March 2014 http://ukscblog.com/scarcity-dissent/; id., "Final Judgment revisited." *European Journal of Current Legal Issues* 21.1, 2015. http://webjcli.org/article/view/418/531. Cf. also Lord Reed (Deputy President of the Supreme Court), "The Supreme Court Ten Years On. The Bentham Association Lecture 2019." 6 March 2019. https://www.supremecourt.uk/docs/speech-190306.pdf: 10: "In practice, it has also become increasingly common in recent years for Justices to produce joint judgments."

24 *Talbot v. Seaman*, 5 U.S. 1 (1801), https://supreme.justia.com/cases/federal/us/5/1/case.html (the first case decided under Marshall´s presidency). For the change of practice introduced by Marshall see ZoBell (fn. 10); John Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures*. New York et alii: Holt, Rinehart and Winston, 1967: 108 ff; Del Dickson, *The Supreme Court in Conference (1940–1985). The private Discussions behind nearly 300 Supreme Court Decisions*. Oxford et alii: Oxford University Press, 2001: 27 et seq.; Urofsky 2015 (fn. 3): 44 et seq.; Katalin Kelemen, *Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective*. Abingdon and New York: Routledge, 2018: 58 et seq. "Opinions of the court" had occurred earlier, even quite frequently (see John P. Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790–1945." In *Washington University Law Quarterly* 77, 1999: 137–182, but not as a rule. Cf. also Kurt H. Nadelmann, "The Judicial Dissent. Publication v. Secrecy." *The American Journal of Comparative Law* 8, 1959: 415–432 (418).

Fiske Stone, who was not adherent of the consensus method, became Chief Justice in 1941. Since then, the rate of unanimous decisions was below 40% in most legal years.[25]

Supreme Courts in many other common law countries have also tended towards less individualistic decision-making in recent years or even in recent decades.[26]

An opposite trend can be observed in the civil law tradition. Many Countries with a *per curiam* tradition of judicial decision-making have in recent decades allowed their apex courts to publish separate opinions. Within the European Union, only Austria, Belgium, France, Italy, Luxemburg, Malta and the Netherlands stick to the pure *per curiam* tradition in not allowing their apex courts to publish separate opinions.[27]

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25 Sunstein (fn.): 771 et seqq.; cf. also Pamela C. Corley, Amy Steigerwalt and Artemus Ward, *The Puzzle of* Unanimity*: Explaining Consensus on the U.S. Supreme Court*. Stanford: Stanford University Press, 2013: 14 et seq.

26 See, e.g., for the Supreme Court of Canada, C. L. Ostberg and Matthew E. Wetstein, *Attitudinal decision making in the Supreme Court of Canada*. Vancouver and Toronto: University of British Columbia Press, 2007: 37; Peter McCormick and Marc D. Zanoni, *By the Court: Anonymous Judgments at the Supreme Court of Canada*. Vancouver and Toronto: University of British Columbia Press, 2019; Peter McCormick, Ian Greene, *Beverley McLachlin: The Legacy of a Supreme Court Chief Justice*. Toronto: James Lorimer & Co., 2019: 131 et seq. and passim; for the High Court of Australia see Thomas B. Bennett, Barry Friedman, Andrew D. Martin and Susan Navarro Smelcer, "Divide & Concur: Separate Opinions & Legal Change." *Cornell Law Review* 103, 2018: 817–877 (829 f.); Matthew Groves and Russell Smyth, "A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001." *Federal Law Review* 32, 2004: 255 et seq. (concerning the High Court history of conferencing); Susan Kiefel, "The individual judge, paper presented at the 2014 Sir Richard Blackburn Lecture in Canberra, 13 May 2014." https://www.actlawsociety.asn.au/documents/item/944%3E: 4 (concerning joint judgments); for current workways of the High Court see id., "An Australian Perspective on Collective Judging." In: *Counting votes and weighing opinions: Collective judging in comparative perspective*, edited by Birke Häcker and Wolfgang Ernst. Cambridge: Intersentia Publishing: 47–56; Andrew Lynch, "Consensus rules in Kiefel´s first year as Chief Justice." *University of New South Wales Newsroom*, 23. February 2018, https://newsroom.unsw.edu.au/news/business-law/consensus-rules-kiefels-first-year-chief-justice (concerning the incumbent president´s efforts to promote consensus).

27 Raffaelli, Rosa, *Dissenting opinions in the Supreme Courts of the Member States*. European Parliament, Directorate General for Internal Policies, 2012: 17 et seqq. http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf. Croatia, which joined the EU after publication of Raffaelli´s survey, does allow separate opinions in its Constitutional Court. In Ireland, separate opinions are illicit when the Supreme Court decides

2.1.3. The overlooked remaining difference: Majority requirements

Thus, the two historical models have undergone a process of mutual approximation. Courts in the common law tradition nowadays mostly deliberate in conference before pronouncing judgment, and often publish opinions "of the court" (or equivalent joint majority judgments), while on the other hand, courts in the civil law tradition are no longer barred from making internal differences public.

The prevailing idea seems to be that insofar as such approximation has taken place, institutional differences between the two models have disappeared, and that culturally entrenched differences in the degree of judicial individualism or collegiality are the only remaining traces of the historical schism, but that is a misunderstanding (on related misconceptions, see below, II.1.e).[28] Courts in the two traditions, however much they may have converged towards producing "opinions of the court", more or less frequently accompanied by smaller or greater numbers of separate opinions, typically continue to differ in the way they answer the following question – a question which is almost routinely overlooked in comparison between common law and civil law traditions of judicial decision-making: What is the object, or the primary object, of judicial voting? In other words - What is it that you need a majority for? How that question is answered is much more consequential than whether or not separate opinions are allowed.

The common law tradition is that judges vote on the outcome of cases, i.e. on the dispositive part of a judgment, and that here, and only here – not with respect to the reasons –, an absolute majority of the votes cast

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in preventive review of legislation proceedings upon a motion by the president of the republic (*Irish Constitution*, art. 26 par. 2); further restrictions reported in some of the literature have been abolished by the 33rd Amendment to the Irish Constitution. For overviews concerning permissibility of separate opinions see Kelemen (fn. 24): 82 (list of 21 European countries, concerning constitutional courts *and ordinary* courts); Venice Commission, *Report on Separate Opinions of Constitutional Courts*, CDL-AD(2018)030: 18 et seq. (constitutional courts in 44 countries) https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)030-e; Caroline Elisabeth Wittig, *The Occurrence of Separate Opinions at the Federal Constitutional Court. An Analysis with a Novel Database*. Berlin: Logos, 2016: 153 et seq. (constitutional courts in 68 countries).

28 For recent clarifications, see Gertrude Lübbe-Wolff, "Why is the German Federal Constitutional Court a deliberative court, and why is that a good thing?" In: Häcker and Ernst (fn. 26): 157–179 (161 et seq.); Wolfgang Ernst, The Fine-Mechanics of Judicial Majoritarianism, ibid.: 3–17 (4 f.).

is requisite.[29] This is in line with the ideal type *seriatim* model where, by definition, there are no reasons for the decision of the court as such but only reasons for the opinions of individual judges. Within the pure historical *seriatim* model, voting on the outcome is obviously the only feasible solution. In just one round of *seriatim* oral voting, with each judge giving just the reasons for the outcome he thinks the right one, there is no way to process the complexity that a systematic determination of majorities concerning each of the relevant questions of law that a case may raise would require.

In theory, the voting protocol might change along with such approximations to the *per curiam* model as I have described above. Where there is deliberation in conference, and where an "opinion of the court" is at least an option, judges may discuss reasons and make out what the reasons of the "opinion of the court" to be drafted will have to look like in order to get majority support. Typically, however, the only mandatory object of voting in common law courts is the outcome of the case at hand and the vote on outcome is the only one for which an absolute majority is needed. This is manifested in the existence of so-called plurality judgments, where the judges in the majority with respect to the outcome are divided about the *rationes decidendi*.[30]

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29 On outcome voting in Common Law Courts see Stearns, Maxwell, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making, Ann Arbor (The University of Michigan Press) 2000: 7 et seq.; for the United States see Saul Levmore, "Ruling Majorities and Reasoning Pluralities." *Theoretical Inquiries in Law* 3.1, 2002: 87–123.

30 For plurality opinions in the US Supreme Court see Adam S. Hochschild, "The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective." *Washington University Journal of Law Policy* 4, 2000: 261–287; Levmore (fn. 29); James A. Bloom, "Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp." *Washington University Law Review* 85, 2008: 1373-1417; Linas E. Ledebur, "Plurality Rule. Concurring Opinions and a Divided Supreme Court." *Penn State Law Review* 113, 2009: 899–921; Pamela C. Corley, Udi Sommer, Amy Steigerwalt and Artemus Ward, "Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court." *The Justice System Journal* 31.2, 2010: 1–21; James F. Spriggs II and David R. Stras. "Explaining Plurality Decisions." *The Georgetown Law Journal* 99, 2011: 515–570; Pamela Corley and Artemus Ward, "Opinion Writing in the U.S. Supreme Court." In: *Routledge Handbook of Judicial Behavior*, edited by Robert M. Howard and Kirk A. Randazzo. New York: Routledge, 2018: 166–179 (173). On UK House of Lords and UK Supreme Court decisions unsupported by a majoritarian *ratio decidendi*, and on efforts to avid such decisions, Paterson (fn. 8): 136 f.

By contrast, courts in the *per curiam* tradition are equally concerned about the reasons leading to a result. Historically, this has not always been the case. As long as courts in the *per curiam* tradition did not bother to give reasons for their judgments, there was obviously no point in voting about reasons and trying to get majorities for reasons. With the introduction of a duty to give reasons, that changed.[31]

Leaving aside some exceptions, it seems characteristic, at least of apex courts in the European continental *per curiam* tradition, that they vote on *reasons* and need an absolute majority for them.[32] A mere relative majority for the reasons of a decision will not do. In other words - plurality decisions in the sense explained above are illicit.

Where this is the case, an interesting question arises: Is a majority needed for *reasons only*, or for *both reasons and outcome*? That question is interesting because voting on reasons and voting on the outcome do not necessarily yield identical results.

By way of illustration, imagine a case, for the sake of simplicity, where judges A, B and C scrutinize a federal regulation. Judge A thinks the regulation is flawless, judge B thinks it is unconstitutional (only) because there was no federal competence, and judge C thinks it is unconstitutional (only) because it disproportionally interferes with a constitutionally guaranteed right. Where judges have to find a majority on outcome only, it will be decided that the regulation is unconstitutional, because an absolute majority of judges (2 of 3) find it so. Where judges have to find a majority on reasons only, the problem that there is no majority for any of the potential reasons for unconstitutionality can be solved by the so-called "issue voting", i.e. by voting (only) on each of the reasons separately. This will, in our example, result in a court finding that the regulation is constitutional, precisely because there is no majority for any of the reasons to the contrary, since both lack of federal competence and disproportional interference with a fundamental right have been asserted by only one of three judges. In other words, securing majorities for the reasons of a deci-

31 On the nexus between duty to give reasons and emergence of the question whether outcome or reasons should be the object of voting (and the corresponding majority requirement) see Ernst (fn. 19): 172, 174 et seq.

32 The term "absolute majority" is used here in the sense of "a majority of more than half …", and as *not* carrying any information as to the object of reference of "half" (i.e. as to whether a majority of the votes cast is sufficient or whether the votes of the majority of the regular members on the bench, present or not, is required; difficulties arising from different usages of the term "absolute majority" with respect to the question of reference would deserve a separate article).

sion by voting on reasons only (with the outcome resulting automatically as a consequence of the way the *rationes decidendi* have been answered) may produce outcomes for which there is no majority.[33] There are courts which proceed in this way, at least in certain respects[34].

Where this is found troubling, the alternative of putting up either with a majority on outcome only or with a majority on reasons only can be avoided by requiring a majority for *both* outcome and reasons *(extensive majority requirement)*.

Relatively clear rules in favour of voting (and consequently in favour of a majority requirement) with respect to *both reasons and outcome* can be found in the Rules of Court of the German Federal Constitutional Court[35] and of the Austrian Constitutional Court.[36]

For many European apex courts, explicit procedural rules on this issue are absent. It is obvious, however, that the practices of almost all of these courts are driven by an assumed necessity to find a majority for both the dispositive part and the reasons of each decision. A frequent practice, somewhat different from that of the German FCC, but equally aiming at a majority for both outcome and reasons, is to put draft decisions to a vote *as a whole*, soliciting an affirmative vote covering both outcome and reasons, and, if the requisite majority is failed, to try again with a modified draft designed to avoid the objections that have thwarted the requisite

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33 On that problem, its discussion, and solutions in 19th century Germany see Ernst (fn. 19): 175 et seq.; for discussion in the US see David Post and Steven C. Salop, "Rowing Against the Tidewater: A Theory of Voting by Multi-judge Panels." *Georgetown Law Journal* 80, 1992: 743–774; Jonathan R. Nash, "A Context-Sensitive Voting Protocol Paradigm for Multimember Courts." *Stanford Law Review* 56, 2003: 75–159; Lewis A. Kornhauser and Lawrence G. Sager, "The Many as one: Integrity and Group Choice in Paradoxical Cases." *Philosophy and Public Affairs* 32, 2004: 249–276.

34 See European Court of Human Rights, Al-Dulimi v Switzerland, Appl. No. 5809/08 v 26.11.2013 (available online at HUDOC). In this case, the application was successful because four of seven judges held that it was well-founded on the merits. But one of these four had held it inadmissible. Had the judges voted by outcome, the application would have been rejected. It is only on the basis of issue voting (first on admissibility, then on the merits, with a majority in favour of the applicant on each of these issues) that the applicant won his case.

35 Art. 27. From discussions with judges from the German Federal Court of ordinary jurisdiction (Bundesgerichtshof), the German Federal Administrative Court (Bndesverwaltungsgericht), and the Federal Finance Court (Bundesfinanzhof), I have learned that they all proceed on the assumption that majorities for both outcome and reasons are needed.

36 Art. 34 par. 2.

majority. This may be repeated several times until a majority finally agrees with the submitted version.[37]

2.1.4. Hybrid regimes

Where European constitutional courts, or constitutional courts with roots in the European continental tradition, do not follow the rule that an absolute majority is needed for both reasons and outcome, this is because they have adopted common law traditions; Norway is an example. While the Supreme Courts of all other Nordic countries in Europe (Denmark, Sweden, Finland and Iceland) operate under the typical European continental extensive majority requirement, Norwegian Justices, seeing the Norwegian judiciary closer to the common law tradition, vote on outcomes only.[38] Another example is the Constitutional Court of Kosovo. In the English version, its rules of procedure explicitly provide for the possibility of plurality decisions, although the Court is otherwise set up as a constitutional court in the continental European tradition. The explanation is that in the process of institution-building, Kosovo was supported not only by European institutions, but also USAID, and the rules of procedure happened to be drafted by a US-American judge[39]. Random blending of elements of

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37 According to information, in conversation, by a former member of the Polish Constitutional Court, decision-making on that court takes off with finding a majority on the outcome, but a majority for the reasons is also needed. In one particularly difficult case, ten successive draft versions of a decision were therefore produced, and discussed in successive conferences, before the required majority for the decision as a whole was reached. A similar example is reported by Dominique Schnapper, former member of the French *Conseil Constitutionnel*: The secretary General of the *Conseil* told her that former president Robert Badinter had once produced no less than fourteen versions of a draft, see Dominique Schnapper, *Une sociologue au Conseil Constitutionnel*. Paris: Éditions Gallimard, 2010: 280.

38 Information gathered at a meeting of the presidents and vice-presidents of Nordic Supreme Courts in Finland in August 2015. I am obliged to Pauliine Koskelo, then president of the Supreme Court of Finland, now a judge of the European Court of Human Rights, for having invited me to take part in that meeting, and to all the participants for answering questions on this issue, as well as for their amiable hospitality.

39 For this information as to background, I am indebted to Durim Berisha, former clerk to the court. The relevant norm is Rule 62 par. 3, sentence 3 of the court´s rules of procedure: "A dissenting opinion may be joined by other Judges and shall state specifically the reasons why the Judge disagrees with the opinion of

civil law and common law traditions with respect to the functioning of courts is also frequent in Latin America. A pertinent example is the Constitutional Court of Colombia. The Court, in many respects, is built upon the model of a European continental, Kelsenian type of court, but as to majority requirements, its *regolamento* follows the common law tradition in providing that for the reasons of a decision, a relative majority will do[40].

2.1.5. Consequences of a majority requirement for reasons

One consequence of a voting protocol demanding that a majority be found for reasons is clear: More discussion will be necessary than if a majority is needed only for the outcome. The persisting difference between courts with a *seriatim* tradition background and courts with per *curiam tradition* with respect to their voting protocol (or, more precisely, with respect to the definition of what must be decided by an absolute majority) is an important factor explaining differences in consensus orientation and deliberativeness. It is obviously not impossible for a court in the common law tradition to develop a culture of intensive deliberation and consensus-oriented decision-making; episodes in the history of many apex courts as well as the more recent moves of a number of Supreme Courts in the common law world testify to that. Nor is it impossible for constitutional courts in the civil law tradition to split into factions of some kind, forget about the purpose of collegial deliberation, and turn to a practice of voting down rather than trying to understand, convince and find solutions that are acceptable to as many as possible. Nevertheless, the requirement that has come to prevail in the *per-curiam*-tradition that not just the dispositive part of a judgment, but also the reasons must be carried by an absolute

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the majority or plurality of the Court." In the country´s own languages, the rule does not mention "plurality"; according to Durim Berisha, however, the court´s practice is to allow plurality decisions. That is plausible considering the drafting history, according to which the English version of the rules is the Original. For problems with the lack of coordination in the production of legislation concerning the Constitutional Court of Kosovo on one hand and the court´s rules of procedure on the other, due to support from different legal systems, see Durim Berisha, "Internationalized Constitutionality and the Rise of Judicial Despotism: How the International Community Failed to Build a Constitutional Court in Kosovo." *IACL-AIDC Blog*, 10 April 2019. https://blog-iacl-aidc.org/2019-posts/2019/4/10/internationalized-constitutionality-and-the-rise-of-judicial-despotism-how-the-international-community-failed-to-build-a-constitutional-court-in-kosovo.

40 Art. 34, 6a.

majority, is definitely more supportive of a consensus-oriented, integrative culture of decision-making than the focus on outcome which has its roots in the *seriatim* tradition and which common-law jurisdictions have preserved, so far, however much they may otherwise have moved towards more collegiality. A majority for the reasons of a judgment will not always come naturally. The requirement that such a majority be produced therefore implies a necessity to converge, and to use appropriate procedures for that purpose, which is absent where no such majority is required. This is probably the reason why so many moves towards collegial decision-making in the history of common law jurisdictions have remained episodic.

The main reason why no attention is usually paid to the outlined fundamental difference between common law and continental European judicial decision-making traditions is simply unawareness of its existence. I have met even constitutional court judges who did not know this difference existed, or who thought that wherever separate opinions are permitted, this implies that there are no limits to concurrent opinions (i.e. who were unaware that in the European continental tradition, majoritarian support for the reasons of a judgment remains necessary even where the strict *per curiam* rule that the court speaks with one voice only has been abandoned). A related misconception is the widespread general idea – often used as an argument against allowing separate opinions – that concurrent opinions, or at least too many of them, jeopardise the clarity of decisions. This is an exclusive problem of those jurisdictions, typically common law jurisdictions, which do not require that a court´s decision have reasons which are supported by an absolute majority. For courts in the *per curiam* tradition, the problem does not exist because in that tradition the majority requirement with respect to reasons makes sure that concurrences can never produce any doubt as to what *the court´s* reasons are. Courts in this tradition have an entirely different problem - their problem is to secure the required majority for the reasons of their decisions, and that is what tends to make them deliberative, consensus-oriented and integrative.

2.2. Other relevant factors

Many other factors are relevant to whether or not constitutional courts manage to work as integrators rather than polarisers. Judicial independence and integrity, which both depend on complex sets of institutional arrangements, must be mentioned in the first place. Where they are absent, deliberating and seeking consensus on a fair interpretation of

constitutional law will fail their purpose, due to motives at work which are, in the short run, stronger than arguments, reason, and duty. Appointment rules preventing block-building and one-sided dominances are also crucial. A host of other frameworks can foster or impede open, deliberative, collegial decision-making. Caseload and filtering mechanisms, issues of confidentiality and transparency, issues concerning equal status of or inequalities among the judges (including issues of presidential powers and powers of individual associate judges in their capacity as *juge d´instruction* or reporting judge), methods of case assignment, professional support, conferencing premises, conferencing rules, degrees of formalism in voting, and so forth. The German Federal Constitutional Court operates under favourable conditions in all of these respects. If it has managed to play an integrative part, so far, this is not due to some miracle blessing the justices with all the necessary prerequisites, including a character that makes them willing to serve rather than shine individually. It is, like everything in society that works well, due to appropriate institutional frameworks and the internalised ethics that are brought about and stabilised by such frameworks.

Part III:
Control of Elections and Electoral Laws

Judicial Review of Elections: The Egyptian Experience

Yussef Auf

Abstract
In line with adopting the Egyptian Constitution of 1923, which paved the way for the first-ever pluralistic elections in the history of modern Egypt, the judicial bodies have been a major player in deciding not only on the election's results and validity, but also on the electoral laws in terms of its constitutionality and legitimacy. While in Egypt the administrative courts decide in queries about the election's procedures, the Court of Cassation, Egypt's highest court in the general judiciary, decides on the validity of the MP's memberships itself. Over time, the Supreme Constitutional Court has frequently been interacting with the electoral issues by deciding on the legitimacy and constitutionality of the electoral laws and regulations. This has been done by judicial review prior to the issuance of the law, and by judicial review after the law's promulgation. This chapter discusses and illustrates the role that has been played over decades by various courts concerned with electoral disputes in Egypt.

1. Introduction

In 1923, Egypt witnessed the issuance of its first modern, comprehensive, and progressive constitution. The latter established two chambers of parliament, which was a novelty, and pushed toward the first multi-party parliamentary elections. Since then, Egypt has been conducting public elections on a semi-regular basis, during the monarchy era, and after the 1952 military action, with some major differences in terms of the election's nature between the two eras. Taking this into account, the electoral history of modern Egypt extends for around a century, and judicial bodies played an important role in relation to elections, i.e. parliamentary elections, presidential elections, local municipalities elections, and public referenda.

The judicial bodies in the Egyptian judicial establishment are: a) the Supreme Constitutional Court (SCC), established in 1969, which adjudicates on the constitutionality of laws and regulations; b) the Administrative Judiciary, established in 1945, with its jurisdiction over administrative

decisions; and finally, c) the Court of Cassation, the highest court in the General Judiciary body established in 1931, authorized to decide on the validity of the MP's memberships with regard to elections.

This chapter illustrates the role that has been played by various courts and judicial bodies in Egypt interacting with elections, with reference to election laws or disputes, starting with the Supreme Constitutional Court which adjudicates on the constitutionality of the electoral laws, unlike the other two judicial bodies, namely the Court of Cassation, and the administrative courts, which adjudicate on the electoral disputes.

2. *Electoral laws: The Supreme Constitutional Court*

As mentioned earlier, the SCC was established in the late sixties, with its competencies prescribed for in consecutive constitutions and Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court of Egypt (SCC Law). Since the 1971 Constitution, the major competency of the Egyptian SCC is to decide on the constitutionality of laws and regulations.

Article 192 of the 2014 Constitution provides:

> "*The Supreme Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes related to the affairs of its members, in disputes between judicial bodies and entities that have a judicial mandate, in disputes pertaining to the implementation of the two final contradictory rulings, one of which is issued by any judicial body or an agency with a judicial mandate and the other issued by another body, and in disputes regarding implementation of its rulings and decisions.*"

Additionally, Law 48 of 1979 of the SCC, Article 25, provides for:

> *"The Supreme Constitutional Court shall have exclusive jurisdiction over the following: First: judicial review over the constitutionality of laws and regulations".*

Thereunder, the SCC practices its role regarding elections by deciding on the constitutionality of electoral laws that govern elections. Hence, the only way that the SCC has influenced electoral activities is through this constitutionality jurisdiction. In other words, the SCC has no competency over deciding whether the electoral process is legitimate or not, or to approve the results of an election. Based on the legal framework that governs the SCC's jurisdiction, the latter used to practice exclusively the

post-enactment (concrete) judicial review until 2005, where the Court considered, for the first time, a pre-enactment judicial review for the then 2005 Presidential Elections Bill.

2.1. The SCC post-enactment judicial review for electoral laws

Before presenting some examples of constitutional disputes, regarding election laws, it is worth explaining that the constitutional cases reach the SCC through two main channels. One of the channels stated in the SCC Law in Article 29, is referral by an ordinary court, including all courts of General Judiciary (civil, criminal, labor, etc. circuits) and Administrative Judiciary. This referral mechanism opens the door for the ordinary court's judges, in the course of a judicial proceeding, to raise issues of constitutionality and refer it to the Constitutional Court if they (as a court) believe that the legislative text to be applied in the ongoing case violates the Constitution. The second mechanism is through a challenge by a dispute's party (whether the plaintiff or the defendant) in a specific case considered by an ordinary court as in the first mechanism, the challenging party believes that the legislative text that the court will/may apply is in contrary with a provision or more in the Constitution.

The SCC practices its competence of judicial review exclusively, i.e. the SCC is the only court in the Egyptian judicial system that is tasked to decide on the constitutionality of laws and regulations. This explains why a constitutional question must be referred, in all cases, to the SCC. On the other hand, access to the SCC is only permitted through a specific ordinary law suit, considered by an ordinary court, and through a decision by these ordinary courts accepting the parties' request to appeal to the SCC for a constitutional challenge.

Thus, the SCC's decision over the constitutionality of electoral laws comes on the occasion of initial litigation brought before an administrative court (or the Supreme Administrative Court). The latter Court's task is to decide on the legitimacy of one or more of the administrative decisions (for instance, decisions by the high committee for parliamentary elections). The court refers the case to the SCC when a constitutional challenge has been raised.

2.1.1. The constitutionality of laws on parliament

In the mid-eighties, the SCC had its first landmark decision issued in this regard. The Court ruled that Articles 5, 6/1 and 17/1 of the People's Assembly Law 38 of 1972, as amended by Law No. 114 of 1983, were unconstitutional.[1] The decision came after two and half years from filing the lawsuit before the SCC on December 12, 1984, when the People Assembly (PA, the then lower parliament chamber) was already elected in mid-1984. The PA election was based on the PA Law, which stated that all Parliament seats to be elected through political parties' lists only. Hence, the law deprived the individuals (non-partisans) of their right to run for parliamentary elections. That was the reasoning on which the SCC grounded its above decision, considering that the law is unconstitutional.

The Court said that as the aforementioned provisions limit the candidacy rights to those who belong to political parties,

> *"and thus deprive others of that right without regard to its nature and its requirements. The right of candidacy is one of the public rights guaranteed by the Constitution in Article 62, and thus depriving a group of this right entails a waste of its origin and violates the principles of equality of opportunity and equality before the law and thus constitutes a violation of Articles 8, 40, 62 of the* [1971] *Constitution".*[2]

According to Article 48 of the SCC Law 48 of 1979, all Court decisions are final and cannot be challenged. Moreover, Article 49 states: "The judgments of the Supreme Constitutional Court in constitutional cases, and its interpretation decisions are binding on all State authorities and erga omnes."

Considering the legal effect of the SCC decisions, the Court's decision in 1987 that deemed some of the PA's law articles as unconstitutional has led to the dissolution of the 1984 People's Assembly by means of a presidential decree to implement the SCC decision. The five-year term would have elapsed by mid-1989.

A second decision by the SCC in the same direction followed in mid-1990.[3] The challenge was directed toward the People's Assembly Law 38 of 1972 but with regard to its amendments by Law 188 of 1986. These

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1 See *Case 131 for the 6th Judicial Year, Supreme Constitutional Court*, session May 16, 1987.

2 http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-131-Y6.html.

3 See *Case 37 for the 9th Judicial Year, Supreme Constitutional Court*, session May 19, 1990.

amendments were made to ease the criticism triggered by the previous amendments (Law 114 of 1983, on which the 1984 parliamentary elections were held, and was later deemed unconstitutional by the SCC), and to amend the electoral system. After dissolving the 1984 elected People's Assembly in May 1987, a new election was held later in the same year under Law 188 of 1986. The electoral system introduced by virtue of that law was distributing the seats allocated for each constituency as one seat for individual candidates, and the remaining seats were reserved for the party lists.

The SCC, when reviewing the constitutionality of the election mode resulting from the amendments by Law 188 of 1986, found that the reading of Article 5 bis

> "*indicates the legislator's intention to allocate one seat, for the individual electoral system in each electoral district, to be contested between the individual candidates and members of political parties. On the other hand, allocated several seats in each electoral district exclusively for party lists candidates… explicitly constitutes a violation of the right of "non-partisan" individual candidates to run for elections on the basis of equality and equal opportunity with other partisan candidates, a violation which led to discrimination between the two categories of candidates and is in contrary with Articles 8, 40 and 62 of the* [1971] *Constitution.*"[4]

The SCC thus considered Article 5 bis of the law unconstitutional. In this decision, the SCC explicitly addressed the consequence of its decision – regarding the legitimacy of the electoral process of the PA itself by stating that:

"*Whereas the election of the People Assembly was based on an 'unconstitutional' law, as found by the Court, hence, the People Assembly formation itself is void since its election.*"

For the second time, the PA was dissolved in October 1990 to implement the binding SCC decision.

The aforementioned decisions by the SCC in 1987 and 1990, had led the government, the *de-facto* legislative authority, to recede from adopting a list electoral system that allocates a big portion of the seats of the People's Assembly seats to partisan lists. The PA law was then amended to enforce an absolute individual electoral system which governed the five parliamentary elections that took place from 1990 to 2010. In this regard, it is obvious how much impact the SCC's decisions have made on the rules

4 http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-37-Y9.html.

of the electoral system that has been governing parliamentary elections in Egypt for decades.

While there is no evidence that these decisions by the SCC were politically motivated – considering the solid reasoning of the Court decisions – however, these decisions reveal the failure of the authorities in Egypt for years, to draft a convenient and balanced electoral system in line with the Constitution, and make all the negative, intended and unintended consequences that had been caused by dissolution of parliament by the Court's decision more obvious. Worth mentioning here is that the two parliaments elected in 1984 and 1987, and dissolved in 1987 and 1990 consecutively, included significant opposition (specially Al-Wafd party and the Muslim Brotherhood). With the individual electoral system in place since 1990, the successive parliaments had seen almost no opposition (except in the People's Assembly of 2000 and the one of 2005, which is considered due to the judicial oversight throughout these elections).

Adopting the individual electoral system for the parliamentary elections in Egypt is, in fact, considered to be a major obstacle to the strengthening of political life, the support of political parties and the spread of pluralism. Successive governments in Egypt have been relying on the individual system to control elections, exclude opposition and eventually marginalize the role of parliament.

The third and latest decision by the SCC that caused the dissolution of the parliament was in June 2012. After the January 2011 uprising, the longstanding demand by political forces in Egypt to apply a "list electoral system" had been met. The *de-facto* authority governing the country at that time, the Supreme Council for Armed Forces (SCAF), amended the People Assembly Law 38 of 1972 (by Laws 108 of 2011, 120 of 2011 and 123 of 2011) that paved the way for "closed partisan lists" to run for two-thirds of the parliamentary seats, and the remaining one-third reserved for the individual system, whether the individuals are independent or partisan.

The SCC ruled that the amendments of the People Assembly Law introduced in 2011 are unconstitutional.[5] The reasoning for the unconstitutionality of the amendments introduced in 2011 did not differ much from those of the 1987 and 1990 decisions. Moreover, the Court evoked its 1990 precedent stating that:

5 See *Case 20 for the 34th Judicial Year, Supreme Constitutional Court*, session June 14, 2012.

"Whereas the election of the people Assembly [late 2011/2012] *was based on the 'unconstitutional' articles, as found by the Court, hence, the People Assembly's entire formation is void since its election."*

It would not be an exaggeration to state that the SCC's June 2012 decision was a huge turning point in the transitional period of the post-January 2011 uprising.[6] The decision came less than five months after the first PA meeting in late January 2012, and only two days before the run-off round of presidential elections on June 16 and 17, 2012. A major criticism to the SCC's 2012 decision was directed to the timing of its issuance, considering that the SCC took around two and half years to issue each of the two previous judgments which caused the dissolution of the People's Assembly in 1987 and 1990, while it only took a few months to decide on the 2012 case. Worth noting here is that the 2012 People's Assembly was dominated by Islamist parties, 43% for the Muslim Brotherhood, and 25% for the Salafist Al-Nour Party. Many doubts have been raised, then, regarding the decision and its timing, especially by the "Islamist Parties", and seen as a crucial factor for the political polarization the country had been through, and which led, eventually, to the July 2013 events.[7]

No evidence is needed to prove the deep impact of dissolving a parliament as consequence of a court's decision, and specifically in a semi-presidential system as in Egypt. In view of this, some political and academic voices have been calling for fixing this distorted status and proposed by proposing two solutions. The first was to change the SCC competency, by amending its law, in order to limit the SCC to pre-enactment review of election laws and to avert any post-enactment judicial review of these. This mechanism would guarantee that all election laws are promulgated after examining its constitutionality; hence, there would no longer be a chance to dissolve any parliament as the SCC has no competency to re-examine the election laws after being enforced. This pre-enactment mechanism has actually happened at some instances since 2005, which will be discussed later in this chapter. The second possible solution (assuming that the SCC practiced its regular post-enactment judicial review competence and ruled that election law is unconstitutional) was to limit the SCC ruling effects to delegitimize the law itself and declaring its unconstitutional articles as void, without extending these effects to dissolve the People's Assembly which should continue its constitutional term. A close compara-

6 http://www.ifes.org/sites/default/files/egypt_scc_decisions_august9.pdf: 4 and 5.

7 https://www.theguardian.com/world/2012/jun/14/egypt-parliament-dissolved-supreme-court.

tive example of this suggested mechanism comes from the German Federal Constitutional Court (FCC). The German FCC ruled that, "Federal Voting Machine Ordinance of September 3, 1975 [amended on 20 April 1999] is not compatible with Article 38 in conjunction with Article 20.1 and 20.2 of the *Grundgesetz* (Basic Law) insofar as it does not ensure monitoring that complies with the constitutional principle of the public nature of elections".

The German FCC based its verdict on:

> "*The principle of the public nature of elections emerging from Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception.*" and "*When electronic voting machines are deployed, it must be possible for the citizen to check the essential steps in the election act and in the ascertainment of the results reliably and without special expert knowledge*"[8].

In this latter case, although the German FCC ruled that an election-related law is unconstitutional, it did not deem the elections of the 16th German Bundestag as void.

2.1.2. Judicial administration for elections

Since 1952, parliamentary elections in Egypt have been described by critics as an unfair process that lacks integrity and is controlled by security apparatuses with widespread fraud. The situation has changed to a large extent during the 2000 parliamentary elections where the Judiciary supervised the election by virtue of a Supreme Constitutional Court decision. Article 88/2 of the 1971 Constitution (before its amendment in 2007) provides for: "The rules on the organization of the ballot shall be determined by law, while the ballot shall be conducted under the supervision of members of a judicial body."

A constitutional challenge to the Law on Regulating the Exercise of Political Rights 73 of 1956 (arts. 24, 34 and 35) reached the Supreme Constitutional Court on January 21, 1991.[9] In this constitutional case, the Court ruled that these articles are unconstitutional as the regulation

8 Bundesverfassungsgericht, Judgment of the Second Senate of March 3, 2009 - 2 BvC 3/07 - paras. (1-166), http://www.bverfg.de/e/cs20090303_2bvc000307en.html.

9 http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-11-Y13.html.

"allows the appointment of the presidents of the electoral sub-committees from those who are not members of the judicial bodies [judges]." The SCC in its reasoning stated that the right interpretation of Article 88 of the Constitution necessitates that each ballot box should be directly supervised by a judicial body member. With this decision, issued on July 8, 2000, the principle of "a judge for each ballot box" was established.

On the basis of the binding nature of the SCC verdicts, the then President of the Republic amended the law on regulating the exercise of political rights allowing "full" judicial supervision for parliamentary elections. Although the law and the political regime, in practice, did not allow the judiciary to manage the electoral process fully and completely, the degree of integrity and the level of public trust had been raised to unprecedented levels, considering that the voters witnessed a judge controlling every ballot box, vote counting, and officially announcing the results on site.

The first election to be held under the new judicial supervision was a few months later in October 2000. The differences between this election and the previous ones (of 1990 and 1995) may be can be noted through the official results, which reflected the return of the Egyptian opposition back to the National Assembly including 17 seats to the Muslim Brotherhood (increasing to 88 seats in 2005 elections).[10] Another indication to the extent of change that the judicial management of polls has caused is the turnout percentage. While was recorded consecutively 46% and 50% through the 1990 and 1995 elections (managed by the security apparatus), the percentage was recorded 28% and 25% in the 2000 and 2005 elections (managed by the judiciary). The discrepancy between these percentages may be seen as an indication of the level of fraud practiced by the government in the elections during the nineties, reflecting unreal turnout numbers, whereas in the 2000's elections the numbers may be considered to more accurately reflect the real public opinion[11].

As the government did not well receive the developments that the judicial supervision had caused, with regard to elections generally (with 2000 and 2005 parliamentary elections, and 2005 presidential elections in mind), the government took an unprogressive step by amending 34 Articles of the then 1971 Constitution, including Article 88 annulling judicial supervision for elections. This step gave its fruits in late 2010 parliamentary

10 Political participation in 2005 parliamentary elections. Samer Sulieman: 91 and 92. http://www.mosharka.org/index.php?newsid=172.

11 Political participation in 2005 parliamentary elections. Samer Sulieman: 31. http://www.mosharka.org/index.php?newsid=172.

elections where the government completely controlled this election and totally excluded all opposition parties and movements from reaching the seats in the People's Assembly. No wonder this election, and the public frustration it had caused on a wide scale, is considered a factor, among others, that triggered the January 25th revolution, a few weeks later.

As expected, and as a result of the demands of the political forces after the 2011 uprising, the judicial management for elections was restored (by every constitutional arrangement post-January 2011) and all electoral processes since March 2011 public referendum have been fully supervised by the judiciary.

2.1.3. Dual nationality

Another intervention by the SCC in the electoral processes relates to the candidacy conditions regarding parliament. Article 8.1 of the House of Representatives Law 46 of 2014 (HoR Law) conditioned holding the Egyptian nationality *only*. This provision, along with some others, was challenged constitutionally before the SCC which ruled that the restricted condition by the HoR Law is unconstitutional. The Court decided on the basis of the following reason:

> "*Whereas the provision of Article 102.2 of the* [2014] *Constitution has conclusively prescribed for the candidacy conditions for the House of Representatives, without ambiguity, that 'A candidate for the membership of the House must be an Egyptian citizen, enjoying civil and political rights." Thus, the constitutional legislator has set out the main and fundamental conditions so that the ordinary legislator may not derogate from it either by restricting or detracting it which may lead to emptying the constitutional texts of its content. These* [candidacy] *conditions included holding Egyptian nationality without any additional restrictions.*"

Hence, the SCC considered that the HoR Law, as it limited the candidacy to those holding the Egyptian nationality only, is restricting the candidacy conditions by depriving Egyptian nationals who additionally hold other nationalities from running for elections. The SCC thus opens the door to dual-nationals to run.[12]

12 See *Case 24 for the 37th Judicial Year, Supreme Constitutional Court*, session March 7, 2015.

2.2. The Supreme Constitutional Court's pre-enactment judicial review for electoral laws

As stated earlier, the SCC's judicial review, for laws and regulations, has been always practiced after promulgations of laws and on the occasion of questions resulting from its implementation, in a specific judicial dispute. However, the SCC was tasked with conducting a pre-enactment judicial review in 2005 by a constitutional amendment. It was a presidential initiative by the then President Mubarak to amend Article 76 of the 1971 Constitution to allow pre-enactment judicial review of the electoral law for the first-ever pluralistic presidential elections. The amendment was approved by a public referendum. The newly amended Article 76.15 and 16 provides for:

> "*The President shall submit the draft law regulating the presidential election to the Supreme Constitutional Court following approval by the People's Assembly and before promulgation, in order to determine compliance with the Constitution.*
> *The Court shall deliver its ruling on this matter within fifteen days from the President's submission. Should the court decide that one or more provisions of the draft law are unconstitutional; the President shall return it to the People's Assembly in order to bring the law into conformity with the ruling. In all cases, the Court's ruling shall be binding on all parties and all State authorities. The law shall be published in the Official Gazette within three days from the date of delivery*".

Based on the above additional competency, the SCC scrutinized the Draft Law of the Presidential Elections 147 of 2005, before its promulgation, and issued its decision, on May 26, 2005, that five Articles of the draft law are unconstitutional[13]. The legislature changed the unconstitutional articles and the law was then promulgated in line with the stipulated constitution prerequisites.

Assigning the SCC with this pre-enactment review for the presidential elections draft law was to guarantee that the law of the presidential elections – on which the incumbent of the highest office in the country is elected – is constitutional, and thus to exclude the possibility of deeming the presidential elections void, following a SCC verdict that the law is unconstitutional, which would lead to a constitutional crisis.

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13 http://hrlibrary.umn.edu/arabic/Egypt-SCC-SC/Egypt-SCC-Decision.html.

3. *Electoral disputes*

As mentioned earlier in the introduction, the SCC decides on the constitutionality of the electoral laws, whether before its issuance or after. The other side of the electoral issues in terms of relationship with the judiciary is the electoral disputes. Based on law and practice, these disputes can be classified into two categories: the first category includes the disputes over the legitimacy of the administrative decisions which organize the electoral processes; the second category of disputes concerns the validity of the parliamentary memberships.

In this regard, the Egyptian Court of Cassation stated that:

> "*The electoral disputes preceding the voting, votes counting and results announcing – which are the prerogative of the Court of Cassation – are according to their proper legal characterization, administrative disputes that shall be the Council of State's competent and not any other judicial body.*"[14]

3.1. *The administrative judiciary (State Council)*

The administrative judiciary or the State Council has played a crucial role in electoral disputes since its establishment in the mid-forties. The State Council Courts' major competence is to review the administrative decisions' legitimacy; if proved illegitimate, it would abolish it.

The illegitimacy of the administrative decisions, if any, is based on some administrative theories and judicial precedents that have been developed over the years by the State Council Courts. Based on that "administrative decisions reviewing competence" the State Council Courts have issued numerous verdicts over the years invalidating electoral-related decisions issued by the election-management authority.

Following the same approach adopted by the Court of Cassation regarding defining its jurisdiction scope regarding elections, the Supreme Administrative Court (SAC), the highest court in the State Council body, sets the limits of its jurisdiction by stating:

> "*The administrative courts are competent to hear electoral appeals relating to the first stage of the elections which is the stage prior to the elections* [election day] *including, for example, adjudicating on the fulfillment of the*

14 See *Case 75 for the 85th Judicial Year, Court of Cassation, Civil Circuits*, session June 27, 2016.

> *candidacy conditions. The second stage, which starts with the announcement of results, is subject to the competence of the People's Assembly* [which has to refer to the Court of Cassation, in this case] *including, for instance, challenging the electoral process itself, or the appeals affecting the validity of the membership.*"[15]

Among the many examples of electoral disputes that the administrative courts have dealt with, is the one that challenged the "official call for elections" decree. Before establishing the National Elections Commission in 2014, the legal tradition has been that the call for elections is issued by the President of the Republic. Based on the "Acts of Sovereignty" theory, the State Council Courts had been refusing to extend their jurisdiction to review such decrees, (to examine their legitimacy) including the call for elections decree.[16] However, the Administrative Judiciary Court issued a landmark decision in 2013 which took a different approach. In February 2013, the then President of the Republic, Muhammad Morsi, issued the Presidential Decree 134 of 2013 calling for parliamentary elections to be held later in April 2013. Upon a challenge filed before the Administrative Judiciary Court, the Court deemed the President of the Republic's decree as void, and, hence, abolished it. The Administrative Court reasoned its decision, in refusing to consider the President of the Republic's decree as an act of sovereignty, by stating that:

> "*The legislature did not set a criterion, or define, the acts of sovereignty, rather, the judiciary itself has the mandate to define the scope of these acts as it should be interpreted as an exception, not the rule that every act (administrative decision) should be subjected to the judicial review. Additionally, the theory of sovereign acts cannot be applied if the administrative decision is in blatant contradiction to the constitutional provisions*."[17]

Worth noting, finally, that the Administrative Court's decision in question was affirmed by a Supreme Administrative Court's decision.[18] The parliamentary elections scheduled to be held in mid-April 2013 were completely cancelled, by virtue of this judicial decision, and Egypt did not see a new

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15 See *Case 25869 for the 5th Judicial Year, Supreme Administrative Court*, session July 5, 2008.

16 See *Case 3608 for the 38th Judicial Year, Administrative Judiciary Court*, session May 8, 1984.

17 See *Case 28560 for the 67th Judicial Year, Administrative Judiciary Court*, session February 23, 2013.

18 See *Case 13846 for the 59th Judicial Year, Supreme Administrative Court*, session April 21, 2013.

parliament until late 2015, after the dissolved 2012 People's Assembly, by a Supreme Constitutional Court rule.

3.2. The Court of Cassation

As stated previously, the Court of Cassation is the highest court in the general judiciary body. Since the 1923 Constitution, the tradition has been to assign the courts of the general judiciary (High Appellate Court and then, since 1931, the Court of Cassation) with the power to decide over the validity of parliamentary membership. This may have been because at the time of issuing the 1923 Constitution – which opens the door for the first-ever pluralistic parliamentary elections – the administrative and constitutional judiciaries were not established.

Before explaining the binding force of the Court of Cassation's decisions, the Court's precedents defined its competency to decide over the validity of parliamentary memberships stating that:

> "*The electoral challenge* [over the validity of parliamentary membership] *are the disputes over the results of the elections and the extent to which they reflect the genuine will of the electorate and the integrity of the electoral process against any fundamental flaw that affects the integrity or legitimacy of the procedures of voting, counting and declaring the results.*"[19]

The nature of the Court of Cassation's reports or decisions, regarding the validity of the parliamentary membership, has been a controversial issue for decades, with two main tendencies[20]. The first trend describes the Court's decision as binding, and hence, the People's Assembly should abide by that decision if the court found that the challenged membership is void. On the other hand, some believe that the Court of Cassation's decisions/reports only have a consultative nature, and the final decision as to deem a membership invalid is in the hands of the discretionary power of the parliament.

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19 See *Case 3249 for the 58th Judicial Year, Court of Cassation, Civil Circuits*, session February 28, 1990.

20 Study by Justice Ahmad Mekki, https://www.youm7.com/story/2009/5/14/-مجلـــس-الشعب-«عبدالمأمور»-وليس-«سيد-قراره»/98824

The 1971 Constitution in Article 93 addressed this competency of the Court of Cassation:

> *"The People's Assembly shall be the only authority competent to decide upon the valid election of its members.*
> *The Court of Cassation shall be competent to investigate contestations of an election presented to the Assembly, upon referral by the President of the Assembly.*
> *The contestation shall be referred to the Court of Cassation within fifteen days from the date of its submission to the Assembly, and the investigation shall be completed within ninety days from the date on which the contestation was referred to the Court of Cassation.*
> *The result of the investigation and the conclusions reached by the Court shall be submitted to the Assembly for a decision upon the validity of the contestation within sixty days from the date of submission of the results of the investigation.*
> *The membership will not be deemed invalid except by a decision taken by a majority of two-thirds of the Assembly members".*

The Article paved the way for a four-decades-long controversy over the nature of the Court of Cassation's reports as it granted the Court of Cassation the authority to investigate the electoral process that may lead to deeming the election of a specific district as void; however, the final authority to decide on the validity of the membership lies in the hands of the People's Assembly itself. In practice, when the Court of Cassation reported electoral violations in specific electoral districts, the People's Assembly did not, in the vast majority of cases, consider the Court of Cassation reports, which lead to waves of criticism of the People's Assembly's policy over years because of overriding the Court's reports, even though the latter is not constitutionally binding. The People's Assembly Speaker in the late eighties had initiated a famous quote on the subject issue stating that: "the Assembly is the master of its decisions" or "Al-Majlis Sayyed Kararoh".

After the 2011 uprising, the constitutional declaration of March 2011, in Article 40, has adopted what many scholars and politicians had been calling for, to authorize the Court of Cassation with a decisive and binding authority over the validity of parliamentary membership. Later in 2011, the SCAF had issued Law 24 of 2012 of the challenge procedures before the Court of Cassation on the validity of membership of the People's Assembly. The current 2014 Constitution then followed the same approach and prescribed in Article 107, which states that:

> *"The Court of Cassation has jurisdiction over the validity of membership of members of the House of Representatives. Challenges shall be submitted to the Court within a period not exceeding 30 days from the date on which the final election results are announced. A verdict must be passed within 60 days from the date on which the challenge is filed.*
> *In the event a membership is deemed invalid, it becomes void from the date on which the verdict is reported to the House."*

The first post-2014 Constitution parliamentary elections in Egypt took place in late 2015, where many challenges were submitted to the Court of Cassation appealing for invalidating some parliamentarian's memberships. The most controversial electoral dispute was the challenge by Dr. Amr Al-Shobaky against his opponent in the Al-Dokki district. The Court of Cassation ruled for Al-Shobaky by invalidating the High Committee for Parliamentary Elections decision which announced his opponent's electoral victory and affirmed the validity of Al-Shobaky's membership.[21] However, and despite the binding nature of the Court of Cassation's decision, Amr Al-Shobaky has not been able to enter into parliament for around two years, while his ex-opponent, with his void membership, still represents the Dokki district in the parliament. The responsibility for such overriding of the Court of Cassation's decision is on the House of Representative and his speaker's side.[22]

4. National Elections Commission

A long-standing demand by the political parties and forces in Egypt had been to establish an independent High Commission/Committee for managing all electoral processes. Before the current 2014 Constitution, the case had been to establish an electoral committee for each election. Even though each committee has the same name, as the High Committee for Parliamentary Elections or the Presidential Elections Committee, the organigram and management staff was different from one election to another. This setup did not help in maintaining the institutional memory of various election committees. Examples of these various committees are those established by Law 174 of 2005 instituting presidential elections

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21 See *Case 75 for the 85th Judicial Year, Court of Cassation, Civil Circuits*, session June 27, 2016.

22 http://english.ahram.org.eg/NewsContent/1/64/248934/Egypt/Politics-/Egypt-parliament-delays-seating-of-MPelect-Amr-ElS.aspx.

committee that managed the 2005 elections with various amendments to the law until its replacement with the current Law 22 of 2014. The same applies to the Parliamentary Elections High Committee.

The current Constitution of 2014, in Articles 208, 209 and 210, established the National Elections Commission (NEC) and mandated it with managing all electoral processes to be held after its establishment. Article 208 provides for:

> "*The National Elections Commission is exclusively responsible for managing referenda and presidential, parliamentary and local elections, which includes the preparation and update of a database of voters, proposal and division of constituencies, setting regulations for and overseeing electoral campaigns, funding, electoral expenditure declaration thereof, and managing the procedures for out-of-country voting by expatriate Egyptians, and other procedures, up to the announcements of results".*

Based on the above constitutional text, the HoR issued Law 178 of 2017 for the National Elections Commission that abolished the High Committee for Parliamentary Elections (organized in HoR law) and the Presidential Elections Committee (as in the Presidential Elections law).

The relationship between the judiciary and the NEC can be tracked in the following three issues:

1. The NEC members are all judges or members of judicial bodies, Article 209 of the Constitution organized the NEC membership: "*The National Elections Commission is administered by a board made up of 10 members selected equally from among the vice-presidents of the Court of Cassation, the presidents of the Courts of Appeal, the vice-president of the State Council, the State Affairs and Administrative Prosecution, who are to be selected by the Supreme Judicial Council and special councils of the aforementioned judicial bodies depending on the circumstances, provided that they are not members in them. They are appointed by a decree from the President of the Republic. They are selected to exclusively work at the Commission for one term of at least six years. The Commission's presidency belongs to its most senior member from the Court of Cassation. Half of the members of the Council are replaced every three years. The Commission may refer to public figures, specialists, and those deemed to have relevant expertise in the field of elections. They do not have the right to vote.*"
2. The affiliated members of the NEC, who are assigned to run the general and sub-committees during the election days are members of judicial bodies. This constitutes a continuation of the policy adopted in 2000 as explained earlier in this chapter. However, Article 210 states that:

"*Voting and counting of votes in referenda and elections run by the Commission is administered by its affiliated members under the overall supervision of the Board. It may use the help of members of judicial bodies. The voting and counting of votes in elections and referenda in the 10 years following the date on which this Constitution comes to effect are to be overseen by members of judicial bodies and entities in the manner set out in the law*." This Article opens the door to abolish judicial supervision of elections starting from the year 2024, as it obliges the NEC to assign the judicial bodies members with elections overseeing only for 10 years starting in 2014.

3. Finally, Article 2103 of the Constitution authorized the Supreme Administrative Court (SAC) to decide upon the challenges against the NEC decisions "*pertaining to referenda, presidential and parliamentary elections, and their results. Challenges against local elections are to be filed before the Administrative Court. Dates to file challenges against these decisions are specified by law, provided that challenges are finally adjudicated within ten days from the date of filing them.*"

4. Concluding remarks

Having illustrated and discussed the role that has been played over decades by various courts concerned with electoral disputes in Egypt, a trend to increasing and definite judicial control of elections can be noticed, the final word of Supreme Administrative Court on decisions of the National Election Commission's decisions being just on example. This trend is supported by the Supreme Constitutional Court's jurisdiction over the past decade, who plays a decisive role in it, as has been exemplified in this chapter.

The Extent of the Authority of the Constitutional Court of Kuwait to Annul an Elected Parliament: The Cases of the 2012 Parliaments

Fawaz Almutairi

Abstract
The Kuwaiti Constitutional Court annulled two elected parliaments in the same year. The court annulled the National Assembly that was elected in February 2012 after four months of its election[1], and the National Assembly that was elected in December 2012 after six months of its election[2]. The two decisions had a major impact on the extent of the court's authority to nullify elected parliaments due to wrong governmental measures which have nothing to do with any parliamentary actions. The legal access to the Constitutional Court to examine the legitimacy of an elected parliament was through the exceptional authority granted to it to examine the electoral appeals. This chapter first discusses the extent of the Court's jurisdiction to examine electoral appeals and then its authority to annul an elected parliament.

The Constitutional Court has a number of competences - its inherent competence being to examine the constitutionality of laws and decrees. The control of election laws and the electoral process also fall under its jurisdiction, as is the case in several other countries of the region, for example Egypt. Here it may be considered as a normal Court where the electoral cases are appealed; whether concerning the division of constituencies or the voting mechanism. In some instances, the same court hears electoral appeals in terms of election invalidity, whether in relation to invalid legal procedures that vitiated the electoral process, or in relation to the inspection of practices during the electoral process, or in relation to arithmetic errors and erroneous announcement of results. Thus, through this appeal function and "detour" in cases, wherein the Constitutional Court examined the former Royal Decrees regarding the electoral process,

1 The election was held in February 2, 2012, and the court's decision was issued on June 20, 2012.
2 The second parliament in the year was elected in December 1, 2012, and the court's decision was issued on June 16, 2013.

the Court has had an enormous impact on the election and on the fate of the two parliaments elected in 2012, through an authority in examining electoral appeals that is questionable.

1. Introduction

In this study, we will examine the role of the Constitutional Court of Kuwait and its impact on the two elected parliaments which were nullified by the Court's authority in examining the electoral dispute, and the electoral process in terms of the constitutional and legal basis, which allows it to intervene. In this context, the formation of the Court and its jurisdiction will be discussed, as well as some constitutional provisions that have influenced the electoral process. By analyzing decisions of the Constitutional Court, the effects of the constitutional rulings will be explained.

The Constitutional Court is empowered with different competences, not by the Constitution but by the election law, and is entitled to hear a variety of actions. The Constitutional Court's inherent jurisdiction is to examine the constitutionality of laws, decree-laws and regulations[3]. The Constitutional Court also has jurisdiction to hear parliamentary electoral appeals. In this case, the Constitutional Court examines parliamentary electoral appeals as a court of merits as it decides upon these electoral appeals, whether for reasons based on calculation or for the declaration of results. In various cases, the Constitutional Court has examined the extent of constitutionality of a law or decree-law during the examination of electoral appeals, thus, it incorporated two jurisdictions at the same time.

The Constitutional Court has played and still plays an important role in the electoral process and the checks and balances among authorities as well. It is enough to know that the Court has invalidated the election of two consecutive parliaments and restored the previous Assemblies as if the elections never held.

2. The authority empowered to examine elections

There is a dispute over which authority is competent to examine electoral appeals. Due to the attachment to parliament, the legislator granted the parliament the basic authority to control the electoral process. This compe-

3 Hasanin 2013: 16; Ikram 2007.

tence of the National Assembly continued until the establishment of the Constitutional Court in 1973, up to then parliament was deciding on the validity of the election of its members. Following the enactment of the Constitutional Court Establishment Law, reviewing electoral appeals was transferred to the Constitutional Court.

2.1. The National Assembly's competence to examine the electoral disputes

The National Assembly was empowered with inherent competence to decide upon the validity of its members. Pursuant to Article 95, permissive jurisdiction may be granted to any judicial authority defined by law.

> "*The National Assembly shall determine the validity of the election of its members and the election shall not be invalidated save by majority of the members composing the Assembly. A law, however, may commit this jurisdiction to a judicial body*."

When the Constitutional Court Establishment Law has been issued, the jurisdiction of the Court has been identified, including hearing of electoral appeals, which is provided in Article 1 of the Law[4].

> "*A Constitutional Court shall be established which exclusively shall be competent to interpret constitutional texts and to adjudicate disputes concerning constitutionality of laws and decrees by laws, regulations and appeals of the election of members of the National Assembly or the validity of their membership. Constitutional Court ruling shall be binding for all courts and individuals.*"

The Constitutional Court Establishment Law entrusted such jurisdiction to the Constitutional Court[5] despite the fact, that the inherent jurisdiction in accordance with the Constitution, as provided in Article 95, is entrusted to the National Assembly; yet, the Rules of Procedure of the National Assembly issued on May 15, 1963 confirmed this jurisdiction.

> Article 5: "*Each elector may request annulment of the election that has held in his constituency and each candidate shall request that in the constituency in which he was a candidate. The request must include a statement of reasons for the appeal and be accompanied by supporting documents. The application shall be submitted to the General Secretariat of the National As-*

4 Al-Sulaili 2013: 110.
5 Hasanin 2013: 61; Ikram 2007.

sembly within fifteen days of election results announcement. If ratification cannot be done, for any reason, as provided for in the preceding paragraph, it may be made at the Secretariat of the National Assembly at the mentioned time."
Article 6: "*The Speaker shall transmit requests for election invalidation to the Committee on the Elimination of Electoral Appeals and shall inform the Assembly at the following first meeting.*"
Article 7: "*The Committee shall send a copy of the appeal to the member challenged in the validity of his membership to submit his statement of defense in writing or orally on the date fixed and may review the documents submitted. The contestant may also submit to the Committee written or oral statements explaining the reasons for his appeal.*"
Article 8: "*The Committee may decide to summon the contestant or member challenged in the validity of his membership or witnesses and may request any Government documents for perusal and to take whatever it deems appropriate and may delegate a subcommittee or more to conduct investigations. The summoning of witnesses shall be by a letter from the Speaker of the Assembly at the request of the Committee by registered mail or the register of the Assembly's correspondence.*"

Election Law 35 of 1962 also required:

Article 41: "*Each elector may request to invalidate the election held in his constituency, and each candidate is entitled to request that in the constituency in which he was a candidate. An application shall be submitted, with signature of elected domicile authenticated, to the General Secretariat of the National Assembly within 15 days of announcement of election results. Neither the voter nor the candidate may, in any case, challenge the request to invalidate the election that held in his constituency or in the constituency in which he was a candidate in if this appeal is grounded to settle a dispute over the electoral domicile*."
Article 42: "*The National Assembly if invalidated the election of one or more members and election results fully revealed, shall declare the victory of the one it believes that his\her election is valid.*"

The appellant of elections results shall submit the appeal to the Constitutional Court directly or through the National Assembly as stipulated in Article 5 of Constitutional Court Establishing Law.

"*Electoral appeals of the National Assembly shall be submitted directly to the Court or through the stated Council in accordance with the procedures prescribed in this regard.*"

In many electoral appeals submitted to the National Assembly, the appeal has been directed to the National Assembly. In other cases, the appeal has been submitted to the Constitutional Court; the court did not reject any appeal owing to the method of submission in accordance with the prescribed provisions.

There still remains a pressing question: is the National Assembly entitled to decide upon the validity of membership of members related to the electoral appeals without referral to the Constitutional Court?

In answering this question, we assume that the National Assembly still has the competence to examine the electoral appeals for several reasons:

1. The inherent jurisdiction to examine parliament membership validity is prescribed for the National Assembly and not for the Constitutional Court; this is what is laid down by provisions of both the Rules of Procedure of the National Assembly Law and the Election Law. Giving the Constitutional Court this exceptional jurisdiction does not prevent from what we consider inherent jurisdiction proceeding.
2. The preamble of the Law 14 of 1973 Constitutional Court Establishing Law, refers neither to the Rules of Procedure of the National Assembly Law 12 of 1963 nor the Election Law, thus excluding an explicit repeal of the National Assembly's competence. As long as the Court continues to accept appeals that have primarily been submitted to the National Assembly, even the idea of an implicit repeal of the provisions of the Rules of Procedure Law may be discarded. As long as submission of appeals in accordance with the Rules of Procedure Law is applicable, the jurisdiction of the National Assembly to adjudicate the validity of its members shall also remain effective unless expressly repealed.
3. Article 39 of Election Law stipulated for the following**:** "*The Chairman of the Committee shall hand over the committee's original boxes and envelope containing a photocopy of election minutes results to the General Secretariat of the National Assembly, to remain in office until all electoral appeals have been decided and returned to the Ministry of the Interior*". Committees' original boxes and an envelope containing a photocopy of election results' minutes shall be deposited to the General Secretariat of the Nation Assembly until deciding upon all electoral appeals. This matter is still applied, which confirms that the National Assembly is the responsible authority to decide upon the validity of membership. Therefore, it does not prevent the National Assembly from continuing to examine the results of the election, particularly in the case of challenges to the calculation of votes that do not require a court decision.

4. The Constitutional Court has a permissive jurisdiction to examine the electoral process based on the Constitutional Court Establishing Law, which decided on the power of the Court to examine the electoral appeals.

2.2. The basis of Constitutional Court's competence to examine the electoral appeals

The Constitutional Court shall have a range of powers that vary between the Constitution and the Constitutional Court Establishing Law.

In accordance with Article 173 of the Constitution, we find that the Court has the jurisdiction of:

> "*The law specifies the judicial body competent to deciding disputes related to the constitutionality of laws and regulations and determines its jurisdiction and procedure.*
> *The law ensures the right of both the Government and the interested parties to challenge the constitutionality of laws and regulations before the said body. If the said body decides that a law or a regulation is unconstitutional, it is considered null and void.*"

Article 95 granted a permissive jurisdiction for the same judicial body as mentioned in Article 173 of the Constitution[6], such jurisdiction may be given to another judicial body which the Law can limit thereof[7].

> Article 95 of the Constitution states:, "*The National Assembly shall determine the validity of the election of its members and the election shall not be invalidated save by majority of the members composing the Assembly. A law, however, may commit this jurisdiction to a judicial body*"

When the *Constitutional Court Establishment Law* was enacted, the jurisdiction of the Court was defined, which include hearing of electoral appeals in Article 1.

> "*A Constitutional Court shall be established which shall be competent to interpret constitutional texts and to adjudicate disputes concerning the constitutionality of laws and decrees by laws, regulations and appeals of the election of members of the National Assembly or the validity of their*

6 Al-Tabtabai 2005: 141.
7 Alfeeli 1997.

membership. Constitutional Court ruling shall be binding for all courts and individuals".

The said law made it a court in a full judicial nature, and entrusted it with the inherent jurisdiction prescribed by the Constitution, which is to settle disputes related to the constitutionality of laws, decree-laws, and regulations. Entrusting the Constitutional Court with permissive jurisdiction means granting it the authority to examining the appeals related to the election of the National Assembly or the validity of their membership. The Constitutional Court Establishment Law attributed a new competence to the Court which is the interpretation of constitutional provisions.

3. *Excluding Parliament from effecting the formation of the Constitutional Court*

The Constitutional Court Establishment Law has granted the government an ability to influence the selection of court members with a full exclusion of National Assembly's ability to affect. Article 2 of the Law provides for:

> "*The Constitutional Court shall be composed of five justices chosen by the Judicial Council by secret ballot. Two reserve members shall be elected, they shall be Kuwaiti and appointed by a decree. If any of the original or reserve members place become vacant, the Judicial Council shall, by secret ballot, the person who will replace him and shall be appointed by a decree. Court provisional and original members shall continue to function therein in addition to their original work in the Court of Cassation or the Court of Appeal*."

3.1. *The method of selecting the Constitutional Court members:*

Art. 2 of the Constitutional Court Establishment Law tasked the Supreme Judicial Council members with selecting the Constitutional Court justices through secret ballot. In practice, what has been implemented is that the members of the Supreme Judicial Council select themselves, based on the interpretation that they are also to be considered a segment from which to select from – an interpretation that may be questioned. How maintain the secrecy required by the legislator on the one hand when they select themselves on the other?

The Constitutional Court is composed of five Kuwaiti justices as well as two reserve justices so as to replace the absent original member within

normal circumstances. The court meeting shall not be valid unless all members attend; judgments are rendered by majority with the necessity to attach the minority opinion.

Worthy mentioning, since the date of its establishment until March 2015, the Constitutional Court had rejected to render judgments except unanimously. In one case, one of the justices argued that he differs in opinion with the Court's approach, however he was not allowed to disagree and judgment was sentenced unanimously, which forced him to resign from the court. In another case, a member of the Court held a separate opinion which forced the court, after the previous situation, to subject to the idea of attaching minority opinion, if any, as required by law. This was in *Constitutional Case 8 of 2014*, *Constitutional*, issued on 22 March 2015. The Constitutional Court Establishment Law also requires that the judgment shall be published in the Official Gazette within two weeks of promulgation.

3.2. The government's power to influence the selection of the Constitutional Court's members by decrees of appointment

Article 2 of the Constitutional Court Establishment Law requires that the Court shall be composed of five members. The members of the Supreme Judicial Council shall take the first step to select or nominate original members of the Constitutional Court and reserve members. Then the Minister of Justice shall report nominations to the Cabinet in preparation for the issuance of the decree of appointment based on the said nomination. The government thus has a direct impact on Court's formation through the use of its authority to issue decrees and its power over decrees issuance. It may thus oblige the Supreme Judicial Council to select another person in the event of reservation against a candidate.

In addition, the executive branch has the power to influence the judiciary through an annual payment of budget allocated to the judiciary and judges.

The Undersecretary of the Ministry of Justice, who is affiliated to the government apparatus is *ex officio* a member in the Judicial Council, and thus participates in the decisions taken by this Council. Article 16 of the Judicial Organization Law 23 of 1990 stipulates membership of Undersecretary of the Ministry of Justice in the Judicial Council.

4. The methods of case proceeding in the electoral appeals:

The Court is empowered with different competences as stipulated by the Constitutional Court Establishment Law which are:

1. Power to examine the constitutionality of laws and decree-laws[8],
2. Power to interpret the articles of the Constitution[9],
3. Power of hearing appeals of National Assembly members' election or the validity of their membership.

These three competences may be relevant to the electoral system or the electoral process[10]: The unconstitutionality of an election or a law related to the electoral process may be challenged before the Court. Also, a request of interpretation of a constitutional text in relation to the constitutional articles dealing with the selection of the Judicial Council or membership issues thereof may be submitted to the Constitutional Court[11]. The case may proceed as an electoral appeal immediately after elections[12].

Electoral disputes and appeals are various - there are appeals related only to the validity of a counting process[13], the calculation of votes, and the announcement of results. There are appeals related to the invalidity of the stakeholder in the electoral process, whether nullification prior to the process or synchronous or after thereof[14].

It has become obvious that the proceeding of electoral dispute or dispute over the constitutionality of the norms governing the electoral system to the Constitutional Court is possible through all jurisdictions and channels granted to the Court.

5. Constitutional Court's decisions and their impact on the electoral system

The Constitutional Court has examined numerous electoral appeals through which it dealt with the electoral process or with the electoral system. The Constitutional Court has been called upon as a body examin-

8 Abdulbaset 2002: 213.
9 Altukaim 2015: 419.
10 Muhannad 2010.
11 Almoqatie 1999: 124.
12 Alasar 1999: 133.
13 Alshakani 2005:218.
14 Al-Tabtabai 2005: 150.

ing the constitutionality of laws with regard to some legislation related to the electoral process.

We will examine two appeals that had an impact on the electoral system:

5.1. Constitutional challenges regarding articles of the Election Law, the division of electoral districts, or decrees related to the electoral process

Some articles of the Election Law have been challenged at various times. Among the serious effects of decisions on constitutionality, are rulings with retroactive effect *(ex post facto)* as a consequence of unconstitutionality. In case a provision on the electoral process is invalidated, the inevitable consequence of this ruling is the invalidity of the electoral process as a whole, and therefore the invalidity of the elected parliament, according to this system.

The first case: The nullification of parliamentary election of February 2012.

Kuwait has a rich experience with political movements and campaigns and it had two experiences where the Constitution itself was suspended during the seventies and eighties of the last century[15]. It was not surprising that a political campaign was initiated demanding the departure of former Prime Minister Sheikh Nasser Al-Mohammad, in the wake of which he submitted his resignation to the Emir, especially after increasing online activism in Kuwait[16]; an Amiri decree was issued appointing Sheikh Jaber Al-Mubarak as his successor. Immediately Sheikh Jaber Al-Mubarak issued a decree to dissolve the National Assembly by holding a meeting with Sheikh Nasser Al-Mohammad Cabinet, based on Article 103 of the Constitution;

> "*Where the Prime Minister or a Minister relinquishes his post for any reason whatsoever, he shall continue to deal with urgent matters falling within his competence until the appointment of his successor*."

15 From 1976-1981 and from 1986-1992. Baaklini 1982.
16 Nordenson 2017.

The new government, as a caretaker government of urgent matters, involved ministers of the old government to issue a decree to dissolve parliament.

Decree 443 of 2011 promulgated to dissolve the National Assembly on 06/12/2011. In the decree preamble thereof, it stated to be based on Article 107 of the Constitution, mentioning that,

> "*if affairs returned thereof representing hindrance to the march of achievement and a threat to the supreme interests of the country, requires a return to the nation to choose their representatives to overcome the existing obstacles and achieve the national interest*."

The decree showed that it has been issued based on a proposal of the Prime Minister after the approval of the Cabinet. The decree was signed by the Prime Minister Jaber Al-Mubarak.

After the dissolution of four parliaments within five years[17], another new National Assembly was elected and it consisted of 50 members using the plurality allocation rule[18]. many of the candidates appealed to the Constitutional Court by way of electoral appeals. While some appeals were related to the non-constitutionality of the decree to dissolve parliament, its invalidity and consequent the invalidity of the decrees on which the results of the elections and the announcement of results were based on. The Constitutional Court, based on the two appeals registered No. 6 and 30 of 2012; which are appeals regarding the National Assembly election 2012, rendered judgment to invalidate the entire election process which was held on 02/02/2012 in five districts. It also invalidated the membership of those who won a seat, due to the invalidity of the prior dissolution of parliament and the invalidity of inviting voters to elect members of the National Assembly, which has been the basis of this elections. As a consequence, and most particularly, the Assembly dissolved by the power of Constitution was to be restored, as if the dissolution were null and void.

The Court pointed out that the appeal requested the nullification of elections due to the invalidity of the previous procedures – the request to dissolve the parliament filed and accepted by a cabinet, that had lost its capacity after resignation and borrowed ministers to obtain their consent to dissolution. The Court argues that this makes this procedure null and void, with no consequential legal effects arising therefrom:

17 Shalaby 2015.
18 Lust-Okar 2002.

"Whereas this objection is valid, since Article 107 of the Constitution states that: "The Amir may dissolve the National Assembly by a decree in which the reasons for dissolution are indicated. However, dissolution of the Assembly may not be repeated for the same reasons. In the event of dissolution, elections for the new Assembly are held within a period not exceeding two months from the date of dissolution. If the elections are not held within the said period, the dissolved Assembly is restored to its full constitutional authority and meets immediately as if the dissolution had not taken place. The Assembly then continues to function until the new Assembly is elected.
Learned is that the parliament dissolution is a constitutional right prescribed to the executive authority and is deemed one of the ways to strike and maintain balance between executive and legislative powers. To request dissolution, it should be demanded by real Government (Cabinet): a government that did not lose capacity thereof, whether following a dispute with the Nation Assembly or because harmony between them is not preserved. Although the Constitution did not restrict government in the use of the right of dissolution which was not constrained by prescribed time, it is entitled to select the time and discretion of occasions, but the Constitution, owing to its gravity of dissolution, has covered dissolution by certain restrictions and guarantees. National Assembly must be dissolved by a decree stating the reasons for dissolution, which requires dissolution. The Decree is to be signed by the Amir and Prime Minister in order to become politically liable. If the Assembly is dissolved, it may not be dissolved for the same reasons again, as new elections must be held within a period not exceeding two months from the date of dissolution...
Hence, after perusal of Sovereign Ordinance issued in 28/11/2011 to accept the resignation of the Prime Minister, included in the first Article that (Resignation of Sheikh/ Nasser Al-Mohammad Al-Ahmad Al-Sabah and the Cabinet is accepted and he shall continue to discharge the urgent business thereof until the formation of new Cabinet). Following, Sovereign Ordinance dated 30/11/2011 was issued to appoint the Prime Minister, first Article provided that (Sheikh/ Jaber Mubarak Al-Hamad Al- Sabah shall be appointed as Prime Minister, assigned to nominate the new cabinet members and submit their names to issue their decree of appointment) and then issuance of Decree 443 of 2011 to dissolve the National Assembly on 06/12/2011, where promulgated pursuant to Article 107 of the Constitution ..., following the proposal of the Prime Minister, and approval of the Cabinet...
As such, the conclusion is that the dissolution is based on Article 107 of the Constitution, and at the request of a cabinet that lost its capacity after resignation thereof was accepted, after a new Prime Minister is appointed

pursuant to Sovereign Ordinance and assigned to nominate members of the new Cabinet, it preceded Prime Minister in his current capacity, formation of this new Cabinet and issuance of decree to form thereof, and invitation of the Cabinet that lost its capacity and borrowed ministers to obtain their consent to dissolution. Such procedure is not valid from the formal point of view, violating the spirit of constitutional principles and the purpose for which its methods were defined by law. The dissolution authorized by the Constitution for the government to use, and whose nature, procedures and purpose have been defined, may not be used as a pretext to waste and violate Constitution provisions. Constitution has sanctity provisions that must be preserved and stipulations thereof must be respected.

Therefore, the dissolution is vitiated with nullity and invalidation which entails to be ignored and revoked as well as consequent invalidity of voters' invitation to elect members of the National Assembly, which based on such invalid dissolution. The will of voters is baseless as the election was created by null and void procedures where procedural restrictions in the Constitution violated as revealed.

Thus, the Appellant objection is grounded on a sound basis with no need to investigate rest of the grounds of appeal. The right of the judiciary -then- to annul the election process altogether, which held on 02/02/2012 in the five districts, and invalidity of membership of those declared winners in the elections, with implications thereof, most particularly is to regain the dissolved Assembly with the force of constitutional as if the dissolution were revoked, to originally complete the remaining term…"

Our comment on this decision will be as follows:

1. The Court rejected opinion and legislation pleaded, arguing that what is raised by appellant's request is related to the invalidity of the Amiri Decree to dissolve the National Assembly as well as the Amiri Decree inviting voters to elect National Assembly's members, being irrelevant for the Court's jurisdiction to hear. Both are matters related to executive authority in relation to the legislative authority and political actions as well. The court rightly replied that the appeal was confined to the measures taken by the executive authority to dissolve the National Assembly and invite voters to the elections. The Court commented that:

"*There is no doubt that the procedural restrictions imposed by the Constitution on the executive authority may not be barred or infringed or dissolved under the pretext that they are political actions, this, therefore, is inconsistent to the exercise of its restricted power in accordance with the Constitution*."

We agree with the court in such regard, procedural restrictions imposed by the Constitution are obligatory rules to follow. Otherwise, these restrictions become ineffective theories, deemed non–binding provisions within electoral appeals, and the Constitutional Court Establishment Law was futile to protect the Constitution.

The Court, in the same decision, has also applied analogy by comparing between regulatory framework, laws to decree-laws and regulations.

> "*It is not acceptable for constitutional system to allow judicial control over constitutionality of laws, decree-laws and regulations, in order to declare the unconstitutionality of legislation violating the Constitution ..., while some procedures, facilitating the election process issued as decisions by the executive authority, are exempted from examination and review by this court when exercising its jurisdiction to hear electoral appeals.*"

2. The new government presided by Jaber Al-Mubarak and the issuance of the Amiri Decree to appoint him directly ended the prior capacity of former Prime Minister. Most importantly, it ended the same capacity of the ministers that the Prime Minister drew upon in order to issue a decree to dissolve the Assembly of 2009. This entails invalidity of the decree inviting for elections, as well as of the results announced as fault-based. Since the Constitutional Court' decision had retroactive effect, the court ruled the invalidation of subsequent Assembly, which was formed through invalid decisions as stated above.

The Prime Minister has met with the Cabinet of Nasser Al-Mohammad, underlying the restriction contained in Article 128, as dissolution decrees must be issued in accordance with the provisions of this Article of the Constitution.

> Article 128 "*Deliberations of the Council of Ministers are secret. Resolutions are passed only when the majority of its members are present and with the approval of the majority of those present. In case of an equal division of votes, that side prevails on which the Prime Minister has voted. Unless they resign, the minority has to abide by the opinion of the majority. Resolutions of the Council of Ministers are submitted to the Amir for approval in cases where the issue of a decree is required.*"

Therefore, issuing decrees requires the presence and approval from a majority of the members of the Council of Ministers and may not be issued by the Prime Minister personally. The mistake committed by new government is involving the old government's constitutional capacity having been removed as soon as the new Amiri Decree was issued to appoint

the Prime Minister. Article 129 states that, "The resignation of the Prime Minister or his removal from office involves the resignation or removal of all other Ministers."

The government in discharge of urgent matters is stipulated by Article 103 of the Constitution "Where the Prime Minister or a Minister relinquishes his post for any reason whatsoever, he shall continue to deal with urgent matters falling within his competence until the appointment of his successor."[19]

The capacity of this government as government in urgent matters ended once an Amiri Ordinance is issued to appoint a new Prime Minister. This is what the Cabinet of Jabir al-Mubarak has failed to abide to when he drew upon the ministers of the outgoing government to issue a decree to dissolve the 2009 National Assembly.

3. We also agree with the Constitutional Court that the constitutional legislator laid down procedural rules to issue a decree to dissolve the National Assembly, for example, in Article 107 of the Constitution. "*The Amir may dissolve the National Assembly by a decree in which the reasons for dissolution are indicated. However, dissolution of the Assembly may not be repeated for the same reasons. In the event of dissolution, elections for the new Assembly are held within a period not exceeding two months from the date of dissolution. If the elections are not held within the said period, the dissolved Assembly is restored to its full constitutional authority and meets immediately as if the dissolution had not taken place. The Assembly then continues to function until the new Assembly is elected*."

What would be the court's situation if the government issued a dissolution decree without reasoning, or dissolved two successive parliaments for the same reason, both of which apparently violate the restriction mentioned in this Article 107?

There is a commitment required by supreme constitutional principles and its spirit. It demands that the Constitutional Court, which is the concerned body, shall examine these decrees from a procedural point of view at least, without having access to appropriations behind issuance of such decrees. The Court has measured procedural rules in Article 107 with other rules, on the basis of which the judgment was issued. The most important of these rules was, that in order to issue a decree, a government needs to enjoy full constitutional capacity granted by the Constitution at the time of decree issuance. Through this process of measurement, the Constitutional Court found that it is entitled to invalidate the Assembly

19 Almutairi 2003: 129.

due to the failure to observe the formal and procedural rules contained in the Constitution or even the spirit and principles of the Constitution, whereupon the Court grounded the reasoning when justifying the invalidity of the decree ordering the dissolution of parliament. It decided that the violation was not an explicit and well-defined of the Constitution, but rather a violation to the spirit and principles of the Constitution. The decision stated that, "This procedure is formally incorrect, violating the spirit and principles of the Constitution and the purpose for which its tradition was enacted."

The Court proved that the violation was not to a constitutional provision[20], but was to the spirit of the Constitution, since it is unreasonable to allow an outgoing government to act as a caretaker government.

The second case: The Constitutional Court's decision rejecting the unconstitutionality of Law 42 of 2006

The Law on Division of Electoral Constituencies was amended by the new Law No. 42 of 2006, which divided Kuwait into five constituencies[21].Every constituency elects 10 members of parliament, in which each voter has the right to cast four votes[22]. This law was applied in the election of February 2012 Assembly: It was the first parliament in which the government lost parliamentary majority and became politically fragile. After a lapse of less than five months, the Constitutional Court ruled, on June 20, 2012, on the requests registered in the Constitutional Court Record 6 and 30 of 2012, to invalidate the entire election process held on February 2, 2012, thus invalidating membership of those announced winners. As explained above, this was due to the invalidity of dissolution of parliament by Decree of the National Assembly 443 of 2011 as well as the invalidation of the Decree 447 of 2011 inviting voters to elect. The effect was that the dissolved Assembly of 2007 has been restored as if the dissolution had not taken place.

Therefore, the Assembly of 2009 returned, but because reform majority announced not to attend the Assembly of 2009, due to corruption issues of some members, this Assembly did not hold meetings even for once.

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20 Shultziner 2012.
21 Zaccara 2013.
22 Assiri 2007.

The government filed an appeal on 15 August 2012 before the Constitutional Court on unconstitutionality of Law No. 42 of 2006 related to the division into five constituencies in its first two articles[23], the first, which divided the electoral constituencies into territorial units, and the second which gave each constituency the right to nominate 10 members, attributing four votes for each voter.

The government, in its appeal, argued on the basis of the following:

1. Determination of constituencies as stated in Article 1 of the mentioned Law and the table attached thereto was unbalanced due to inequality between the constituencies' electorate. The total number of the electorate in first constituency reached 74876 voters, while the total number of the electorate in second constituency reached 47772 voters, the third constituency reached 73065 voters, the fourth constituency 108395 voters, and fifth constituency 118461 voters. Such disparity caused a relative difference of voters in every constituency, so voters in more intensive constituencies have an over-all higher number of votes than those in smaller constituencies.
2. In spite of the disparity between voters' number within the five constituencies, each one was represented by the same number of deputies in the National Assembly regardless of the different size of each constituency, and without harmony between deputies' number and number of voters in each constituency, irrespective of how large or small.
3. The table attached to the Law has ignored to include some residential areas within some of these constituencies, for example, areas of Al-Nahda, Jaber al-Ahmad, Abu Fatira, Anijafh, Shuwaikh Industrial Area, and Shuwaikh Health District, an action which deprived resident nationals to exercise their political rights to elect their representatives in the National Assembly.
4. Article 2 of the Law specifies that the number of candidates whom each voter can vote for, may not be more than four, a matter that led to election irregularities and results that do not accurately represent Kuwaiti society.

Accordingly, the Cabinet requested to rule that Articles 1 and 2 of Law 42 of 2006 are deemed unconstitutional and to re-determine the constituencies with regard to the election of the National Assembly, arguing that they consist in a violation of the principles of justice, equality and

23 Albloshi and Alfahad 2009.

equal opportunities, and a violation of Articles 7, 8, 29 and 108 of the Constitution.

However, the Court rejected the government's appeal and stated in its decision:

> "*Since the Kuwaiti Constitution did not specify the electoral constituencies and to which territory the State is divided, and did not place constraints on the determination of the number, nor on the number of deputies representing each constituency in the National Assembly, but left it to the legislator to discharge thereof in accordance with discretionary authority in this regard. In Article 81, the Constitution limited itself to state that "electoral constituencies are determined by law" namely by a legislation that addresses the determination of these constituencies, which may either be based on the population, or on geographical criteria. Such a point is supported by the discussion about the Constituent Assembly in this regard during the drafting of the Constitution in early stages, which confirms such significance.*
> *Whereas this court does not have power to oblige the legislator to specify the number of electoral constituencies or divide thereof in a particular manner, therefore, the Law in the first Article may not determine constituencies to five constituencies which -per se- constitutes a violation to Constitution provision, in addition to the paragraph that commenced with to "determine the constituencies.." refers to the delimitation of boundaries between a constituency and another to the extent of multiplicity. This court is deprived of judicial means by which constituencies and the components of each is re-determined through entering the areas of argument that the table annexed to the law has overlooked to include into any of the constituencies referred to. The Court noted through perusal of legislative stages passed by determination of electoral constituencies that the reasons and motives referred to by the government in the appeal request are no more than the same reasons and motives referred to in the explanatory memorandums to successive laws issued in this regard, which requires to consider constituencies determination more than once, the latest is the Law No. "42" of 2006 referred to which was issued after being approved by the National Assembly.*
> *As for the issue raised by the government in the appeal's request on the voting system in each constituency not to exceed four candidates, which is stated in Article 2 of the aforementioned Law stating that this system has been exploited in committing electoral irregularities, its application resulted in shortcomings, emergence of drawbacks and results did not truthfully and accurately reflect the nature of the Kuwaiti society and representation thereof. What the government stated in this context, as mentioned in the*

appeal's grounds, does not reveal per se a constitutional defect, and does not fit to appeal unconstitutionality for regression of court's control.
What the government has evoked, that the law determines the components of each constituency, is groundless. This discrepancy, as stated, results in relative disparity of voters, so that voters in the more densely populated constituencies have fewer votes than those in lower constituencies as per a statistical statement made in 2012. In addition to the fact that the intended equality is not absolute or computational equality, as it is not justified, in examining the constitutionality of a Law, to challenge a variable Law to render the law unconstitutional.
Therefore, the appeal is groundless; hence, it should be rejected.
Accordingly, the Court rendered judgment to reject the appeal."

The Court has set some principles that affect the electoral system:

1. The Constitution granted parliament to determine the mechanism of the constituencies[24]; and parliament is entitled to choose between determination on the basis of population or on a geographical basis. The selection by parliament for a certain mechanism to determine electoral constituencies is not a sufficient reason to lodge an appeal of unconstitutionality.
2. As the legislator has identified electoral constituencies on a geographical basis, the relative weight variation of the voter is not subject to challenge because equality is neither a calculation nor absolute.
3. The Constitutional Court has endeavored and blocked the way to transform Kuwait into a single electoral constituency and imposed a plurality in constituencies following the literal interpretation of Article 81 "constituencies shall be determined" when the court stated that "in addition to the paragraph that began with 'constituencies shall be determined'..." refers to the delimitation of boundaries between a constituency and another to the extent of multiplicity.

The appeal did not address the issue of constituencies' multiplicity or not, and the Constitutional Court is found to tackle such interpretation without appeal on this matter. Thus, this interpretation may be considered as unacceptable as the legislator used the word "constituencies" in plural form, which does not prevent him from personation of constituencies and vice versa. But it is clear that in the unlikely event of changing the electoral system to one constituency, fate thereof will be invalidity unless the court

24 Al-Remaidhi and Watt 2012.

gives up this unsuccessful judicial trend[25]. We believe that the Court has addressed the question of the unconstitutionality of turning Kuwait into a single constituency because of proposals having been made in the 13th legislative term in 2009–2010: During this term there were three proposals to turn Kuwait into a single constituency[26].

There is a political motivation of the government to challenge this Law because of its certainty that it will lose the majority in case that subsequent elections are held in accordance with the same rules of five constituencies and 10 seats and four votes for every voter. So, the government turned to the Court as it may invalidate the system and thus allows government to avoid the political embarrassment to choose another system.

The Court, on September 25, rejected government appeal of Law 42 of 2006. On October 7, Decree No. 241 of 2012 was issued to dissolve the 2009 Assembly as a result of members' majority refusal to attend, and hearings, therefore, could not be held. On 2 October, Decree Law 20 of 2012 was issued amending Law 42 of 2006 on the re-determination of electoral constituencies, including a replacement of the provision that Article 2 of the law referred to, which stipulated that "each constituency shall elect 10 members of the Assembly and each voter has the right to cast a vote for one candidate in constituency wherein he registered, voting for more than this number shall be deemed null and void".

This decree caused a severe political crisis in Kuwait which had started by the elections' boycott that was supported by Single Vote System, and a large nonviolent movement had been initiated and called *karamt watan*, "The nation's dignity"[27]. Such crisis is still arising up to the present time.

The government also issued Decree Law No. 21 of 2012 to establish the Supreme National Electoral Commission to control the electoral process in order to grant the judiciary more control over the electoral process and what is related to it.

The third case: The nullification of parliamentary elections of December 2012

Following the issuance of several decrees in the period between the dissolution of the 2009 Assembly which returned by virtue of Constitutional Court judgment and between the election of next Assembly, a decree was

25 Almutairi 2015: 11.
26 Alawadhi 2010.
27 Albloshi and Herb 2018.

issued, the Decree 20 of 2012, to transfer voting mechanism of four votes per person to one vote[28], while maintaining the division of electoral constituencies to become five constituencies wherein 10 members are elected in each. Also Decree 21 of 2012 was issued to establish the Supreme National Elections Commission in order to impose more control and judicial supervision over elections.

The government was seeking to impose the single vote as a tactic to break the parliamentary majority; a majority which was formed under the four votes system in the first judicially rescinds Assembly which has been elected in February 2012. It was a step that resulted in a state of fierce anger in Kuwait at the level of political movements and various societal forces and entailed a wide campaign to boycott the parliamentary elections. The first elections under a single vote system were held on December 1, 2012. The participation rate reached 39%, which is a low figure compared to the previous elections, which were up to nearly 70%, rather, some believe that the declared figure of 39% is not real, and the rate was lower, but the government pressed to give the false impression that the participation was reasonable.

More than fifty election appeals were submitted after the elections were held on December 1, 2012[29], as they represent the closest and expedite means to have access to the Constitutional Court. Some of these appeals were purely electoral, related to counting the votes and membership declaration, others were appeals of unconstitutionality of decrees which amended the electoral system, among them the Single Vote Decree and the Decree to establish Supreme National Elections Commission.

The former parliament's opposition anticipated the Constitutional Court's decision on this decree specifically. Opposition was not concerned about invalidity of neither the existing Assembly nor the accompanying decrees but was only concerned with the invalidity of Decree No. 20 of 2012, the Single Vote Decree. Speaking of opposition in Kuwait, it needs to be mentioned that the opposition was not considered a minority[30], but was constituting the majority at this time, as governments in our countries (the Gulf region) are constituted from sons of royal family without taking into account the parliamentary blocs and partisan organizations[31].

28 Tavana 2018.
29 Katzman 2012.
30 Freer 2018.
31 Coates Ulrichsen 2014.

The Constitutional Court's decisions on these decrees have had a dramatic impact on the elections in Kuwait. Before the judgment was issued, most of the political forces were boycotting the elections because they were convinced of the invalidity of the decree of Single Vote and the necessity to dispose thereof.

Still, the Court's decision has confirmed the Single Vote Decree. In return, the first Parliament based on a Single Vote was rescinded under the pretext that Decree 21 of 2012, on the establishment of the Supreme National Elections Commission, did not meet the requirements of "necessity" as an objective condition. The decision resulted that boycott continued partially with some independent political forces deciding to participate in the elections held in 2013 due to the court deciding upon constitutionality of this decree. Until now, the political situation in Kuwait is still in a case of disturbance owing to this decision.

The decision has diversely dealt with several issues and the impact on the electoral process as well. On the one hand, the judgment has replied to some appeals, on the other responded to the Opinion and Legislation Department which is a body entrusted with the defense of the government and the defense of decrees issued by the government accordingly, which is as follows:

The Court explained the appeal filed by the appellant on non-constitutionality of Decrees 20 of 2012 and Decrees 21 of 2012 on the grounds that, in Article 71, the Constitution granted the government the right to issue decrees with the force of law under the following conditions:

1. Absence of the Assembly,
2. Existence of a state of necessity that justifies the use of this exception,
3. The decrees do not violate the Constitution and financial estimates contained in the general budget,

The appellant held that these decrees lacked an essential condition for issuance which is the state of necessity[32].

But the court responded to this plead in respect of Decree 20 of 2012, which replaced the voting system from four votes to single vote as follows:

1. The legislations are, principally, issued to fulfill the needs of the nation through legislature, but the constitutional legislator has given the government this extraordinary authority in urgent cases, as required by emergency events.

32 Sari 1995: 140; Shaker 2005: 123.

2. The Court indicated that the state of necessity does not only mean occurrence of a new emergency, but ongoing events can gain the same description "measures that cannot be delayed " as stated in Article 71 of the Constitution.
3. These decrees shall be inevitably presented to the National Assembly to definitively acquire the legal capacity, which leads to control by parliament. In addition, judicial control also expands over these decrees.
4. The government has been challenged before the Constitutional Court with regard to the Law on Division of Electoral Constituencies and the voting mechanism with four votes, which showed the flaws of this system and how it denied a balanced representation of all segments of society. Yet, after the Court rejected this appeal, the government has tried to invite the Assembly of 2009 to attend the sessions to modify the system, but as members refused to attend for political reasons, the government had no choice but to dissolve the parliament and thus issuing the appealed decree to confront the passivity of previous electoral system[33].
5. The Court stated that Single Vote System is applicable in democratic countries giving minorities the opportunities to be represented in the parliament.
6. The Electoral Affairs do not determine a right, so the applicable system can be replaced by another according to the public interest.
7. To say that the government may pay attention to its special interests in the electoral system, this is not acceptable as MPs have their supposed special interest in this regard because their fate is to run as candidates in the future.

Hence, the Constitutional Court rejected the appeals filed against Decree Law 20 of 2012, which replaced the Four Votes System with Single Vote System.

The government, preserved the Single Vote System, but annulled the first National Assembly (which was elected under this system), on the basis that Decree 21 of 2012 on the Supreme National Elections Commission was null and void for not meeting the requirement of necessity in accordance with Article 71 of the Constitution.

> The Court stated in the decision that "*it cannot be imagined that (State's Supreme interest) called for the issuance as stated in the explanatory memorandum of the decree, as State's Supreme interest is the greater and of*

33 Alshayji 2009.

> *highest degree and not to be purely reduced to establish a committee in order to achieve greater integrity and transparency*. "
> The Court continued ..."*The result is that this decree, actually, represents a blatant violation to Article 71 as well as the purposes for which this article stipulated. For words of the constitution to prevail and preserve the provisions and entity thereof to abide by its provisions, the judiciary has rendered the right judgment to declare the above-mentioned Decree-law 21 unconstitutional*".

The Court's decision in this regard required to eliminate the decree since its inception, to disempower its enforceability and to remove its resulting legal effects. The election process took place on the first of December 2012, and was held in accordance with the procedures established under this decree–as from nomination procedures until the end of the declaration of results. It has been vitiated by invalidity of the decree-law declared unconstitutional Law-decree, which was contested on this assumption. The will of the voters, in this case, was in lack of a valid legal basis, and thus becomes incumbent upon the judiciary to invalidate the entire process of election in five constituencies, and to invalidate the membership of those declared winners along with the consequent effects; most particularly is, to have elections repeated, and to consider Decree-Law 21 of 2012 as not having been issued.

Hence, the Court stated the consequences of the invalidity of Decree-Law 21 of 2012:

1. No state of necessity to establish the Supreme National Elections Commission and that the decree of necessity does not support the government to establish a committee.
2. Invalidity of this decree entails invalidity of the parliament, which was elected based on the provisions of this decree.

We find that the Court did not content itself with the invalidity of the abstract provisions but accessed to invalidate the election of the whole authority, as the second National Assembly, parliament, elected in the same year, consecutively rescinded.

5.2. The consequences of Constitutional Court's decision declared unconstitutionality of decrees related to the electoral process

The Constitution did not desire a court in the technical sense to hear constitutional issues to exist, rather called it "judicial body". Article 183 stated

that, "The court shall decide to rule", so the court renders a decision not a rule. When the legislator desired to organize this body, he turned it into a complete Court and made it issue provisions in case of constitutional actions and issue decisions in the event of requests for interpretations of constitutional provisions.

The legislator decided that the decisions rendered by this court shall be legally binding and stamped with the executive formula in accordance with Article 23 of the *Constitutional Court Establishing Law*. The judgment is binding to all courts. The constitutional judgment prevails upon all parties, not only the action parties.

6. *Appeals Examination Committee and its authority on constitutional challenges*

The Constitution equalized between government and concerned parties to resort to the Constitutional Court. The Constitutional Court Establishing Law, since issued in 1973 until 2015, was depriving persons of direct appeal before the Constitutional Court, while giving the government and parliament the right to recourse directly to the Constitutional Court. It also gave ordinary courts the authority of direct referral to the Constitutional Court based on a plead the ordinary court submitted *motu proprio*. As for individuals, their only means to reach the Constitutional Court was to have a case pending before ordinary courts and then lodge an appeal of unconstitutionality of a provision to be applied in case. If the court rejected, the only choice is to challenge court's decision before a committee called the Commission of Appeals Examination. This committee is composed of three members of the Constitutional Court. It examines the appeal and in case of acceptance thereof, the constitutional action shall be registered before Constitutional Court. In case of rejection, its rejection shall be final and no way to challenge it. Then this person will have way to resort to the Constitutional Court.

The committee examines the extent of seriousness of the constitutional appeal but does not examine the subject of the appeal. The reality proves that the court goes beyond its powers and addresses the subject, moreover, it sometimes, has developed new theories opposing the constitutional provisions.

This Committee is created by the Constitutional Court Establishing Law as a means of filtering appeals in order to avoid that the Constitutional Court is overwhelmed by an unnecessary flood of appeals. Nevertheless, whom who knows such justification will be surprised that the Constitu-

tional Court Establishing Law did not ensure the complete availability of court members to their function in the Constitutional Court. The provision was disappointingly making members of the Constitutional Court continue to work in the ordinary courts, assigned to carry out the duty of members of the Constitutional Court as well as their original work. The creation of the Appeals Examination Committee to ease the proceedings before the Court is inconsistent with the notion of judges' part-time work, but rather underlines the need to assume the office of the Constitutional Court only.

Appeals by individuals are divided into two stages; the first stage was the only one existing prior to the issuance of Law 109 of 2015, a law related to the right of persons to directly lodge a complaint in front of the Constitutional Court. Until then, persons did not have the right to directly lodge an appeal of unconstitutionality, but they were entitled to invoke unconstitutionality through a plea of unconstitutionality during a court's hearing of a case wherein she or he is a party.

6.1. The period before amending the Constitutional Court's establishment law

At this stage, individuals had no right to directly appeal before the Constitutional Court, despite the fact that individual persons are mentioned as persons concerned in Article 173 of the Constitution. It was a decried trend to deny what is mentioned in the Article namely; to deny to individual persons to have a direct appeal, while allowing the National Assembly to have a direct appeal despite the lack of constitutional provisions which states this right to the Assembly.

The right of individuals to lodge an appeal of unconstitutionality was made by plea through court's hearing of dispute as follows:

The person must have a case or dispute before a Court of Merits such as administrative or civil or criminal judiciary.

When hearing the dispute, the person shall be pleading to lodge an appeal of unconstitutionality of the provision to be applied to the dispute.

The court of merits hears the dispute and shall consider the seriousness of the appeal as follows:

- If the plea is serious, the matter will be referred directly to the Constitutional Court to set a session for hearing and examining the constitutionality of the contested law. The Constitutional Court shall decide the constitutionality/unconstitutionality of the law.

- If the court holds that the plea is trivial, the plea shall not be transmitted to the Constitutional Court and shall be rejected, but the rejection owing to lack of seriousness by a court of merits is not final. The appellant of unconstitutionality may challenge the decision on lack of seriousness before a committee called Appeals Examination Committee which is a judicial committee emanating from the Constitutional Court as an associate court organ to facilitate the subsequent issues of the courts of merits. This committee is composed of three members of the Constitutional Court; its task is to examine the validity of a court of merit's ruling only concerning seriousness of plea, and shall not decide upon constitutional proceedings.
- If the Appeals Examination Committee decided the plea's lack of seriousness, it shall approve the judgment rendered by the court of merits, and the judgment of the Committee's decision shall be final and not appealable.

6.2. The period after amending the Constitutional Court's Establishment Law

Due to the widespread criticism with regard to deprivation of individual persons from direct appeal before the Constitutional Court, the Parliament has issued Law 109 of 2014, which opened a direct route for individuals to resort to the Constitutional Court as an amendment to the previous law. The Law which consists of one Article states that:

> "*Any natural or legal person may appeal an original action before the Constitutional Court against any law or decree-law or regulations if he has serious suspicions that it violates the provisions of the Constitution, and had a personal a direct interest to challenge thereof. The notice of appeal shall be signed by three lawyers admissible before the Constitutional Court. The applicant shall deposit, at the time of submission of the appeal notice, a five-thousand-Dinar as a surety, clerk administration shall not accept the appeal sheet if it is not attached by proof of bail. Deposit of one bail in case of multiple applicants is enough if they lodged their notice of appeal as one statement, even for different reasons for appeal. The appeal will be presented to an in-camera hearing. If the court holds that the appeal falls outside the scope of court's jurisdiction or not acceptable formally, it shall decide to reject thereof and confiscate the bail decision by unchallengeable decision through brief reasons proved in the minutes of the meeting. If the court holds otherwise, another session to hear the appeal shall be specified*."

Any person, whether a natural or legal body, including companies and associations, shall be entitled to directly lodge an appeal of unconstitutionality of a law or regulation before the Constitutional Court, the law stipulating certain conditions, namely:

1. To pay a bail of 5,000 Kuwaiti Dinars in every notice of appeal no matter how many applicants are there.
2. The notice of appeal shall be signed by three lawyers admissible before the Constitutional Court.
3. The plea shall be serious: the appellant shall be intending to cancel the contested provision, without aiming to prolong the dispute.
4. Existence of interest to lodge an appeal of unconstitutionality of the law or regulations. This is considered as given when the application of the contested legislative provision affects the rights guaranteed by the Constitution in a manner that causes a direct damage to the appellant. Interest must be legal, personal, direct, and existing interest.
5. In this case, appeal shall not be presented directly before the Constitutional Court, but shall be brought before an in-chamber hearing of the Constitutional Court, which means part of the Court's members. If the chamber of the Court holds that: a) it falls outside the scope of court's jurisdiction, b) or is formally inadmissible, c) or the appeal is not serious, it decides not to accept the appeal and confiscate the bail amount by a decision that cannot be appealed.
6. If the chamber of the Court accepted the appeal, the in-chamber hearing Court shall call for the case to be heard before the full Constitutional Court.

7. *Conclusion*

After examining the constitutional decisions, it became clear how the court had a significant impact by examining electoral appeals, through which the court annulled two elected successive parliaments in 2012. The Constitutional Court has the tools to affect the electoral process, either through reviewing the legal dispositions related to electoral process, by determining their constitutionality, or through the examination of the electoral disputes and electoral process, whether in phases prior or simultaneous or subsequent thereof. The constitutional decisions have had direct political implications to the extent of disrupting the country's general political scene, which is witnessed by Kuwait since 2012 until now. Constitutional Court is the last resort on constitutional proceedings and electoral

appeals. Some electoral appeals have been accompanied by significant effects such as the invalidation of two National Assemblies due to the examination of electoral appeals.

The court is facing huge political challenges because of its exceptional authority in examining the electoral appeals which was inherently rendered to the parliament itself. We believe that there will be amendments to the court's law, either by withdrawal of such an authority or by participation of the National Assembly in the process of the court's formation and selection either in the nomination process or in the confirmation process. In addition, transformation may occur to the by entering non-judiciary-based elements in the Court's formation process as the Constitution requires.

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Challenging the Validity of Membership of the House of Representatives in Jordan

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Abstract
This chapter aims to analyze the legal means available to challenge the validity of membership in the Jordanian House of Representatives, which is considered as one face of electoral disputes that arise after the completion of the voting process and the announcement of final results. The chapter focuses on the scrutiny that the Jordanian judiciary exercises in case of contesting the election procedures and consequently claiming that the membership of a certain candidate is void, from the legitimacy and constitutionality perspectives. The oversight of legitimacy revolves around the extent to which electoral procedures were violated, whereas the constitutional control relates to the extent the Law of Election is compatible with or contravenes the provisions of the Jordanian Constitution. Both methods were substantially revised in 2011, upon the comprehensive constitutional reform that Jordan conducted. Finally, the chapter deals with the legal implications of applying both the legitimacy and constitutional scrutiny with respect to the membership of those elected to the Jordanian House of Representatives.

1. Introduction

The right to elect is deemed as the most prominent manifestation of the participation of people in the decision-making process. In a parliamentary governmental system, the role of voters is limited to the selection of representatives to exercise the powers on their behalf, through the conduct of a fair and free election. As such, the Jordanian Constitution provides for various safeguards which ensure that voters are able to cast their votes first, and then to challenge the outcome of the election using all legal methods available. The reasons for challenge are either that the electoral proceedings were not correctly applied by the authority in charge, or that the rules for election contradict with the provisions of the Constitution.

In this regard, Article 67.1 of the Jordanian Constitution clearly provides for the principles which should govern the holding of parliamentary elections in Jordan. It states that

"The House of Representatives shall be composed of members elected by general, secret and direct election in accordance with an election law which shall ensure the following matters and principles: The right of candidates to observe the electoral process, the punishment of those adversely influencing the voters' will, and the integrity of the electoral process in all of its stages".

A further safeguard for holding a fair and free election was incorporated by the revision of the Jordanian Constitution in 2011: an Independent Election Commission (IEC) was to be set up by law to supervise the parliamentary electoral process and to administer it in all of its stages. When established in 2012, the jurisdiction to hold parliamentary elections was moved from the Ministry of Interior to the IEC in accordance with the Constitution. This has helped to restore public confidence in the parliamentary representation system, and has worked to increase voters' participation in parliamentary elections held after 2012.

The importance of holding fair and free parliamentary elections also stems from the fact that Jordan is a signatory state to the main international instruments which form the International Human Rights Law. Both the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights provide for the international standards and norms for a fair and just election, which Member States must obey. Therefore, Jordan is under an international duty to comply with the principles stated by international law. Jordan is expected to uphold electoral justice, and to allow electorates the right to challenge before the judiciary, key decisions related to all stages of the electoral process; starting from the preparation of voters' lists, to deciding on candidacy applications, and finishing with challenging final results published in the Official Gazette from any party with interest, and as per the procedures described in the Constitution.

In this chapter, all procedures relating to the submission of appeals against the validity of parliamentary membership are covered in terms of the methods for challenging the illegality or the constitutionality of the membership of one of the elected candidates of the House of Representatives in Jordan, and in terms of the implications in case a challenge is upheld.

2. *Challenging the legitimacy of membership of the Jordanian Parliament*

This legal path of challenging the validity of membership for those elected to the House of Representatives in Jordan aims to verify as to whether the general election was conducted in accordance with the provisions of the electoral law. In this regard, the 2011 constitutional amendments have fundamentally changed the proceedings in question. Before 2011, challenges by the electorate claiming that elections were held in violation of the statutory provisions used to be submitted to the House of Representatives itself. The repealed Article 71 of the Jordanian Constitution provided that

> "*The House of Representatives shall have the right to determine the validity of the election of its members. Any voter shall have the right to present a petition to the Secretariat of the House within fifteen days of the announcement of the results of the election in his constituency setting out the legal grounds for invalidating the election of any deputy. No election may be considered invalid unless it has been declared as such by a majority of two-thirds of the members of the House*".

It was argued that the above-mentioned mechanism was in full contradiction with the international standards for the right of adjudication and access to justice. It was also regarded as a clear contravention of the principle that individuals must have access to natural justice as per the international conventions.[1] Furthermore, challenging parliamentary membership to the House of Representatives was seen as a serious trespass on the ultimate jurisdiction of the judiciary to resolve disputes. Article 102 of the Jordanian Constitution provides that "The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, civil and criminal, including cases brought by or against the Government".

Moreover, this regulation, authorizing the House of Representatives with the constitutional power to decide on the petitions disputing the validity of membership of one or more of its members, was seen as entirely against the principles of fairness and objectivity; Parliament is not a judicial body, and was deemed as the opposition and the jury at the same time. As such, and despite the numbers of challenges submitted after every

1 Laith Nasrawin, "The Constitutional Amendments of 2011 and their impact on the public authorities in Jordan." *University of Jordan Journal of Shari'a and Law Sciences, DIRASAT* 40, 2013: pp 223.240.

general election held in Jordan, the House of Representatives had accepted none since the promulgation of the Jordanian Constitution in 1951.[2]

This mechanism was altered in 2011, and the judiciary has been assigned the responsibility to adjudicate on challenges concerning the validity of membership to the House of Representatives. Article 71 of the Jordanian Constitution was amended to the effect that the judiciary was given the competence to determine the validity of the election of the Members of the House of Representatives. Since 2011, every voter has the right to file a petition to the Court of Appeal, which has jurisdiction over the constituency of the representative the validity of whose election is contested from his constituency. This has to be done within fifteen days from the date of the publication of the elections results in the Official Gazette.[3] The petition should include clear reasons, and a decision by the Court of Appeal must be issued within thirty day from the date of the registration of the petition. Such judicial decision shall be final, and is not subject to any way of challenge.

It could be argued in this context that it would have been better to give the constitutional power to resolve electoral disputes to the administrative judiciary. Administrative courts are better suited and thus be more capable to apply the principles of public law, which govern the relationship between individual and the state when the latter is having the sovereignty and the authority.[4] Furthermore, the administrative judiciary in Jordan consists of a two-tier system as decided in the 2011 constitutional amendments. As such, judgments issued by the Administrative Court are challengeable to the High Administrative Court. Also, giving the jurisdiction to the administrative courts to adjudicate electoral appeals would unify court principles and jurisprudence. There are concerns that the existing of three courts of appeal in Jordan would lead to various interpretations and understandings of the legal rules relating to the resolving of disputes in question.

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2 Eid Al-Husban, "Political and Judicial Safeguards for the Right to Elect in Accordance with the Provisional Election Law for the House of Representatives No. (34) of the year 2001." *Manarah Journal for Researches and Studies* 9, 2003: 325.

3 Sayeed Al-Harbi, "Electoral Disputes and Resolving Challenges of Validity of Parliamentary Membership". (LLM Thesis submitted to Al al-bayt University, 2005): 51.

4 Laith Nasrawin, "Political and Judicial Safeguards for the Right to Elect in Accordance with the Provisional Election Law for the House of Representatives No. (34) of the year 2001".

The Constitution of Jordan has made the judicial decision issued by the Court of Appeal ruling on the validity of the parliamentary membership final and not subject to any means of reconsideration.[5] This constitutes a clear denial of justice, and contravenes the right of access to all types and level of courts. The same critics about the constitutional provision before the 2011 amendments, which provided that decisions by the House of Representatives regarding petitions presented by electorates were final, could be brought forward against the revised constitutional provision which authorizes the Court of Appeal to adjudicate challenges against the validity of membership in Parliament.

The importance of appealing against the decisions of the Court of Appeal stems from the powers granted to the Court to declare the entire election in one constituency void. If it is evident to the Court that the election procedures in the constituency to which the petition relates are not consistent with the provisions of the election law, it can rule for the invalidation of the whole election in that constituency.

The legal implication of such ruling goes beyond the two parties to the challenge, over to other elected members, who are going to lose their seats in Parliament as a result of the Court's decision. Thus, they should be allowed the right to challenge the decision in question issued by the Court of Appeal to a higher judicial body.[6]

Once the challenge is submitted to the Court of Appeal, the Court shall resolve to dismiss the petition and, accordingly, the parliamentary seat is confirmed to the elected member in question. The Court of Appeal may also decide to uphold the petition, and in such case, it shall announce the name of the successful representative, and the successor to the Member of Parliament whose membership was invalidated. The House of Representatives is required to abide by the court decision. It is expected to declare the invalidity of the membership of the representative concerned and to invite the new member specified by the Court's decision to take the oath immediately.

In order to ensure the stability and continuity of the work of Parliament with respect to enacting legislation and monitoring acts of government, it has been decided in the Jordanian Constitution that all actions taken by

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5 Nofan Kin'an, *The Principles of Constitutional Law and the Jordanian Constitutional System*. Amman: Dar Ithraa, 2013: 3, 29.

6 Laith Nasrawin, "Political and Judicial Safeguards for the Right to Elect in Accordance with the Provisional Election Law for the House of Representatives No. (34) of the year 2001".

the member whose membership was invalidated by the Court of Appeal prior to its invalidation are deemed correct.

3. *Challenging the constitutionality of membership of the Jordanian Parliament*

Beside the right to challenge the validity of membership to the Court of Appeal, any interested party may contest the constitutionality of the election law in full or any of its provisions. Any decision declaring the said law or any of its rules unconstitutional would make the election process void, and as such invalidating the memberships of all elected candidates to the House of Representatives.

It is submitted that constitutional judicial review provides a valuable avenue for advancing human rights and access to justice. Depending on how constitutional adjudication is structured in a given country, it can be used to nullify or amend laws and regulations which are incompatible with individual rights and freedoms enshrined in national constitutions and international treaties. Also, constitutional judicial review is an example of the functioning of separation of powers in a modern governmental system where the judiciary is one of three branches of government.[7] In essence, it allows the judiciary to take an active role in ensuring that the other branches of government abide by the constitution.

In *Regina v. Secretary of State for the Home Department, Ex parte Pierson* [1998],[8] Lord Steyn affirmed that the importance of constitutional review stems from the fact that it includes both procedural and substantive elements, and thus is probably best described as reflecting a version of the "thick" understanding of the rule of law.

As part of the constitutional revision of 2011, a new chapter (Chapter 8) was added to the Jordanian Constitution which created a Constitutional Court to work as an independent and separate judicial body with headquarters in the capital. The Constitution provides for the establishment of an ordinary law that defines the work and procedures within the new Court; the Law of the Constitutional Court of Jordan was issued in 2012, which was highly influenced by the French model of constitutional review and, to some extent, by other regional systems in Egypt and Bahrain.[9]

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7 Ali Shadnaw, *The Jordanian Constitutional System*. Amman: Dar Wa'el, 2013.
8 [1998] AC 539, 591.
9 Nu'man Al-Khateeb, *Al-Baseet in the Constitutional System* Amman: Dar Althaqafa, 2014.

It should be noted that Jordan had always applied the constitutional judicial review prior to the constitutional amendments of 2011 which led to the establishment of the Constitutional Court. However, its scope was unclear; neither the Constitution nor any laws or regulations gave judges an explicit power to conduct such a review. Judges of all courts had assumed that function as a part of their duty to decide on the cases before them for the sake of safeguarding the individual rights and liberties guaranteed by the Constitution.[10] They had no ability to declare laws or regulations null and void, but they could refrain from applying laws that they found unconstitutional in pending cases, even if the issue of non-constitutionality had not been raised by the parties, and these decisions did not carry precedential value.[11]

Nevertheless, with the establishment of the Constitutional Court in Jordan, an independent judicial body was constitutionally assigned with the power to strike down laws and regulations which are considered unconstitutional, and to issue judgments which are deemed final and binding on all authorities and individuals of the state.

For the sake of ensuring a high standard of effectiveness in the work of the Constitutional Court, and to avoid stressing the judges with ill-founded claims of unconstitutionality, access to the Court was strictly drawn through two main avenues, political and judicial. Political access is given through the constitutional right of the House of Representatives, the House of Senate, and the Council of Ministers to directly submit challenges against certain provisions in a law or regulation in effect that they consider to contravene the Constitution, and to request the court to determine its constitutionality. The Constitutional Court is expected to resolve the petition no later than 120 days from the day of receipt by the Court.

As far as individuals and political parties are concerned, they have the right to submit challenges of unconstitutionality but in an indirect way. The Constitutional Court Law allows any of the parties to a case pending before the courts to put forward the defense of unconstitutionality of any law or regulation that is applicable to the substance of the case. If such defense is deemed *substantive and serious* by the court considering the case,

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10 Ali Abu Hjaileh, *Scrutinizing the constitutionality of laws in Jordan*. Amman: Commercial Dastour Press, 2004: 123–125.

11 M. Abu Karaki, R. S. Faqir, and M. Marashdah, "Democracy and judicial controlling in Jordan: A constitutional study." *Journal of Politics and Law* 187, 2011: 180–195.

it shall then refer it to the Court of Cassation for further consideration as to be referred to the Constitutional Court.[12]

Thus, the mechanism of applying the constitutional judicial review to challenge the validity of membership in the House of Representatives requires that a case involving the application of the election law or any of its provisions is filed before a national court. The applicant can then submit the defense of unconstitutionality of the said law. The Law of the Constitutional Court requires that such defense is put before the court that is considering the case by means of a memorandum, in which the challenger shall state the name and number of the law or regulation in respect of which the defense of unconstitutionality has been raised. The challenger must also define the scope of the defense in a clear and specific manner with support for its claim that such law or regulation is applicable to the substance of the case, with the grounds for why it is in breach of the Constitution.

If the court considering the case finds that the election law or any of its provisions in respect of which the defense of unconstitutionality has been raised is applicable to the substance of the case and that the defense of unconstitutionality is *substantive*, it shall suspend consideration of the case, and refer the defense to the Court of Cassation to decide on the issue of its referral to the Constitutional Court. The underlying case must remain suspended until the constitutionality claim is either rejected by the Cassation Court or resolved by the Constitutional Court.

According to the Law of the Constitutional Court, the Court of Cassation shall convene with a panel of at least three members, and it shall issue its decision within 30 days from the date the case reaches it. If it approves the referral, it shall notify the parties to the case to that effect.

If the constitutionality challenge is put before the Court of Cassation or the High Administrative Court for the first time, the respective court must immediately decide on the issue of referring the challenge to the Constitutional Court in accordance with the Constitutional Court Law.

Arguments have been made against the referral system in Jordan, contending that denying individuals the right to file constitutional challenges directly with the Constitutional Court compromises their right to free access to the court.[13] It was also argued that direct access to constitutional

12 Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication: Jordan as a Case Study." *Digest of Middle East Studies* 25: 264–284.

13 Mohammed Hammouri, *Rights and Freedoms between Political Whims & Constitutional requisites*. Amman: Dar Wa'el, 2010.

judicial review would provide individuals and groups with more opportunities to submit challenges of unconstitutionality that would allow the Constitutional Court to fill any gaps in the existing legal system that would otherwise leave – without remedy – those affected by alleged unconstitutional legislation.[14]

This argument should be dismissed. Giving a complainant a direct access claim would overburden the Constitutional Court and restrict its efficiency. Having a filtering system of unconstitutional claims in Jordan is in line with international best practices that give Constitutional Courts the right to have a broad discretion to dispose of complaints according to clearly stated criteria like those deployed elsewhere. In Germany, for instance, the constitutional complaint may not be lodged until all remedies have been exhausted, however, it may decide immediately on a complaint of unconstitutionality lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant pursuant to Article 90.2 of the Law on the Federal Constitutional Court.[15]

Another example is the U.S. Supreme Court, which also controls its own docket. It has wide latitude to decide which cases to hear, and denies about 99% of *certiorari* (a writ or order by which a higher court reviews a decision of a lower court) petitions. Even though the court receives about 10,000 civil and criminal petitions per year, it has established an efficient vetting process which allows the court to identify about 75–80 cases that warrant an oral argument.[16]

In France, access to the French Constitutional Council is restricted to raising the question of unconstitutionality within an existing case in another court, and to applying a test of seriousness to complaints of unconstitutionality.[17] Complaints reach the Constitutional Council only if the highest civil or administrative court has approved the referral. In Egypt, a litigant has the right to file a claim directly with the Supreme

14 Ahmad Mitwali, *Constitutional Law and Political Systems*. Alexandria: Maarif Press, 1993: 195.

15 Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication - Jordan as a Case Study". 2016.

16 R. C. Black and C. L. Boyd, "Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process." *Social Science Quarterly* 94.4, 2012: 1124-1144.

17 M. Tushnet and Fleiner, *Routledge Handbook of Constitutional Law*. Abingdon, UK: Routledge Press, 2013.

Constitutional Court when the ordinary court adjudicating his or her case has determined that the constitutional matter is serious.[18]

However, the multi-referral system of challenges to the Constitutional Court in Jordan raises concerns as whether ordinary judges can refer a case to the Cassation Court without being prompted by a litigant.[19] The answer to this question is not definite and can be subject to two different views. It was argued that each judge has a duty to ensure that only laws that conform to the Constitution are applied in cases before them, and that they have not only a right, but an obligation to refer constitutionality issues sent to them be sent to the Constitutional Court.[20] Others argue the opposite that the current Constitutional Court Law requires a motion from a party to a lawsuit in order to apply the multi-referral system.[21]

As far as the definition of *substance and seriousness* of the challenge of unconstitutionality is concerned, it was submitted that this term is a purely technical matter of whether the outcome in the underlying case depends on the constitutionality of the challenged provision; a case at hand cannot be justly adjudicated without determining constitutionality of a particular legal provision.[22] Seriousness also refers to the importance of the challenged law or regulation to the case at hand. It is a concept related to public interest and human rights: a judge must take into account socio-political and economic implications of a challenged law and determine if the law is compatible with fundamental rights and freedoms outlined in the constitution.

International experience suggests that the term "*serious*" should be understood as "*not frivolous*". Accordingly, complaints of unconstitutionality should reach the Constitutional Court whenever the challenged law is relevant to the case and the argument against constitutionality could be made by a reasonable person in good faith, not just as a delaying tactic.[23]

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18 N. Kamel, *Judicial Scrutiny on Constitutionality of Laws: Constitutional Adjudication*. Cairo: Dar Alnahda, 1993.

19 Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication: Jordan as a Case Study", 2016.

20 A. Salman, *Systems of Scrutinizing Laws: Comparative Study between Different Legal Systems and the Egyptian Law*. Cairo: Dar Sa'ed Samak for Legal and Economic Publications, 2000: 174.

21 R. Al-sha'er, *General Theory of Constitutional Law.* Cairo: Dar Alnahda Alarabieh, 2005.

22 A. Al-Bazz, *Scrutinizing the Constitutionality of Laws in Egypt*. Alexandria: Egyptian Universities Press, 1978: 556.

23 S. Fawzi, *The Constitutional Lawsuit*. Cairo: Dar Alnahda Aljaditha, 1993: 92.

On a national level, it is desirable that the Constitutional Court issues guidelines or instructions on when claims of unconstitutionality are serious and therefore warrant referral by lower courts and the Court of Cassation. Also, all courts in Jordan should publish well-reasoned decisions so that the referral practices can be harmonized and made consistent. This is especially important at this early stage in the Constitutional Court's life, a stage at which shared understandings of how the system will work are still developing.

Any judgment of the Constitutional Court with regard to a challenge of unconstitutionality of the election law is final and binding on all authorities and the people. Generally speaking, any judgment issued by the Constitutional Court shall be enforceable with immediate effect. Thus, if the Constitutional Court rules that a law or regulation in force is unconstitutional, the law or regulation shall be deemed void from the date the judgment is issued. However, if the judgment specifies another date for its enforceability, the law or regulation shall be deemed void from the date specified in the judgment.

By applying the above-mentioned principles on any constitutional challenge of the election law, once the Constitutional Court rules that the said law or any of its provisions is unconstitutional, the electoral process shall then be deemed void from the date the judgment is issued, and accordingly, all memberships of elected candidates are considered null and void.

4. Conclusion

The Jordanian legal system provides for two means of challenging the validity of membership of the House of Representatives. One challenge that the electoral process, at any stage, has violated the election law, known as the legitimacy submission, and the second petition is that the election law – or any of its provisions – contradicts with the Constitution, known as the constitutionality submission.

The Constitution of Jordan was amended in 2011 and statutory rules of both ways were revised. The legitimacy challenge is not any more submitted to the House of Representatives itself, but to the Court of Appeal where the doctrine of access to natural justice is preserved. The administrative judiciary, however, could be seen as a more suitable court, giving the nature of the challenge of membership that principles governing public law are applicable.

The Court of Appeal is given the power to invalidate the membership of the elected candidate in question, and it is also empowered with the right to declare the electoral process in one constituency as a whole to be void.

As per the constitutional submission, a new Constitutional Court was established in Jordan in 2012 in the hope that it would serve as an effective judicial tool to protect human rights, enhance access to justice, and advance the rule of law. It was set up as a response to public demands, with powers to invalidate laws and regulations that contradict the Constitution and violate fundamental rights and freedoms. However, skeptics argued that the constitutional review process was unnecessarily cumbersome, that many provisions of the Constitutional Court Law are vague and ambiguous, and that the lack of direct access to the Court makes it difficult for individuals and civil society to use constitutional judicial review in an effective and productive manner.

Challenges of unconstitutionality against the election law could be submitted directly to the Constitutional Court by both Chambers of Parliament and the Council of Ministries. Meanwhile, individuals must go through the system of "multi-referral", starting from the court considering the case to the Court of Cassation before being taken up to the Constitutional Court. Any decision by the Constitutional Court declaring the election law or any of its rules to be against the Constitution would imply that memberships of all those elected are null and void.

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?

Nathalie Bernard-Maugiron

Abstract
If Islam is given a privileged status in most constitutions of the Arab world, religious references coexist alongside other provisions, drawn from the concept of Western constitutionalism. This chapter examines the different forms of constitutional consecration of religion in the constitutions of the Arab world and claims that their impact on the political and legal orders of these countries remains under the close supervision of the secular elites. The inclusion of Islam as the religion of the State into the constitution therefore is as much a way to take into account the religious values of the majority of the population as a political motivation to strengthen the religious and political legitimacy of the rulers. It is therefore the way for politics to interfere into the religious sphere more than for religion to interfere into politics.

1. Introduction

After the revolts of 2011 in the Arab world, the debates around the identity of the State and the place of religion in the normative system were one of the main challenges in the process of constitutional drafting in Egypt and Tunisia. These provisions crystallized tensions, both inside and outside the constituent body, highlighting the lack of consensus within these societies on the definition of common values.

Islam, indeed, is given a privileged status in most of the constitutions of the Arab world, in different modes and degrees. However, these references coexist alongside other provisions, drawn from the concept of Western constitutionalism, alien to traditional Islamic *fiqh*. The fact that religious references appear in a document drafted by a secular state body and adopted by the people or its representatives alongside the principle of separation of powers or human rights provisions, is a sign of the reconfiguration of Islamic normativity to fit modern political conditions.

The spread of religious constitutional references is a relatively recent phenomenon. In the early constitutions of the Muslim world, notions specific to Islam were used primarily to place limits on the government and the legislator[1] and did not have real effects on the constitutional order. From the middle of the 20th century, the growth in the number of independent states and the generalization of the constitutionalization movement, however, multiplied the opportunities to meet religious references. In addition, the rise of Islamist currents has led to an increasingly participatory process of constitution drafting and increased pressure to include religious references in these texts, in particular in Egypt and Tunisia after 2011. Islam was put forward by governments and constitutions have started regulating the relationship between positive and *sharia* law and questioning the organization of the powers.

By adopting a constitutional design and integrating religious references in their supreme norms, Arab rulers rendered the political authority accountable to the *sharia* but also ensured that their constitution would be considered as acceptable. They also and foremost tried to increase their own legitimacy towards their people. Rulers claim that they are accountable to Islamic law while, actually, they keep the political and legal impact of Islamic normativity under their control. In most of these countries, indeed, religious references produced little effect on the organization of the political and legal systems, whose boundaries and contents are defined by the political elite.

The constitutional consecration of the religious referent can take different forms.[2] Some of these provisions deal with the political organization

1 Saïd Amir Arjomand, "Introduction." In: *Constitutional Politics in the Middle East. With special reference to Turkey, Iraq, Iran and Afghanistan*, Hart Publishing, 2008: 3.

2 Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries." *Georgetown Journal of International Law* 36, 2005: 947–1078. See also Abduallahi An-Naim, "Shari'a and Modern Constitutionalism." In: *Towards an Islamic Reformation*. Syracuse University Press: Syracuse, 1990: 69 and s.; Gianluca Parolin, "Religion and the Sources of Law: Sharīʿah in Constitutions." In: *Law, Religion, Constitution; Freedom of Religion, Equal Treatment, and the Law*, edited by W. Cole Durham, et alii. Farnham: Ashgate, 2013: 89–104; Clark Lombardi, "Constitutional Provisions Making Shari'a "a" or "the" Chief Source of Legislation: Where Did They Come from, What Do They Mean, Do They Matter", *American University International Law Review* 28. 3, 2013: 733–774; Abdelfattah Amor, "Constitution et religion dans les États musulmans." In: *Constitutions et religions*, *Actes de la dixième session de l'Académie internationale de droit constitutionnel*. Toulouse: Presses de l'Université des sciences sociales de Toulouse, 1994: 25–88; Julia Iliopoulos-Strangas, ed., *Constitution et Religion. Table ronde,*

of the state, others with the legal order. All of them, though, are exercised under the close supervision of the secular elites who control their impact on the political and legal internal orders of these countries.

2. Islam and the state's identity

Different types of references to Islam can be found in the political organization of the constitutions of the Arab world. Some proclaim the Islamic identity of the State, others translate this identity on the structure and functioning of the political regime. The concrete consequences of these provisions on the structure of the state are, however, limited by the structuring of these documents around their political leaders and the concepts of modern constitutionalism.

2.1. References to Islam as the religion of the state

Most constitutions of the region declare that Islam is the religion of the state.[3] Such a provision can be found for instance in Jordan (1952, art. 2), Kuwait (1962, art. 2), Oman (2021, art. 2), Bahrain (2002, art. 2), or Iraq (2005, art. 2). In Mauritania (1991, art. 5), Islam is the religion of the people and of the state and in the United Arab Emirates, the federal character of the state makes Islam the official religion of the federation (1971, art. 7).

Athènes 22-26 mai 2002. Bruylant, 2005; Sabine Lavorel, *Les Constitutions arabes et l'islam. Les enjeux du pluralisme juridique.* Presses de l'Université du Québec, 2005; Dawood I. Ahmed and Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions." *Virginia Journal of International Law* 54.3, July 2014: 615–695; Nathan J. Brown, "Islam and Constitutionalism in the Arab World", In: *Constitution Writing, Religion and Democracy*, edited by Ash U. Bâli et Hanna Lerner. Cambridge University Press, 2017: 289–316; Abdelouahab Maalmi, "Les constitutions arabes et la sharî'a." *Islamochristiana* 32, 2006: 159–171; Rainer Grote and Tilmann J. Röder, eds., *Constitutionalism in Islamic Countries between Upheaval and Continuity*. Oxford: Oxford University Press, 2012, and Rainer Grote, Tilmann Röder and Ali El-Haj, eds., *Constitutionalism, Human Rights and Islam after the Arab Spring*. Oxford: Oxford University Press, 2016.

3 The Ottoman Constitution of 1876 proclaimed for the first time Islam as the religion of the State (art. 11). The sultan was to be the caliph and protector of the Islamic faith (art. 3 and 4).

The constitutions that were adopted or revised after 2011 also declare Islam the religion of the state. This is the case in Morocco (Art. 3 of the 2011 Constitution) and in Algeria (Art. 2 of the 2020 revised Constitution). In Egypt, the Constitution of 2014 has taken over the same provision from the two previous ones (1971 and 2012): "Islam is the religion of the State. The principles of Islamic *sharia* are the main source of legislation". In 2012, though, the Constitution (art. 219) tried to define the meaning of "the principles of the Islamic *sharia*" by referring to extremely technical and complex concepts of the medieval Islamic legal tradition.[4] Although the intention of the Constituent Assembly, under the pressure of Salafists, was clearly to broaden as much as possible the body of principles to be included, in practice however, referring to such a large and diverse set of sources and fundamental principles of Islamic jurisprudence, from the most moderate and progressive to the most reactionary and archaic, could paradoxically have granted political and judicial bodies great freedom. In a decision of June 2013[5], the Supreme Constitutional Court applied Article 2 of the 2012 Constitution without taking into consideration Article 219.

In Tunisia, according to the Constitution of 2014, "Tunisia is a free, independent, sovereign state; its religion is Islam (*dinha al-islam*), its language Arabic, and its system is republican". The same provision was already included in the previous Constitution of 1959. There was a consensus in the Constituent Assembly to keep this provision despite or rather probably because of its ambiguity. It is not clear, indeed, whether Islam is the religion of the state or the religion of Tunisia as a nation. During the debates in the Constituent Assembly, Ennadha tried to include a provision stating that "No revision should undermine Islam as the religion of the State" (draft Art. 148), which would have removed the ambiguity of the said provision by privileging the interpretation of Islam as the religion of the State, but this proposal was rejected by the other members of the Assembly.

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4 Nathan Brown and Clark Lombardi, "Contesting Islamic Constitutionalism after the Arab Spring. Islam in Egypt's Post-Mubârak Constitutions." In: *Constitutionalism, Human Rights, and Islam after the Arab Spring*: 245–260; Nathan Brown and Clark Lombardi, "Islam in Egypt's New Constitution." *Foreign Policy*, 13 December 2012, http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution; Gianluca Parolin, "(Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition", NYU School of Law, *Public Law Research Paper* 13–15, 10 May 2013, https://ssrn.com/abstract=2251346 or http://dx.doi.org/10.2139/ssrn.2251346.

5 Supreme Constitutional Court, June 2, 2013, No. 41/26, *Official Gazette* 23 bis (b), June 10, 2013.

Some states also claim to be Islamic states, like Oman (art. 1), Bahrain (art. 1), Yemen (1990, art. 1) or Saudi Arabia (1992, art. 1). Mauritania and Morocco adopt a similar provision in their Preamble.

Several constitutions barred constitutional amendments that would diminish the religious nature of the state. In Morocco, for instance, "No revision may infringe the provisions relative to the Islamic religion" (art. 175). The Algerian Constitution (2020, art. 223) also prohibits constitutional amendments that would undermine Islam as the religion of the state. A similar provision can be found in the Bahraini Constitution (art. 120) that does not allow amending Article 1, according to which the religion of the state is Islam and the Islamic *sharia* a main source of legislation (*al-shari'a al-islamiyya masdar ra'isi li-l-tashri'*). In Tunisia, Article 1 states that "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. » Paragraph 2 adds "this provision shall not be amended."

In the Arab world, only Syria, Lebanon – a multi-confessional state - and the Sudan, do not consider Islam as the religion of the state. In Syria, though, the *fiqh* is a main source of legislation and the head of the state shall be a Muslim.

If defining the religion of the state as Islam or claiming to be an Islamic state has a very strong symbolic bearing on national identity, the real effects of such a proclamation on the structure of the state will, however, depend on the content that will be given to such expressions. How to determine the degree of "Islamicity" of a country? Islamic *fiqh* gives little guidance regarding the form a state based on Islam should take. Furthermore, the notions of an Islamic state or republic may appear to be intrinsically contradictory since neither the concept of state nor that of republic has their origin in Islam. Besides, how to reconcile the concept of the territorial nation state (*dawla*) with the ideal model of the *umma*, a community of believers united within the same identity? The poverty in the religious sources has given leeway to states in the choice of their political organization while claiming to apply an Islamic mode of organization of the power.[6]

6 Mohammad Hashim Kamali, "A Contemporary Perspective of Islamic Law." In: *Constitutionalism in Islamic Countries*: 22.

2.2. *Other types of religious references to the organization of the state*

Several constitutions give a special status to the head of state and/or establish religious bodies.

2.2.1. *The head of state*

Some constitutional provisions give a special status to the head of the state. In Morocco, thus, the King is the "Commander of the faithful" (*Amir al-mu'minin*) (art. 41). He shall ensure compliance with Islam and guarantee the free exercise of religion. Article 41 further specifies that the King "exclusively exercises by *dahir* (royal decree) the prerogatives inherent in the religious institution of *imarat al-mu'minin*."

This title of "Commander of the faithful" inscribes the King in the continuity of the first Caliphs and makes him the most powerful religious authority in the kingdom, thus grounding absolute obedience to him. His power in religious matters can be interpreted broadly, such as King Mohammed VI's support to the reform of the *Mudawwana*, the new family code, in 2003. Although the 2011 Constitution now distinguishes between the King "Head of State" (art. 42) and the King "Commander of the Faithful" (art. 41), it is hard to know if his *dahirs* were taken in his political or religious capacity. They are considered by all state bodies as superior to their own decisions. The Constitution also gives him leadership over the Higher Council of Ulema, a body empowered to issue fatwas or religious views.

In Saudi Arabia, the only religious status that can be claimed by the King is that of "custodian of the holy places of Islam" (*khadim al-haramayn al-sharifayn*). But his alliance with Wahhabi *ulema* allows the secular state apparatus to benefit from a form of religious legitimacy in the face of opposition and Islamist movements. It also puts the King in a position of dependence on the *ulema* who will try to defend their privileges against attempts to modernize the legal system, which they perceive as a threat to their own status and powers.

Some constitutions require that the head of the state be a Muslim, like Syria (art. 3), Tunisia (art. 74), Kuwait (art. 4), Algeria (art. 87), Mauritania (art. 23), Yemen (art. 106), Jordan (art. 28), Qatar (2003, art. 9), or Oman (art. 5).

In Lebanon, the 1926 Constitution, as amended in 1990, establishes a confessional regime based on a political balance. Article 24 states that the seats in the Parliament are to be divided equally between Christians

and Muslims, but Article 95 specifies that this division of public functions shall disappear in the long run. In accordance with an unwritten "National Pact" of 1943, the presidency of the Republic belongs to a Maronite Christian, that of the Council of Ministers to a *sunni* Muslim, the Speaker of the Parliament shall be a *shia* Muslim and its Vice-President a Greek Orthodox.

The constitution may also require the provision of a religious oath. Thus, in Yemen, the Constitution (1991, art. 160) provides that the President of the Republic, the Vice-President, the Prime Minister, the Ministers and Members of the Representative Assembly shall take an oath on the Quran and *sunna*. In Egypt, before assuming his functions, the President of the Republic shall take the following oath before the House of Representatives: "I swear by Almighty God (*uqsim bi-llah al-'azim*) to loyally uphold the republican system, to respect the Constitution and the law, to fully uphold the interests of the people and to safeguard the independence and territorial integrity of the nation." (art. 144).

2.2.2. Interference of religious bodies in the political field

Some constitutions allow religious bodies to interfere in politics. In Morocco, Article 41 refers to the Higher Council of Ulema. This body, presided over by the King, shall study the questions submitted by him. It is the sole instance enabled to adopt religious consultations (fatwas) on the questions that were referred to it "on the basis of the tolerant precepts and designs of Islam". The attributions, composition and modalities of functioning of the Council are established by *dahir*. Besides, the Council can only adopt recommendations, that the King may or may not follow. It allows the King to secure control over the religious sphere and to rely on official religious institutions to legitimize his power, while eliminating any risk of competition.

In Algeria, the Constitution (2020, arts. 206–208) organizes the Higher Islamic Council, instituted with the President of the Republic. The Council shall encourage and promote *ijtihad*, express its opinion with regard to the religious prescriptions on what is submitted to it and present a periodic report of activity to the President of the Republic. It is composed of fifteen members, including a President, appointed by the President of the Republic, among the high national experts in different sciences.

A Council of the Great Ulema (*hay'a kibar al-'ulama'*) is mentioned by the Saudi Basic Law of 1992 (art. 45). Established in 1971 by King Faysal, it has between 21 members who specialize in Islamic law, and is

led by the Grand Mufti. Since 2009, its composition has been enlarged to include a representative of each of the three other *sunni* schools (hanefite, shafeite and malikite), in addition to hanbalites. But it does not include *shia* members. A 2010 royal decree gave the Council a monopoly on the adoption of *fatwas*, allowing them to control the religious field.

In Egypt, the Constitution of 2014 (art. 7) declares that al-Azhar constitutes "the fundamental reference (*al-marja' al-asasi*) for religious sciences and Islamic issues". It does not specify, though, how al-Azhar shall intervene in the religious field and whether and when it shall be consulted. In practice, al-Azhar is regularly consulted by the legislator when drafting texts perceived to have a religious dimension, particularly family law reforms. It is also involved in censorship and the seizure of works relating to religion. Al-Azhar is very dependent on the state, especially financially, since its nationalization in 1961.[7]

In 2012, the Constitution adopted under Muslim Brotherhood President Mohammed Morsi, (art. 4) declared that the Council of Senior Scholars of al-Azhar[8] was to be consulted in matters pertaining to Islamic law. However, this Council, like in Morocco or Algeria, could only deliver opinions. Besides, the Constitution did not specify who was to seize the Council nor when and in which areas they had to be consulted, thus leaving a great deal of autonomy to the legislature, judges or government. This competence of al-Azhar was not depriving the Supreme Constitutional Court of its full power of judicial review of laws, even those that were challenged under Article 2 of the Constitution.[9]

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7 Al-Azhar however has always been trying to keep its independence from the State. See for instance Nathan Brown and Mariam Ghanem, "The Battle over Al-Azhar, Carnegie Endowment for International Peace." May 31, 2017, https://carnegie-mec.org/diwan/70103 and Tamir Moustafa, "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt." *International Journal of Middle East Studies* 32.1, February 2000: 3–22.

8 The Council of Senior Ulema of al-Azhar is made up of 40 members, known for their piety and knowledge, first appointed by the Sheikh of al-Azhar and then co-opted. The Council will be responsible for electing the new Sheikh of al-Azhar who, until 2012, was chosen by the President of the Republic.

9 Article 175 of the 2012 Constitution. For the only case implementing Article 4 under the Constitution of 2012 and its limited effects see Nathalie Bernard-Maugiron, "La place du religieux dans le processus constitutionnel en Egypte après 2011." *Archives des sciences sociales des religions*: *Le religieux à l'épreuve des révoltes et des contre-révoltes dans le monde arabe*, edited by Cécile Boëx and Nabil Mouline, 181, January–March 2018: 47–68.

A High Islamic Council has also been created in Mauritania (1991, art. 94). In 2017 it was replaced by a High Council for Fatwa and Grievances (*al-majlis al-a'la li-l-fatwa wa-l-mazalim*).

2.2.3. Effects of these provisions on the political organization of the State

If all constitutions in the Arab world give a privileged status to Islam, in few of them has such a status a significant impact on the political organization of the state. It is rare for the Islamic nature of the State to result in a theocratic regime and the association to power of religious authorities.[10]

Official religious bodies enable the executive power to secure its grip on the religious sphere and establish its authority by maintaining them in a relationship of subordination. Most of them are appointed by the Head of State and can only give advisory opinions, on the questions he submitted to them. They cannot give their opinions on a specific topic if they are not required to. Their integration into the state apparatus restricts their field of competence so that they do not arise as competitors.[11] But such a control of the executive power also contributes to discrediting these institutions in the eye of the community and the Islamist movements. The assertion of the Islamic character of the state does not necessarily imply the application of a hypothetical *Islamic model* for the organization of power. Institutional mechanisms remain modern and religious provisions are accompanied by references to modern constitutionalism. All these constitutions organize a more or less extensive separation of powers, even if the head of state remains at the center of the institutional system. Although constitutionalism was not born in the Muslim world, modern political terminology, such as democracy, elections, executive power, parliament, right of dissolution or motion of non-confidence, ended up being part of the vocabulary of the protagonists of the political scene. All these constitutions, besides, proclaim fundamental rights and freedoms and most of them invoke national or popular, not divine sovereignty,

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10 Nathan Brown, "Official Islam in the Arab World: The Contest for Religious Authority." *Carnegie Endowment for International Peace*, May 11, 2017, https://carnegieendowment.org/2017/05/11/official-islam-in-arab-world-contest-for-religious-authority-pub-69929.

11 For attempts by these religious bodies to gain autonomy, see Nathan Brown, ibid., *Carnegie Endowment for International Peace*, May 11, 2017, https://carnegieendowment.org/2017/05/11/official-islam-in-arab-world-contest-for-religious-authority-pub-69929.

The Islamist parties that took part for the first time in constitution drafting processes in Egypt and Tunisia after 2011 have also placed themselves in the continuity of constitutionalism rather that within the traditional system of Islamic law, where law is the expression of the will of God as interpreted by theological jurists. Even if this adherence of Islamists to the principles of the modern state might seem purely tactical to many, it reinforces the legitimacy of these concepts.

Even the Egyptian Constitution of 2012, that was drafted by an Islamist majority Constituent Assembly, stated in its Article 6 that "The political system is based on the principles of democracy, consultation (*shura*), and citizenship, which together regulate public rights and duties among the citizens. It is also based on pluralism in politics and among parties, the peaceful transfer of power, the separation and balance of powers, the rule of law, as well as respect for human rights and freedoms, according to the provisions of this Constitution. No political party may be based on discrimination of gender or origin or religion". These principles are quite far from those of "Islamic" models of the organization of power.

If the political consequences of the proclamation of Islam as the religion of the state or the affirmation of its Islamic identity differ from country to country, in most cases, however, such provisions did not have significant effects on the organization of power. Their political system is organized on the Western model with a more or less thorough separation or the religious and state fields.

3. *References to the normative value of the sharia*

If several constitutions of the Arab world refer to the normative value of the *sharia*, the legal effects of such provisions, however, remain symbolic or limited to family law and, less often, to penal law.

3.1. *Constitutional references to the sharia*

Some Arab constitutions refer to the *sharia* as "a" or "the" source of legislation. Such a reference was introduced in the Arab world for the first time in the Syrian Constitution of 1950 where *fiqh* was to be the main source of legislation (*al-fiqh al-islami huwa al-masdar al-ra'isi li-l-tashri'*) and has since then been adopted in several other countries, though most of them refer to the "*sharia*" rather than to the "*fiqh*".

Some states claim that the *sharia* is "a main source of legislation (*masdar ra'isi li-l-tashri'*)". Such a provision was included in the Kuwaiti Constitution of 1962 (art. 2), in the United Arab Emirates (1971, art. 7) or in Bahrain (art. 2).[12] In Qatar (2003, art. 1) « The Islamic *sharia* is a main source of its legislations (*masdar ra'isi li-tashri'atiha)*». In Syria (2012, Art. 3), "Islamic *fiqh*" is a main source of legislation (*al-fiqh al-islami masdar ra'isi li-l-tashri'*).

Other constitutions proclaim the *sharia* "the" main source of legislation. In Yemen, since 1994 (art. 3), thus, "the *sharia* is the source of all legislations" (*al-shari'a al-islamiyya masdar jami' al-tashri'at*) and in Oman (art. 2), the Islamic *sharia* is the "basis" for legislation (*al-shari'a al-islamiyya hiya asas al-tashri'*). In Sudan, according to the Constitution of 2005 (art. 5), "Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic *sharia* and the consensus of the people ».

In Mauritania, the Preamble of the constitutional text considers the precepts of Islam (*ahkam al-din al-islami*) as the sole source of law (*al-masdar al-wahid li-l-qanun*). In Egypt, since 1980, "the principles" of Islamic *sharia* are the main source of legislation. Before the 1980 Amendment of Article 2, they were only "a" source of legislation.

In Saudi Arabia, the Basic law of 1992 proclaims that the Quran and *sunna* are the constitution of the country (*dusturuha kitab allah ta'ala wa sunna rasulihi*) (art. 1). The Basic Law adds that "the power derives its authority from the Book of God and the Prophet's *sunna*, which take precedence over the constitution and all other state laws" (art. 7). Such a provision can be considered as establishing the superiority of religion over politics but also as a way to legitimate the power of the King. Indeed, his authority does not emanate from the sovereignty of the people or the nation but from the Quran and *sunna*. The King, thus, places himself above the people by claiming to hold his power from God through the Quran and the Prophet.

The normativity of *sharia* can also be addressed through a negative approach: it is forbidden to adopt laws that would violate the *sharia*. Such a provision, known as the "repugnancy clause" was inserted for the first time in the Iranian Constitution of 1906 as amended in 1907. In the Arab world, the Iraki Constitution of 2005 declares that Islam (and not the *sharia*) is a main source (*masdar asas*) of legislation (art. 2) and adds that

12 W. M. Ballantyne, "The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies", *Arab Law Quarterly* 1.1, November 1985: 3–18.

it is forbidden to promulgate laws contrary to the fixed prescriptions of Islam (*thawabit ahkam al-islam*).

In some countries, in particular in the Arabian Peninsula, the constitution mandates the application of Islamic norms in specific areas. In the Kuwaiti Constitution, for instance "Inheritance is a right governed by the Islamic *sharia*" (*al-mirath haqq tahkumuhu shari'a al-islamiyya*) (art. 18). A similar provision can be found in the constitution of Yemen (art. 23): "The right of inheritance is guaranteed in accordance with Islamic *sharia* (*haqq al-irth makful lil-shari'a al-islamiyya*). A special law will be issued accordingly" or in Qatar (art. 51) "The right of inheritance is secure and governed by the Islamic *sharia* (*haqq al-irth masun wa tahkumu al-shari'a al-islamiyya*)" and Bahrain (2002 art. 5) (*al-mirath haqq makful tahkumhu shari'a al-islamiyya*).

States such as Algeria, Morocco, Jordan or Tunisia make no reference to the *sharia* in their constitutions.

3.2. Meanings of normativity of the sharia

On the legal level, the provisions that proclaimed the *sharia* "a" or "the" main source of legislation did not give any guidance on how legislation was to be derived from the *sharia* and who this injunction aimed at. Can judges decide to disregard the application of a law that they consider contrary to Islamic *sharia*? Should all *sharia* principles prevail over all levels of legislation, when it is designated as its primary source? How to identify these *sharia* principles?

From the point of view of classical Islamic orthodoxy, the authority of the *sharia* does not depend on human intervention and the Quran is the only constitution needed by Muslims. God is the only legislator and rulers shall only be executive authorities, with no power to legislate. Islamic law, therefore, does not contain provisions regarding the place to be given to religious and secular law respectively, even if public Islamic law has always acknowledged the right of the leader of the *umma* (*wali al-amr*) to enact administrative regulations deemed necessary to the good administration of the community of believers and the protection of public order (*siyasa shar'iyya*) on the condition that they would not violate the *sharia*.[13]

13 See for instance Amr Shalakany, "Islamic Legal Histories." *Berkeley Journal of Middle Eastern & Islamic Law* 1, 2008: 2–81 and the writings of Rudolph Peters and Khaled Fahmy on 19th century Egypt.

In most states that enshrine the norms of *sharia* law, there is no mention of a body that would be responsible for ensuring that laws conform to *sharia* law. In Egypt, though, this role was devolved to the Supreme Constitutional Court. This court, in charge of judicial review of laws and regulations, has the power to invalidate laws that violate the Constitution, including its Article 2. The Egyptian Supreme Constitutional Court is known for having adopted a liberal interpretation of Article 2. In two leading cases,[14] indeed, the Court has interpreted narrowly Article 2 and limited the normative value of Islamic law. It asserted the non-retroactivity of the 1980 Constitutional Amendment and made a distinction within the principles of *sharia*.

The Court distinguished between absolute Islamic principles and relative rules. For the court, only the principles "whose origin and meaning are absolute" *(al-ahkam al-shar'iyya al-qat'iyya fi thubutiha wa dalalatiha)*, that is to say the principles which represent non-contestable Islamic norms, whether in their source or in their meaning, must be applied compulsorily. They are fixed, immutable, cannot give rise to interpretative reasoning (*ijtihad*) and cannot evolve over time. They represent "the fundamental principles (*al-mabadi' al-kulliyya*) and the fixed foundations" (*al-usul al-thabita*) of Islamic law. To this body of absolute principles, the Court opposed a set of rules considered as relative (*ahkam dhanniyya*), either in their origin (*thubut*) or in their meaning (*dalala*), or in both. They are subject to interpretation, are evolving in time and space, are dynamic, have given rise to divergent interpretations and are adaptable to the changing nature and needs of society. The Supreme Constitutional Court, therefore, has granted a great deal of freedom to the state's authorities, that are only bound by the "absolute Islamic principles" and are empowered to adapt the "relative rules" to the transformation of the Egyptian society. Besides, the Court has attributed itself the power to define which principles of the Islamic *sharia* are absolute and which rules are relative.[15]

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14 Supreme Constitutional Court, No. 20/1, May 4, 1985 and No. 7/8, May 15, 1993.

15 For a criticism of the decisions of the Court regarding the principles of the *sharia*, see Clark B. Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State." *Columbia Journal of Transnational Law* 37, 1998: 81 et s. See also Nathan Brown and Clark Lombardi, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law." *American University International Law Review* 21, 2006: 379–435." and N. Bernard-Maugiron and B. Dupret, "Les principes de la charia sont la source principale de la législation. La Haute Cour constitutionnelle et la référence à la loi islamique." *Égypte-Monde arabe* 2, new series, 1999: 107-125.

The role of judges will be all the more important since many of these constitutions contain contradictory provisions, with proclamations that Islam is the religion of the state or the *sharia* the main source of legislation, next to provisions protecting freedom of religion, giving a special status to religious minorities or proclaiming equality between men and women. In Saudi Arabia, the Basic Law of 1992 even states that "The State shall protect human rights in accordance with the *sharia*" (art. 26) and in Yemen, the Constitution declares that "Women are the sisters of men. They have rights and duties, which are guaranteed and assigned by *sharia* and stipulated by law" (art. 31).

Article 6 of the 2014 Tunisian Constitution states that "The state is the guardian of religion. It guarantees freedom of conscience and belief (*hurriyat al-mu'taqad wa al-damir*), the free exercise of religious practices (*mumarasa al-sha'a'ir al-diniyya*) and is the garant (*damina*) of the neutrality of mosques and places of worship from all partisan instrumentalisation. The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred (*al-muqadassat*), and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for apostasy (*takfir*) and the incitement of violence and hatred." This provision, the result of a compromise in the Constituent Assembly, contains several vague and contradictory notions that the constitutional court will have to define and interpret.

3.3. Sharia in the legal systems of the Arab states

In practice, the attachment to religion proclaimed in the constitution had little impact on national positive law. In contemporary legal systems in the Arab world, *sharia* applies only in personal status law and in penal law of a few Arab countries. All other branches have been secularized on the model of Western codes.

Family law continues to draw its norms from religious sources, but all these countries, except Saudi Arabia, have adopted a family code. Through the codification process, several rules were revised, to improve the status of women in marriage and divorce by using various techniques such as the choice of rules within the four *sunni* law schools (*takhayyur* and *talfiq*).

Conversely, the fact that the constitution does not enshrine the normative value of the *sharia*, like in Tunisia, Morocco, Jordan or Algeria, has not prevented the legislators of these countries from drawing from the normative corpus of Islamic *fiqh* when drafting family codes and from legitimizing the most daring reforms by invoking the right to reinterpret re-

ligious sources (*ijtihad*). When HabibBourguiba codified Tunisia's personal status law in 1956, he denied any break with *sharia* and stressed that all developments had been accomplished "in accordance with the teachings of the Holy Book". The Tunisian Constitution, though, does not make any reference to the *sharia*. In addition, Tunisian courts relied on Article 1 of the 1959 Constitution to raise the exception of public order against foreign decisions regarding custody and visitation rights they considered to be contrary to the *sharia*. Some courts also relied on this article to declare the marriage of a Muslim Tunisian woman with a non-Muslim man invalid.[16] A 1973 circular from the Ministry of Justice that prohibited civil servants from registering such marriages was finally repealed in September 2017 by former President Béji Caïd Essebsi but some municipalities and notaries continue to refuse to celebrate such marriages.

As for criminal law, all Arab countries except Saudi Arabia have adopted a penal code on the model of the French code. This is the case in countries that do not enshrine the normativity of *sharia* in their constitution, such as Algeria, Jordan, Morocco or Tunisia, but also of those who make the *sharia* a source of legislation, such as Egypt (1937), Syria (1949), Bahrain (1976) or Oman (2018). All these penal codes have shifted from Islamic criminal law and its categories (*hudud* / *qisas* / *ta'zir*) and its penalties, to adopt the French classification of penalties into crimes, offenses and misdemeanors. While some of these countries still punish behaviors considered to be the most serious crimes in Islamic criminal law (*hudud*), most of them, however, have replaced the corporal punishments provided for by *fiqh* with imprisonment and/or fines. In most countries, talion (*qisas*) has also disappeared and has been replaced by prison terms and/or fines and the death penalty in case of intentional homicide. Classical Islamic penal law remains applicable only in a few Arab countries, such as Saudi Arabia, the Sudan, Libya or Mauritania and in most of cases, it is so difficult to prove *hudud* that corporal punishments only rarely apply and are replaced by other penalties on the basis of *ta'zir*.

All these countries, besides, have entrusted criminal litigation to secular courts. Even in Lebanon, Jordan, Bahrain or Iraq, where religious courts survive, they are only competent in family law litigation. The civil courts to which criminal litigation has been transferred rule on the basis of a code

16 See the decisions of the Court of Cassation in favor of the impediment of inheritance for disparity of religion (Houriya decision, January 31, 1966) or declaring the nullity of the marriage of a Muslim woman with a non-Muslim husband (Court of Cassation, June 27, 1973).

of criminal procedure and a system of evidence also inspired by French law.

The reference to the normative value of *sharia*, therefore, does not necessarily entail a specific legal role for religious norms or a more rigorous application of the rules derived from the *sharia*. The Islamic referent often functions more as an identity marker than as an effective source of law. The reference to Islamic law can be a way for these states of distinguishing themselves from the West.

Sharia, therefore, has an ethical and symbolic dimension more than a legal one. Its invocation by Muslims means a desire for order, stability, a certain authenticity and for greater social justice. It is mainly a call for the implementation of moral or ethical religious prescriptions and for the improvement of public governance. In Egypt, thus, members of Islamic parties were marching in November 2012 and calling for the strengthening of the *sharia* in order to put an end to unemployment, drug trafficking and corruption.

4. Conclusion

Religious references in constitutions do not necessarily entail that the state will be a theocracy or that the *sharia* will be applied in all fields and in particular in penal law. *sharia* is associated to good governance and decreasing its official status could be considered by their population as entailing political corruption and lack of accountability of the regime. One of the main purposes of religious references in the constitutions of the Arab region, therefore, could be to provide religious legitimacy to the rulers who know that secularism has limited appeal and is seen as unacceptable by the majority of their population.

By inserting a constitutional provision recognizing the normative value of *sharia*, constituents also hope to counterbalance the rise of the Islamist opposition by promoting an official Islam. The mobilization of Islamic referents by rulers enables them to control religious institutions and ensure compliance with their conception of Islam. It is, however, a double-edged sword. The radical movements of political Islam will invoke, too, these constitutional references to found their challenge to power on it and demand that government practices be brought into conformity with their constitutional commitments. They will claim a range of measures such as re-Islamization of society, discrimination against women and non-Muslims, consultation with religious authorities before voting on bills, censorship of artistic creations, penalization of apostasy of Muslims, denial

of certain religions; etc. There is therefore a risk that each side tries to appropriate Islam to legitimize its own political action. Judges may also refer to these religious references to invoke the existence of an Islamic public order (ex. Egypt) or to give an extensive interpretation of provisions of the personal status code (ex. Tunisia).

Just as constitutional provisions on the separation of powers or on the protection of human rights often remain a dead letter in many Arab authoritarian states, articles affirming the constitutional status of Islam and *sharia* rarely have real legal or political effects. However, they retain a very strong symbolic value, which is found in discourses and sometimes even in court decisions, then turning against the power that wanted to instrumentalize religion for the purpose of legitimation.

The inclusion of Islam in the Constitution does not always serve to make the state politically responsible before Islamic law and therefore limit power, but on the contrary strengthens its control over society. Such provisions thus give the state a religious legitimacy based on divine sovereignty, in addition to its political one.

As to the constitution, it is more an instrument in the hands of the political elite than a tool to organize and limit the power. The inclusion of Islam in the constitution as the religion of the state, therefore, is as much a way to take into account the religious values of the majority of the population as a political motivation to affirm the preponderance of the state over the religious field. Politics interfere into the religious sphere more than religion does interfere into the political sphere. Religious references reflect the constitutionalization of Islam more than they are a sign of the Islamization of constitutions.

The Allocation of Power between Religious and Secular Authorities in Egypt

Adel Omar Sherif

Abstract
The struggle over religious authority in organized societies, and hence the allocation of power between religious and secular authorities in the modern state, is at the heart of constitutional law. In Egypt, the Supreme Constitutional Court, one of the oldest institutions endowed with constitutional review powers in the region of the Middle East and North Africa, has developed over the past decades an interpretation of the pertinent Constitutional provisions. The chapter, referring to three landmark rulings of the Supreme Constitutional Court, is discussing who should have the final role on *sharia* and whether secular authorities have the legitimacy to be allocated such a power. The author illustrates the complexity of the interpretation of the constitutional articles, and highlights the Supreme Constitutional Court's stance not to allocate supremacy of a particular constitutional provision over the other ones, but instead to consider all the provisions as an interrelated organic unit. As the institution exclusively endowed with power to interpret the Constitution, it is the Supreme Constitutional Court to have the final word.

Who has the Final Word on sharia *in Egypt?*
The Supreme Constitutional Court, Al-Azhar, or Dar al-Ifta'

1. Introduction: Religion v. state - A deep-rooted struggle

The struggle over religious authority in organized communities is as old as the emergence of these communities themselves. History has shown us how contentious and bloody the tension between religious clergies, on one hand, and the rulers on the other, has always been, wherever and whenever the two parties competed with each other over assuming power in any given society. In ancient civilizations, as in ancient Egypt

for example, thousands of years ago, the existence of a God was held inherently unquestionable. Religious aspiration was clearly manifested in the lives of the people in every way; hence, definitely influenced the form of their governance systems. God was there to tell people what they should do and what they should not. Therefore, people always believed that their worshiping of a God would help them getting a divine earthly support throughout the journey of their lives followed by a heavenly reward in the hereafter. At these ancient times, the clergies, being keen on controlling all powers, including political power, portrayed themselves as a sole road to God and salvation. Since people had a lot of belief in the clergies and always honored them, the clergies usually successfully managed to recruit the supreme ruler of the land, or the King, to their side, and even to position him as a God himself in order for him to gain the support of the subjects. There were not many options available before the King to follow if he wished his reign to be peaceful and uninterrupted. The price he had to pay, therefore, was to establish his integration within, or at least alliance with, the religious institution as a way of ensuring his divinity and legitimacy. The process of subjecting one team to the other had never been that easy, but rather a catastrophic one marked by wars and bloodshed. But in all cases, religion was always there, presenting itself as a key-factor in ruling ancient societies.

One way or the other history continued to show us, chronologically, that the ancient Egyptian model had been similarly adopted by many sequential civilizations and nations. Indeed, there was a turning point in modern history with the arrival of secularism and separation between state and religion. Nonetheless, the influence of religion is still there at different levels, not only in these states that are constructed on religious basis, but also in those states that explicitly encourage such separation. Therefore, it becomes necessary, with the domination of a religious orientation in any given society, to identify those figures or institutions that are authorized to tell us what religion informs us and how religious rules should be decided, then implemented. Only by this, the transparency of the law and order would be guaranteed and maintained.

2. Who decides the law in Muslim communities? An ongoing struggle

In that sense, in a Muslim dominated society, the question of law, as who has the power to decide what the law is, presents itself as a serious issue of immense importance. It is all about revealing the Will of God, by competent figures, *mujtahedin*, in a way that is consistent with recog-

nized Islamic norms. Since its inception in Medina in the year 622 CE, and throughout the subsequent few centuries, during the golden age and spreading over of Islamic rule, the centralization of power in the hands of the Khalifa, who was usually himself a competent *mujtahid*, there had been not much controversy over this issue due to the existing unification, at that time, of religion and state. But at a later stage, when Islamic states or societies gradually became more considerate of politics and the power of ruling itself regardless of the compatibility of exercising this power within Islamic norms, the struggle over religious authority became evident. Such struggle assumes that political authority has invaded the realm reserved for *mujtahedin*, or the religious authority, by asserting its power to decide the law, either solely or in some form of collaboration between them. The modern form of Islamic state reflects this struggle wherein political authority, while aware of the necessity of adhering to Islamic norms in the law-making process, is always keen on having a final say in deciding the law of the state in its entirety. Occasionally, the state might scarify some of these norms for whatever political reasons, but at least would always endeavor to flavor the law-making process by an Islamic cover-up.

3. *Modern constitutional structures require participation of many actors in the lawmaking process*

Nowadays, the complications of modern state constitutional structure, even within those states that proclaim that they are Islamic, requires the participation of a number of actors in the law-making process. Indeed, if a single actor handles this mission, it becomes clear who is in charge. But when multiple actors exist, as the case usually is, the potential of struggle over religious authority becomes obvious.

With its unique complex composition of both certain and uncertain norms, the journey to identify and realize the law in a Muslim country turns out to be demanding as well as challenging. Unlike definitive norms of Islamic law that all jurists honor, what makes it devastating is the fact that most of the rulings of Islamic law do not belong to the definitive, but rather to the indefinite areas wherein *fiqh* usually maneuvers amongst various interpretations, of fundamental differences to each other, in an attempt to reveal God's law. Allowing various actors to play a role, at the same time, to realize the law and bring it up to the level of enforcement, would certainly pave the way before different juristic schools, not only to manifest their differences, but eventually to collide with each other in a

manner that will most likely negatively affect legal certainty and expose societal harmony to real risk.

4. The role of the religious authority in Egypt: From supremacy to declination

Herein, the case of modern Egypt presents an interesting example showing us how the power of the religious authority gradually declined dramatically over time in the law-making process in favor of other irreligious institutions or the state at large. The Muslim conquests reached Egypt as early as the year 641 CE and led to the termination of the Byzantine rule and beginning of the Islamic rule under Amr ibn al-As. Since then, Egypt remained a state affiliated with the subsequent Islamic empires until its official separation from the last one of them, the Othman Empire, in 1914, before the demission of that empire in 1923. The harbingers of separation and autonomy, however, began earlier following the commencement of the rule of Mohammad Ali's family in 1805.

Throughout the Islamic empires' rule, there had been ups and downs as far as the empire-controlled state affairs, including defining Islamic *sharia* and law. However, with the deterioration of the Othman power on one hand, and continuing upsurge of Mohammad Ali's power on the other, many improvements of western style to state bureaucracy had been initiated and somewhat led to indispensable changes in that role religion and religious institutions had traditionally played in the land. The tradition in Muslim societies is for competent religious figures and institutions to inform the rulers on matters of Islamic *sharia* and law. Therefore, by the 19th century onwards traditional religious institutions embraced al-Azhar, with a long history dated back to the 10th century, and the state Muftis, who are an innovation of the 19th century and always associated themselves with the state throughout the time. In addition, among the important actors were *sharia* judges who represented an integral part of the ruling system in the Islamic era until *sharia* courts were finally abolished in the year 1955. The contribution of these actors to the law-making process was substantial, but with the changes in the governing system the new rulers introduced, their role in this area began to decrease. As a result, today, and with all changes and developments to the governance system throughout time that turned it to be more western based than Islamic, one may question whether these institutions have maintained a role to play? And if so, how influential this role would be? In fact, the moral weight of that role is a constant feature of any given Islamic society wherein a tendency to observe the religious law and abide by it always remains valid at all times. But

when the modern state penetrates this area, for obvious political reasons that largely have to do with the existing constitutional structure, it is very unlikely for religious institutions to remain powerful when it comes to deciding the law of the land. At modern times, even within states who proclaim to be Islamic, the authority to decide the law does not solely rest in the hands of whatever religious institutions they might have. No matter how the religious institution is involved, the reality continues to be that the state, as a political power, remains to be the final authority that controls the law.

5. Constitutional deference to Islamic sharia in Egypt responding to a 20th century's regional call

As we will be discussing later in this chapter, since the 20th century, Egypt has followed a trend widely existing in the vast majority of Arab states, by proclaiming deference to the principles of the Islamic *sharia* within its successive constitutional documents, that is derived far more from European than Islamic legal traditions, with a formula that varied chronologically from one constitution to the other. Article 2 of the 1971 Constitution, as amended in 1980, followed by subsequent constitutional documents, including the existing 2014 Constitution, positioned Islamic *sharia* at the apex of legal norms. It explicitly provided for Islam as the religion of the state and Islamic *sharia* to be the principal source of legislation. At the comparative level, it is not uncommon to argue that the constitution itself is bound by prior or higher principles. Therefore, despite the fact that the constitution, the supreme law of the land, which makes other laws possible, and always presents itself as the fundamental law of the state and the expression of the will of a sovereign people; the reference to the Islamic *sharia*, implies the existence of a higher or prior law. This could mean that the *sharia* is adopted not only to guide interpretation processes, but also to supersede all other legal rules, including, perhaps, the constitution itself. And this is not merely a theoretical or abstract argument; much contentious political debate, and sometimes violence, has centered on the proper relationship between the legal order devised by human beings and that derived from divine sources.

6. *Egyptian society signifies high-level of religiosity*

As the case is settled in many other Muslim dominated societies, the level of religiosity in Egyptian public life is high, and Egyptians generally cast their understanding of relations not only between individuals and God, but also among individuals themselves, in terms of religious concepts and obligations. The dominance of Islam in Egyptian society, with perhaps over ninety percent of the society professing to be Muslims, is acknowledged in all Egyptian constitutional texts in the 20th century. Nevertheless, those same constitutional documents insist that non-Muslim Egyptians are to be accorded the same status as Muslim Egyptian citizens. Such provisions can be, and are, understood not as antithetical to a *sharia*-based order, but as intrinsic to it, founded on provisions for freedom of religion and belief.

As a result, the political order in Egypt has presented itself as Islamic since the arrival of Islam to the country almost fourteen hundred years ago. With the majority of the Egyptian population turning to Islam, the *sharia* became the accepted basis, not only for governance, but also for social relations. While total obeisance to *sharia* principles was probably never the norm, the Islamic *sharia* still held ideological dominance until the late 19th century.

7. *Gradual declination of the applicability of the sharia*

Since that time, the 19th century, and with the progressive improvements to the governance systems presented by the rulers, new and comprehensive law codes, derived mainly from the European codes, began to be adopted parallel to similar governance system developments in the Ottoman Empire and its affiliated Arab countries. The result was to restrict the applicability of *sharia*-based legal principles in almost all fields, with the exception of the family status issues field, in which Islamic *sharia* principles continued to prevail. Non-Muslims continued to be governed by their own religious rules, a practice itself in accordance with Islamic principles guaranteeing followers of divine revelations, Christians and Jews, the right to apply their own religious laws.

In reality, the process of transformation has left its impact on these countries since then up until now. Today, legislation in most Arab countries, including Egypt, is generally not drawn from the Islamic *sharia*, but is grounded in those European codes. For instance, civil and criminal codes now applied in Egypt are ultimately derived from French codes

and have in turn inspired a multiplicity of the substantive and procedural legal rules in the region. This state of affairs has become increasingly controversial in recent years, not only in Egypt, but throughout the Arab world. Increasing calls are heard from various Islamic movements for an Islamic State based on *sharia*. Such calls seem to strike a strong resonance in predominantly Muslim societies, and Egypt has seen a remarkably intellectual ferment concerning this issue. It is not surprising, therefore, that Egypt has, along with many other Arab countries, moved to attempt to adopt a *sharia*-based constitutionalism.

8. Islamic states with secular practices

Despite this trend and despite the fact that the constitutions of Islamic countries, to which the Constitution of Egypt belongs, ensure their religious nature, the recent movement to accommodate religion has not yet resulted in a noticeable change to the system of government and the practices of public authorities in these countries, which remain essentially secular. This, in fact, presents a conflict between state and religion in Islamic countries that these countries are now attempting to address in various ways. The struggles that have gained most international attention have even taken violent form. Yet a constitutional and legal struggle, occurring far less in the especially western public eye, has also led to a remarkable effort to diminish the gap between law and governance on one hand and *sharia* derived principles and practices on the other.

9. Article 2 of the Constitution and the supremacy of the sharia

As we have highlighted earlier in this article, in 1971, Egypt joined those Arab and Islamic countries who explicitly provide for a link between the Islamic *sharia* and legislation. That year, the country received a "permanent" constitution to replace the avowedly temporary documents of the Nasser years. Unlike preceding constitutional documents, Article 2 of the 1971 Constitution went beyond mere declaration of Islam as the religion of the state as such a formula was no longer deemed adequate. It more ambitiously described the principles of the Islamic *sharia* as "a principal source of legislation." Arguments in favor of still stronger provisions were rejected for the moment as reflected in the minutes of the Preparatory Committee for drafting the Constitution. Yet the proponents

of a stronger Article 2 won a delayed victory as the Constitution was amended nine years later to make the principles of the Islamic *sharia* "the" principal source of legislation. As amended, Article 2 of the 1971 Constitution proclaimed: "Islam is the religion of the State, Arabic is its official language and the principles of the Islamic *sharia* are the principal source of legislation". Same language has been adopted in the following constitutional documents, including, both the 2012 Constitution and the 2014 Constitution.

10. Many actors are there, but are they influential?

Today, in addition to the traditional known religious actors, other new actors have already joined the track. Al-Azhar, the state Mufti and the Ministry of Religious Affairs sit at the frontline among religious competing actors. Despite of their autonomy from each other, they are all considered partners in leading a serious movement towards renewing religious discourse in order to promote the image of Islam in contemporary world and present it in its true sense as a religion of peace and tolerance. Other, official and unofficial, actors include, but not limited to, the media, both state supervised media and private ones; educational intuitions wherein religious education is mandatory throughout pre-university level; prayer places and family law courts as family law issues are generally governed by religious rules. There is no doubt that some influence of these institutions is present whenever a religious issue is brought to the attention of the people. Though al-Azhar, the state Mufti and the Ministry of Religious Affairs all have official capacity, and eventually seen as loyal to the régime, their engagement or contribution to any public or religious debate could differ. While the Ministry is understandably serving as the mouthpiece of the government, both al-Azhar and the state Mufti tend to portray themselves as the religious conscience of the land, especially al-Azhar after being accorded a constitutional status by virtue of Article 4 of the 2012 Constitution, followed by Article 7 of the 2014 Constitution, that considers it an autonomous scientific Islamic institution and the predominant reference in religious sciences and Islamic affairs. For that reason, both al-Azhar and the state Mufti are likely keen not to be observed as subservient to the political authority; hence are usually eager to assert their autonomy before the public; such autonomy that is actually guaranteed by virtue of state laws and regulations organizing these institutions and specifying their mandate.

11. The final authority in deciding Islamic norms does not belong to the religious actors

Despite the co-existence of these multiple actors by each other, and considering whatever contributions they might be able to make in any religious debate; the reality is that any role played by any of these institutions, either official or unofficial, remains within the consultation or advisory side of the process and is not, *per se*, enforceable. Other than the moral value the fatwas or other religious pronouncements declared by these institutions may hold, they are all legally unbinding and cannot be enforced without appropriate enforcing mechanism. To be legally enforced, they have to be embodied within legislation or ordained by a court decision. This ultimately means that the final authority in deciding enforceable Islamic norms does not belong to the religious institutions, no matter how societally influential they are; rather, this authority remains within the hands of the legislature, which is Parliament, together with the executive branch of the Government whenever this branch is accorded a constitutional mandate to exercise legislative power. The Supreme Constitutional Court (SCC) is also considered a final authority and arbitrator in deciding what the law, including Islamic law, is. Through exercising exclusively, the power of judicial review in constitutional issues, the SCC articulates and gives the final true and binding meaning to the constitutional norms guaranteed by the Egyptian Constitution, including Islamic *sharia* norms. This has been the case since the Court was first founded back in 1969 up until now by virtue of its establishing legislation as well as constitutional commands.

12. The rule of the Muslim Brotherhood: An unsuccessful attempt to raise the power of the clergies

Another interesting development to highlight, however, had taken place right after the collapse of Mubarak regime in 2011, and the arrival of Mursi to power the following year. The Muslim Brotherhood, with their outrageous animosity towards the SCC and its liberal interpretation methodology in Islamic *sharia*, found it to be a golden opportunity to use their 2012 Constitution as a tool by which they would raise the power of the clergy; hence, limit the power of the SCC. Contrary to the SCC's methodology, their vision was that law should always be measured for consistency with legal principles found in the four traditional sources of *sunni* Islamic law: the Quran, *sunna*, *qiyas*, and *ijma*, then interpreted in

a manner informed by a study of texts considered exemplary within the *sunni* tradition. Among these texts, must be the traditional *sunni* texts dealing with the subject of *usul al-fiqh* and *qawa'id fiqhiyya*. In order to implement this vision, they had to introduce two new provisions to that Constitution, Article 4 and Article 219. In Article 4, they accorded al-Azhar a constitutional status as an autonomous Islamic institution in charge of spreading Islamic discoursing, religious sciences and Arabic language over Egypt and throughout the world. They also required that opinion of al-Azhar's Body of Senior Religious Scholars (*Hay'at Kubar al-Ulama'*) should be taken on Islamic *sharia* affairs. Then in order to foster their attempt, they introduced Article 219 by using an ambiguous language and some technical terms rarely used outside of scholarly circles that read: "The principles of the Islamic *sharia* include its *adilla kulliya, qawa'id usuli* and *qawa'id fiqhiyya* and the sources considered by the *sunni madhhabs*."

Had the core of these two new constitutional articles been actually implemented, they would have definitely changed the mode in which the law is argued and how its legitimacy is evaluated, and also as to determining those who are competent to be in charge of carrying out this mission. But as Mursi's constitution was only there for just a very short period of time, these provisions were never tested or given real substantive effect in the law-making process; hence, no major changes to the already established theory of the law-making and interpretation was practically introduced. Today, in the existing 2014 Constitution, while Article 7 continues to recognize the role of al-Azhar as an autonomous Islamic institution and principal reference in religious sciences and Islamic affairs, the arrangements embodied in Article 219 of the 2012 Constitution have now ceased to exist and are no longer there.

13. *How the law is finally articulated? The supremacy of the constitutional jurisdiction as to defining Islamic law*

Today in Egypt, and throughout the past few decades, the country's Supreme Constitutional Court has found itself in the forefront of the battle to decide what Islamic law is by giving life to the very general wording of Article 2 since it was amended in the 1980 up until this moment under the 2014 Constitution. The Court, as a secular, not religious, institution adopted a distinctive modernist approach that acknowledges scholars and their traditions. Yet at the same time, occasionally, the Court's approach has the flexibility to ignore the views of the traditional scholars if the Court considers them no longer compatible with modern life exigencies

and the needs of the people. *De novo* approach has always been the Court's practice while adjudicating Article 2 cases. The Court interpreted Islamic law using its own distinctive, somewhat idiosyncratic, version of modernist reasoning. The Court concludes that state law would be measured against two different types of Islamic principles: *The first* were those clearly and explicitly announced in the Quran and that limited number of *hadiths* whose authenticity was not merely presumptively true, but was entirely beyond doubt -- which the SCC found very few in number. *The second* were overarching principles that could be induced from a study of the scriptures as a whole. Among these induced principles, some of the most important were principles of utility and justice -- and the Court did not automatically defer to traditional *sunni* scholar's understandings of these terms. Rather it measured laws against its own quite liberal understandings, often arriving at results inconsistent with traditional pre-modern *sunni* interpretations of Islamic law.

In carrying out this methodology, the fulfillment of public welfare, preservation of the foundation goals of the *sharia* (religion, life, lineage, intellect and property) and consideration of the changing human needs, in terms of time and place, have always been at the center of the Court's concern. Today, there is no doubt that the understandings and rulings of the Court, the highest judicial institution in the country and one of the most influential in the Arab world, has helped determining the extent to which the Islamic *sharia* serves as a sound base for a constitutional democracy in the contemporary world.

14. Three major foundations in deciding Islamic norms

In practice, the SCC has established three foundations in developing its jurisprudence and binding interpretation of the meaning of Islamic *sharia* principles within a constitutional framework. *The first* of these is that Article 2, together with all other Articles in the Constitution, forms a unified organic unit. *The second* is that the constitutional obligation imposed upon the legislature to adhere to Islamic *sharia,* in accordance with Article 2, is prospective and not retrospective in nature. *The third* base asserts that the application of *sharia* principles in constitutional litigation must be based on a distinction between its definitive and indefinite sources. Though these foundations were established under the 1971 Constitution, they have remained valid all through up until the present time due to the Court's continuing uniform constitutional understanding of the role of Islamic *sharia* in society since the amendment of the 1971 Constitution in 1980.

First: The constitution should be looked at as a single, uniform organic unit. The unity of the constitution has always been a prevailing theme running throughout the jurisprudence of the SCC. This view of the constitution leads the SCC to deny the supremacy of a particular constitutional text over the rest of the constitution. Instead, the Court has insisted that constitutional provisions do not collide with each other, but collectively form an interrelated, organic unit, accomplished by coordinated methods of construction that conserve society-oriented values. Constitutional provisions are to be understood as a coherent, harmonized body of rules, reconciled and brought together to the extent that none of them is to be viewed as standing in isolation from the other (*Constitutional Case No. 23 of the Fifteenth Judicial Year*, decided on 5 February 1994).

This rule, undoubtedly, extends to Article 2 of the Constitution and, therefore, the Islamic *sharia* should always be perceived in a way that assures its harmony with other constitutional commands. Article 2 can therefore not be taken to undermine the rest of the text; instead, the various provision of the Egyptian Constitution must be viewed together.

Second: The application of Article 2 has a prospective nature. Ever since Article 2 of the 1971 Constitution was amended in 1980 to elevate the principles of Islamic *sharia* from "a" principal source to "the" principal source of legislation, the issue of its chorological applicability, and whether it could be applied retroactively, had to be addressed by the SCC. Since 1985, Article 2 jurisprudence of the SCC has been established on the premise that the constitutional requirement that all legislation must be consistent with the principles of Islamic *sharia* was prospective only from the date of adoption of the constitutional amendment, that is May 22, 1980; hence, the binding constitutional obligation to derive legislation from the principles of Islamic *sharia* only applies to the future. Legislation passed before the 1980's amendment of Article 2, cannot therefore be contested on constitutional grounds as a violation of Islamic *sharia*. This is because the true purpose of the amendment was to limit the legislative power of the legislature, which logically could only be exercised for future legislation (*Constitutional Case 20 for the First Judicial Year*).

The SCC, however, held that Article 2 is a limitation on the legislature, which must determine for itself whether legislation adopted before May 22, 1980 is consistent with the Islamic *sharia*. By deciding so, the court did not free the legislature of any responsibility for ensuring that pre-1980 legislation conformed to *sharia* principles. On the contrary, it imposed a political responsibility on the legislature to initiate new legislation to amend such texts where they are clearly in contradiction with principles of

Islamic *sharia*. Both existing and future legislation, eventually, have to be consistent with Islamic *sharia*.

Third: Establishing a distinction within Islamic *sharia* between definitive and indefinite norms. The final and most complex principle developed by the SCC involves the nature of *sharia* principles. In essence, the SCC has held that *sharia*-based norms have different value: such norms are either definitive or indefinite. In defining Islamic *sharia* principles the court relied on an unshaken chain of precedents which clearly stated that definitive principles are Islamic norms which are not debatable, either with respect to their source or the precise meaning. Such definitive norms must be applied. All other Islamic norms are indefinite in that they are susceptible to different interpretations and–due to their nature–changeable in response to the exigencies of time, place and circumstances. Such flexibility reflects not a defect in the *sharia* in the Court's eyes, but a strength, because it allows the principles to be adapted to changing realities and ensures their continued vitality and elasticity. Only in the realm of Islamic indefinite norms may the legislature intervene to regulate matters of common concern and achieve related interests. It must do so in consistence with basic Islamic norms, the aim of which is the preservation of religion, reason, honor, property, and the body. The legislature might develop different practical solutions to satisfy variable societal needs. The SCC regards the bulk of Islamic indefinite norms as highly developed, intrinsically in harmony with changeable circumstances, repulsive of rigidity, and incompatible with absoluteness and firmness. In no way may an Islamic indefinite norm, which is fading–whether due to time, place, or pertinent situations–be mandated by the Court or the Constitution (*Constitutional Case 8 of the Eighteenth Judicial Year*, decided on May 18, 1996).

The SCC jurisprudence, has always upheld this distinction between definitive or peremptory provisions or norms of the *sharia* on the one hand, and its indefinite or non-peremptory provisions or norms on the other. After the 1980 Amendment of the Constitution, all newly enacted legislation must adhere to definitive or peremptory norms of Islamic *sharia*. Where no such definitive norm exists, the legislature should adhere to the *ijtihad* most favorable for the people, selected from among indefinite or non-peremptory norms of the Islamic *sharia*.

Thus, *ijtihad* governs the process of determining the best applicable rule within indefinite norms. *Ijtihad* within the non-peremptory provisions in *sharia* is a process of reasoning to deduce practical rules to regulate the life of the people and achieve their interest. It should, therefore, cope with the context of events prevailing at the time. While the legislature might choose a specific interpretation as the basis of legislation, it cannot give

that interpretation the status of binding doctrine, except on those who accept it. The court's jurisprudence is based on viewing such multiple possibilities as a sign of divine mercy that encourages Muslims to think and discuss, diminishing the possibility of human error. The existence of indefinite norms is also taken to ensure that the Islamic *sharia* always develops and displays flexibility to accept ijtihad of responsible people to achieve the public interest.

When invoking Islamic *sharia*, the court, therefore, first searches for peremptory norms, and if finding none, looks at *ijtihad* that is consistent with the challenged legislation and achieving the interest of the people. Then, the court examines the purposes of this legislation. And at the outset, the Court determines whether the challenged provision is consistent with the interests of the people or not, and decides its constitutionality based on this conclusion.

15. Conclusion: The role of the state, and that of the SCC, supersede the role of the religious actors in defining the law

The current situation in Egypt suggests that existing religious institutions, both official and unofficial, do not have a considerable input in the law-making process. Though they undoubtedly might sometimes heat up the debate and have an indirect role informing the law makers of Islamic norms while preparing legislation, still their role cannot be always deemed of having a great influence in this process at all times. The state, through the legislature, remains the sole actor in charge of pronouncing the state's law, including Islamic law. The SCC, through exercising the power of judicial review in constitutional issues solely and exclusively is there not to legislate, but rather to monitor the legislature, within check-and-balance arrangements, in order to make sure that state law, including Islamic law, is consistent with the constitutional commands which include Islamic *sharia* principles themselves as the principal source of legislation. Indeed, this positions the SCC as the final arbitrator and elevates it to the higher status in shaping up Islamic norms in Modern Egypt; a mandate that the SCC has always undertaken seriously, liberally and progressively throughout the years.

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Islamic *Sharia* in the Legal Orders of Saudi Arabia and Kuwait

Salma Waheedi

Abstract
This chapter provides a background and overview of the place and role of Islamic law in the constitutional orders of Saudi Arabia and Kuwait. It discusses the place of Islamic *sharia* in the constitutional structure, court system, legal framework, and approaches to religious freedom protections in these facially similar but also significantly diverging political systems. It demonstrates, contrary to prevalent western assumptions, that the inclusion of a commitment to Islam in a given constitutional order does not simply lead to any pre-determined uniform outcomes, nor does it exclude secular law from the legal order. Even in Saudi Arabia, where the Basic Law commits to full Islamization of the legal system, practical and contemporary needs have led to the adoption of an increasingly hybrid legal system in response. The interpretation and application of *sharia* in law and practice continues to evolve and shift with changing political dynamics and public policy considerations.

1. Introduction

Most majority Muslim countries have adopted constitutions that entrench a national commitment to Islam and a role for Islamic *sharia* in shaping their legal systems.[1] The most commonly adopted constitutional commitment to Islam by far is the Islamic establishment clause, which generally provides that Islam is the religion of the state. A more concrete clause is termed the Islamic source of law clause, which provides that Islamic *sharia*, or principles of *sharia*, are "a" source or "the" primary source of legislation,

1 For a background, history, and analysis of these clauses across different Arab constitutions, see Clark Lombardi, "Constitutional Provisions Making Sharia 'A' or 'The' Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?" *American University International Law Review* 28.3, January 2013: 737–774. See also, Dawood I. Ahmed and Moamen Gouda, "Measuring Constitutional Islamization: the Islamic Constitutions Index." *Hastings International and Comparative Law Review* 38.1, 2015: 1–76.

thus committing to a more concrete role for Islam in national lawmaking. Even stronger language sometimes appears in the form of a repugnancy clause, which declares any law in contradiction to Islamic *sharia* to be invalid.

The inclusion of any of these clauses in a national constitution, particularly the Islamic source of law and repugnancy clauses, immediately gives rise to a number of substantive and structural questions. The Arabic term "*sharia*" means "path," and it is broadly used to refer to the divine, immortal, and unchanging law of God. The specific meaning of *sharia* and the particular rules it encompasses are, in turn, elaborated through *fiqh* (jurisprudence), which is a human exercise of deriving rules from the interpretation of the Quran and *sunna* (Prophet's traditions).[2] There is hardly any agreement among Muslims, with respect to the meaning and interpretation of *sharia*, and there is no uniform set of *fiqh* outcomes to apply. This dilemma with respect to substance is compounded by the lack of a uniform Islamic "institutional design" to guide the establishment of structures that may interpret Islamic constitutional clauses and ensure the compatibility of national legislation with *sharia*.[3]

Commitments to constitutional Islam, in all their subtle variances, are often outcomes of complex internal political dynamics and the significance of their impact in shaping legal systems and institutional judicial structure is also highly context-dependent. Arab Gulf monarchies are prime examples of conservative predominantly Muslim states, with strong commitments to *sharia* in their constitutions. This article focuses on Saudi Arabia and Kuwait in particular, both ruled by tribal monarchies but nonetheless diverge significantly in their political structures, levels of popular participation in lawmaking, and most importantly for the purposes of this article, the position of Islamic *sharia* in their constitutional order.

Since the establishment of the Saudi state, it has declared a commitment to create a legal system that is most representative of an Islamic governance model. Its Basic Law, promulgated in 1992, states emphatically that it is not a constitution but rather that the Quran and *sunna* of the Prophet are

2 For a primer on Islamic law and its sources, see Wael Hallaq, *The Origins and Evolution of Islamic Law.* Cambridge: Cambridge University Press, 2004.

3 For a discussion of the different models of judicial review in countries with *sharia* provisions in their constitutions, see Salma Waheedi and Kristen Stilt, "Judicial Review in the Context of Constitutional Islam." *Comparative Judicial Review*, edited by Erin F. Delaney and Rosalind Dixon. Cheltenham, UK and Northampton, MA, USA, 2018: 117–141.

"the constitution,"[4] and outlines provisions throughout its text that emphasize the integral role of *sharia* in legislation and adjudication, while offering only limited rights protections. Kuwait, on the other hand, adopted a constitution following its independence from Great Britain that reveals an aspiration to create a more inclusive legal system that, notwithstanding strong commitments to Islam, emphasizes equality, non-discrimination, and protection of citizens' rights. The main commitment to *sharia* in the 1962 Kuwaiti Constitution is expressed in Article 2, which declares Islam as the state religion and *sharia* as "a primary source of legislation."[5] In turn, the application and interpretation of this article is delegated to the judiciary. These different approaches to the positioning of Islamic *sharia* in the two constitutional frameworks then translate into structurally and substantively diverging legal systems and judicial institutional structures, with each corresponding to different historical and political trajectories.

This article provides an overview of the role of Islamic law in the constitutional order of Saudi Arabia and Kuwait, covering their constitutional frameworks, legal systems, judicial structures, and approaches to freedom of religion. It also demonstrates, contrary to prevalent western assumptions, that the inclusion of a commitment to Islam in a given constitutional order does not simply lead to any pre-determined uniform outcomes, nor does it exclude secular law from the legal order. Even in Saudi Arabia, where the Basic Law commits to full Islamization of the legal system, practical and contemporary needs have led to the adoption of an increasingly hybrid legal system in response. Hybridity, in fact, is a visible characteristic in the legal systems of all Arab countries without exception, as *sharia* based laws continue to coexist with secular laws, and the interpretation and application of *sharia* related constitutional clauses have, time and again, proven to be fluid and evolving in line with shifting political dynamics and public policy considerations.

2. *Saudi Arabia*

2.1. *Sharia in the constitutional and legal framework*

Saudi Arabia's legal system and its commitment to Islam can only be understood in the context of the history of emergence of the modern Saudi

4 *Basic Law of Saudi Arabia* (1992), art. 1.
5 *Constitution of Kuwait* (1962), art. 2.

state and the founding pact between the Al Saud ruling dynasty with the puritan Salafi movement of Muhammad bin Abd al-Wahhab (d. 1792), whereby Saudi rulers ceded broad control of all matters related to religion, its interpretation, and application, in exchange for political power and legitimacy.[6] This alliance between the ruling family and powerful Salafi religious forces has endured since the establishment of the Saudi state, and it was only in recent decades that monarchs began to gradually chip away at the tight grip of religious scholars on the legal system through a process of institutionalization and bureaucratization of state apparatus. One of the most significant reforms in this respect was King Faisal bin Abd al-Aziz Al Saud's issuance of a 1971 Royal Order institutionalizing the Council of Senior Scholars (*Hay'at Kibar al-Ulama*) as a state body whose members are appointed directly by the King and paid by the state. The Council, presided over by the Grand Mufti, is the Kingdom's most senior religious authority and is responsible for advising the King and government on all religious matters. It is also responsible for issuing official *fiqh* opinions, or *fatwas*, which have strong public and political influence, even as they are not legally binding in a formal sense.[7]

The Basic Law of Saudi Arabia was promulgated seventeen years later by King Fahad in 1992, with the broad support of the Council of Senior Scholars.[8] The Basic Law of 1992 is often referred to as Saudi Arabia's Constitution, and it generally functions as one – yet the document itself states that "the constitution of the state" shall be the Quran and the *sunna* (traditions) of his Prophet.[9] Article 1 of the Basic Law establishes that Saudi Arabia is an Arab Islamic state and declares Islam to be the state religion. Article 1 is then followed by provisions that entrench Islamic *sharia* as the foundation of all legislation, governance, and adjudication. Article 7 establishes the Quran and *sunna* as the [sole] sources of authority and legitimacy of the regime, and declares them supreme over all other

6 For a historic overview of the role of *sharia* in the law and politics of Saudi Arabia, see Frank E. Vogel, "Saudi Arabia: Public, Civil, and Individual Shari'a in Law and Politics." *Shari'a Politics*, edited by Robert H. Hefner. Indiana: Indiana University Press, 2011: 55-93.

7 Royal Order of King Faisal bin Abd al-Aziz Al Saud (3 September 1971). See the Council's website for current members, fatwas, and other related information and services, https://www.alifta.gov.sa/Ar/Pages/default.aspx.

8 For a historical contextualization and discussion of the Basic Law's drafting and promulgation process, see Abdulaziz H. Al-Fahad, "Ornamental Constitutionalism: The Saudi Basic Law of Governance." *Yale Journal of International Law* 30, 2005: 376-96.

9 *Basic Law of Saudi Arabia* (1992), art. 1.

laws, including the Basic Law itself. Article 8 emphasizes that the system of governance is based on justice, *shura* (consultation), and equality, "in accordance with the Islamic *sharia*." Article 23 of the Basic Law then compels the state to "protect the Islamic creed and apply Islamic *sharia*." The rights and duties of citizens and the powers and authorities of the monarch and state institutions are all formulated with explicit recurrent references to their Islamic basis.[10] The Basic Law includes provisions throughout its text that enshrine the foundational role of *sharia* in guiding legislation, governance, and adjudication.

In practice, lawmaking in Saudi Arabia belongs to one of two domains, a *fiqh* domain – where *sharia*-based law is judge-made and applied in accordance with judges' interpretation of *sharia* – and a *siyasa* (policy) domain, where the King issues codified laws, often called regulations (sing. *nizam*) to distinguish them from *sharia* law; the scope of what the *siyasa* domain comprises is determined by the King in accordance with public interest.[11] Primary examples of codified *siyasa* laws and regulations include primarily business, banking, and insurance-related regulations, such as the Banking Control Regulations of 1966, the Labor Regulations of 1969 (amended and reissued in 2005), the Social Insurance Law of 2000, the Cooperative Insurance Companies Control Law of 2003, and the Companies Law of 2015, in addition to procedural regulations governing the functions of state institutions and the court system.

The majority of laws in Saudi Arabia, however, remain uncodified and subject to *fiqh* interpretations. For example, to date there is no written criminal law, family law, or contracts law in Saudi Arabia, and this lack of codified legislation continues to be a fundamental source of uncertainty and lack of consistency in the application of justice, as judges continue to enjoy wide discretion in applying their own personal preferences and *fiqh* interpretations. In 2010, the government announced its intention to "codify the largely unwritten *sharia* regulations governing the kingdom's criminal, civil and family courts in order to bring more clarity and uniformity to judicial rulings,"[12] but instead of issuing legislation, this codification took the form of publishing annual compendiums of judicial rulings as pdf documents, which are available on the website of the Ministry of

10 *Basic Law of Saudi Arabia* (1992), Part 5: Rights and Duties; Part 6: Authorities of the State.

11 See Frank E. Vogel, "Shari'a in the Politics of Saudi Arabia." *Review of Faith and International Affairs* 10, 2012: 18-27.

12 Caryle Murphy, "Saudi to Codify Sharia for Clarity." *The National*, 21 July 2010, https://www.thenational.ae/world/mena/saudi-to-codify-sharia-for-clarity-1.518063

Justice.[13] While these provide some clarity on the treatment of certain issues by courts, the lack of a system of binding precedent, and the grant of wide discretion to judges to apply unwritten *sharia* law as they interpret it individually, renders these published rulings of limited practical value.

Saudi Arabia's Basic Law also empowers judges to refrain from applying any law they deem contrary to the Islamic *sharia*. Article 46 states that "the judiciary is an independent authority, and judges are not subject to any authority except to that of the Islamic *sharia*." Article 48 adds that "courts shall apply the tenets of the Islamic *sharia*, as directed by the Quran and *sunna*," as well as apply laws decreed by the ruler that "do not contradict the Quran and *sunna*." The Basic Law therefore practically places manmade law under the scrutiny of judges. In theory, at least, a Saudi judge may refrain from applying a *nizam* if he deems it incompatible with the Quran and *sunna* (as interpreted by that particular judge), although, depending on the political circumstances and degree of sensitivity of the case in question, it may not always be politically feasible to do so. In any case, refraining from applying such a regulation does not mean that the regulation is no longer generally applicable; rather, the judge's choice would only apply to the particular dispute before him. The ability of judges to refuse to apply codified regulations may also be circumvented by including provisions in the law which establish specialized tribunals within the executive branch with jurisdiction to apply them, thus bypassing the regular courts. [14]

2.2. Islamic sharia and the judiciary

The original institutional design of the judiciary in Saudi Arabia granted the religious establishment, represented by the jurist-judges, broad powers to apply and monitor the compliance with what they determine to be *sharia* law. The grant of these powers to the judiciary was an established *de facto* practice since the establishment of the modern Saudi state in 1932 and *sharia* courts of general jurisdiction have long retained broad jurisdictional powers to rule over most civil, criminal, and personal status disputes. Commercial cases have, at different points in time, been treated as an exception due to their specialized nature and economic importance

13 See "Collection of Judicial Rulings on the website of the Saudi Ministry of Justice." https://www.moj.gov.sa/ar/SystemsAndRegulations/Pages/default.aspx.

14 Vogel (2012), supra note 11 at 19.

and were carved out of the jurisdiction of *sharia* courts. Specialized commercial courts were first established in 1931,[15] but were disbanded in 1955 and their jurisdiction was transferred to *sharia* courts briefly until 1960.[16] In 1960, the Saudi Council of Ministers created a Committee of Commercial Disputes Settlement to assume the jurisdiction of the former commercial courts and placed this Committee under the authority of the Ministry of Commerce and Investment.[17]

In 1975, King Faisal issued a unified Judiciary Act as part of his wide-ranging administrative reforms, with a view to formally institutionalize and organize the court structure, and for the first time, established procedures to govern judicial functions. The 1975 Act divided the *sharia* courts of general jurisdiction into first instance courts, a Cassation Court, and a Supreme Judicial Council to serve as the highest authority of appeal.[18] The Kingdom's Board of Grievances, which dates to the early founding of the state, was formalized earlier in 1954 as a state judicial institution under the supervision of the Council of Ministers, and in 1982 it was placed under the direct authority of the King.[19] In 1987, the jurisdiction over commercial disputes was transferred to the Board of Grievances (*Diwan al-Mazalim*),[20] and commercial court circuits were established within the Board to rule over both the commercial cases that fall under *sharia* law as well as the cases arising a codified law (formerly covered by the 1931 Commercial Courts Law).[21] In addition to commercial disputes, the Board's scope of jurisdiction covered administrative cases, cases against state institutions, criminal cases arising from infractions of *siyasa*-based regulations, and enforcement of foreign court judgments.[22] Nonetheless, up until recently, the religious establishment continued to exercise significant control of the judiciary and *sharia*-trained judges retained broad powers to adjudicate as they see fit, interpreting the law in accordance with their *fiqh* training and relying on any majority or minority view in the Hanbali school. Judges

15 *Saudi Arabia Commercial Courts Law of 1931.*
16 *Saudi Arabia Council of Ministers' Decision 228 of 1960.*
17 *Council of Ministers' Decision 228 of 1960*. In 1962, the Minister of Commerce and Industry issued *Decision 277 of 1962* organizing the Committee and its appellate chamber.
18 *Saudi Arabia Judiciary Act of 1975*, art. 5. This was changed later by the 2007 Amended Judiciary Act.
19 *Royal Order* M/51 *of 1982.*
20 *Saudi Arabia Council of Ministries Decision 241 of 1987.*
21 Diwan al-Mazalim's official website, https://www.bog.gov.sa/AboutUs/Pages/Engender.aspx.
22 Ibid.

were under no obligation to consider or follow neither precedent nor any specific legal rationale or basis for interpretation. Rulings often varied significantly even in identical disputes.

In 2007, King Abdullah bin Abd al-Aziz enacted a decree that introduced a wide range of reforms to the judiciary, which served to weaken the jurists' near-exclusive control of the judiciary and introduced subject matter specialization and training for judges for the first time in Saudi Arabia.[23] The 2007 decree overhauled the judicial system of Saudi Arabia, creating new specialized courts of first instance, specialized courts of appeals, and a Supreme Court at the apex of the court system. Article 9 of the amended Judiciary Act of 2007 organizes the judiciary into five categories: courts of legal rights, criminal courts, family status, commercial courts, and labor courts, with the Board of Grievances transformed to serve as an administrative court.[24]

One of the most significant changes introduced by King Abdullah was mandating specialized professional training for judges in their respective fields of jurisdiction. It abolished the requirement that all judges must be graduates of the *sharia* faculty, and in Article 31(d), it allowed the appointment of graduates of law faculties – rather than only *sharia* graduates – to the judiciary, provided they pass an entry exam designed by the Supreme Judicial Council. In September 2012, the head of the Supreme Judicial Council issued a directive specifying a new system for appointing judges, which appears to be aimed at streamlining the appointment process and adding more systematic selection criteria.[25] The new system opened judicial positions to holders of graduate degrees from the High Judicial Institute and required graduates of the *sharia* faculty to obtain satisfactory grades in *fiqh*. The new system also incorporates a personal interview by a panel of three sitting judges before an appointment is made to the judiciary. [26]

The Act creates the Saudi Supreme Court to serve as the highest court of appeal, removing this function from the Supreme Judicial Council.[27]

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23 For a detailed overview of the court system and all major enacted reforms up to 2015, see Abdullah F. Ansary, *UPDATE: A Brief Overview of the Saudi Arabian Legal System.* NYU Hauser Global Law School Program, 2015 https://www.nyulawglobal.org/globalex/Saudi_Arabia1.html.

24 Saudi Arabia's *Judiciary Law* (2007), arts. 9, 17.

25 "Six Rules for Appointing New Judges to Courts" (Arabic), *Okaz Newspaper*, September 15, 2012, http://www.okaz.com.sa/article/506830.

26 Ibid.

27 Saudi Arabia's *Judiciary Law* (2007), art. 11.

Cases may be appealed to the Supreme Court if a question arises with respect to the compliance of any particular law with *sharia* or if there is a dispute in jurisdiction or adjudication procedures. The Supreme Court also has mandatory jurisdiction to review *hudood* rulings, for example, crimes that carry a sentence of execution or stoning.[28] The Supreme Court may only rule on questions of law but not questions of fact.[29] In part, the Supreme Court serves as Saudi Arabia's version of an "Islamic" constitutional court, with Islamic *sharia* serving as its highest law against which to conduct review.[30] The 2007 Judiciary Act provides that the Supreme Court is composed of a "number of judges," to be nominated by the Supreme Judicial Council and appointed by the King, and that the King selects and appointed the President of the Court.[31]

With the establishment of the Supreme Court, the role of the Supreme Judicial Council was reshaped and refocused to become one of regulation and oversight.[32] The Supreme Judicial Council continues to be appointed by the King, but instead of consisting entirely of judges (who were senior religious scholars), the new Council would include the President of the Supreme Court, four senior judges, the Undersecretary of the Ministry of Justice, the Public Prosecutor, and three additional members to be chosen by discretion of the King.[33] The Act empowers the Supreme Judicial Council to manage the employment affairs of judges, supervise the operations of courts and judges, name the presidents of first instance and appeals courts, issue guidelines for the appointment of judges, and issue court administrative regulations and establish additional specialized courts as needed in accordance with the new court structure.[34]

Saudi judicial reforms continue to accelerate under the rule of the King Salman bin Abd al-Aziz and with the emergence of Crown Mohammed bin Salman as the driving force behind the Kingdom's ambitious and wide-reaching program of institutional and legal reform. In 2017, the formal establishment of the new specialized commercial courts, including

28 Ibid.
29 Ibid.
30 See Waheedi and Stilt (2018), supra note 3 at 125–127.
31 Saudi Arabia's *Judiciary Law* (2007), art. 10.
32 See Saudi Supreme Judicial Council Official Website, https://www.my.gov.sa.
33 Saudi Arabia's *Judiciary Law* (2007), art. 5.
34 Saudi Arabia's *Judiciary Law* (2007), art. 6.

commercial courts of appeals, was announced,[35] and these courts began hearing cases in 2018.[36] Labor courts were established the same year, with jurisdiction over disputes related to employment contracts, wages, employment rights, injuries, and social insurance claims, among others.[37] Most recently in April 2020, Saudi Arabia announced the enactment of a new Commercial Courts Law, which clarifies the jurisdiction of commercial courts and outlines their governing rules and procedures.[38] All these rapid changes, stemming from the 2007 Judiciary Act, respond to a pressing need for uniformity, predictability, and efficiency in the court system, and have also recently been complemented by various measures for automation and digitization of judicial procedures.

There are no female judges in Saudi Arabia to date.[39] Historically, the exclusion of women from the judiciary was an outcome of the ight grip of the religious establishment over the justice sector. The appointment of women to the judiciary remains a controversial issue in Islamic law, and the Hanbali school – particularly in its most puritan Salafi version – takes a strict position against the appointment of women as judges. And despite the lack of a universal consensus on the matter, there is a prevalent impression amongst a significant number of Muslims that appointing female judges is inconsistent with *sharia*.[40] Nonetheless, women in many Muslim

35 "Saudi Arabia Sets Up Commercial Courts to Expedite Investment." *Reuters*, October 16, 2017, https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT.

36 "'There Has Never Been a Better Time to Invest in Saudi Arabia,' Says Ministry of Justice." *PR Newswire*, August 8, 2019, https://www.prnewswire.com/news-releases/-there-has-never-been-a-better-time-to-invest-in-saudi-arabia-says-ministry-of-justice-842216592.html.

37 Ibid.

38 In June 2020, the Minister of Justice issued the implementing regulations of the *Commercial Courts Law of 2020*, *Saudi News Agency* (22 June 2020), https://www.spa.gov.sa/viewfullstory.php?lang=ar&newsid=2100925.

39 There has been one report of a woman appointed as an arbitrator in a commercial case, although not confirmed by any official source; see Robert Anderson, "Saudi Appointed First Female Commercial Judge," *Gulf Business* (August 2, 2016), https://gulfbusiness.com/saudi-appoints-first-female-commercial-judge/.

40 There is no explicit prohibition in the Quran or *sunna* of women taking judicial positions, but there is also no explicit endorsement of the appointment of women to the judiciary. The Hanbali school of *fiqh* takes the position that women are not permitted to serve as judges, so does the majority of scholars in the Shafi'i and Maliki Schools. The Hanafi school permits the appointment of female judges but only in civil cases. More progressive interpretations exist, citing the lack of a prohibition and the view of a number of respected jurists, such as Ibn Jarir al-Tabari, al-Hasan al-Basri, Ibn al-Qasim al-Maliki, and Ibn Hazm.

majority countries have reached the highest positions in the judiciary, including in Tunisia, Algeria, Morocco, Egypt, Bahrain, Turkey, Malaysia, Pakistan, and Indonesia.[41] In 2009, Palestine became the first in the Arab world to appoint female *sharia* judges.[42]

In 2006, women were permitted to enroll in law schools in Saudi Arabia, in a groundbreaking move at the time by King Abdullah. In 2018, the Ministry of Justice issued licenses for the first time to female lawyers allowing them to conduct some notary services, in addition to being able to secure positions in law firms and government offices.[43] The number of registered female lawyers reached 487 by November 2019.[44] Most recently, the Saudi Ministry of Justice implemented a number of initiatives that sought to increase the number of female employees at the justice sector, including establishing special sections for women in courts and appointing women in different supporting functions in courts.[45] The Minister of Justice appointed a woman as deputy director general for alimony affairs, the most senior position held by a woman in the Ministry.[46]

While nothing in the laws of Saudi Arabia explicitly prevent the appointment of women to the judiciary, it is likely that the first appointment will only come as a result of a political decision by the country's highest leadership. In July 2020, the Shura Council rejected a proposal by Council member Isa al-Shahrani to permit women to serve as judges. [47] This was the second attempt by a Shura Council member to advocate for the inclusion of women in the judiciary, following a 2018 rejection of a similar proposal by Shura members Latifa al-Shaalan, Faisal al-Fadhel,

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41 See, e.g., "Women, Law, and Judicial Decision-Making in the Middle East and North Africa: Towards Gender Justice." UNESCO Seminar Report, Amman, June 14, 2006, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/gender_justice.pdf.

42 See "Women in the Judiciary in the State of Palestine." UN ESCWA, E/ESCWA/ECW/2018/TP.1 (2019), https://www.unescwa.org/publications/women-judiciary-state-palestine.

43 The notary services allow the issuance and dissolution of agencies and the documentation of all kinds of contracts; Mariam Al-Jaber, "Saudi Arabia's First Female Lawyer and Notary: This is How Society Accepted Me." *Al-Arabiya*, July 15, 2018, https://english.alarabiya.net/en/features/2018/07/15/Saudi-Arabia-s-first-female-lawyer-and-notary-Here-s-how-society-accepted-me-.html.

44 January 29, 2020, https://www.arabnews.com/node/1619676/saudi-arabia.

45 Ibid.

46 Ibid.

47 Muhammad Abu Rizq, "Saudi Women Reaching the Judiciary: Efforts Blocked by the Shura Council," (Arabic) *Al-Khaleej Online*, 2 July 2, 2020, https://alkhaleejonline.net/وصول-المرأة-السعودية-للقضاء-مساعٍ-تصطدم-بجدار-مجلس-الشورى/.

and Atta al-Subaiti.[48] Notably, the Islamic and Judicial Committee of the Shura Council refused to discuss the merits of the proposal, stating that it is a matter of "internal judicial affairs" in which the Council may not interfere.[49]

2.3. Religious freedoms

Unlike the constitutions of the majority of Arab and Muslim states, the Saudi Basic Law contains very limited protections of individual rights and liberties. It guarantees certain rights, such as the right of movement, the right to privacy in one's home and secrecy of correspondence, the right to own property, and the right to education and employment.[50] However, it does not include any mention of freedom of religion, expression, assembly, or demonstration, nor does it explicitly prohibit discrimination on any grounds. Human rights, according to Article 26 of the Basic Law, are protected to the extent provided in Islamic *sharia*.[51] There is no official recognition in the Basic Law or codified laws of any religion other than Islam, or of the right of the followers of any other religion to observe or practice their religious rituals.

In practice, according to the US Department of State's Religious Freedom Report of 2019, public observance of any non-Muslim religious rituals is prohibited in Saudi Arabia, including public display of non-Islamic religious symbols, proselytizing by a non-Muslim, promotion of atheistic ideologies, or "any attempt at casting doubts about the fundamentals of Islam," and several instances of direct targeting of religious minorities have been recorded.[52] Saudi Arabia has been designated as a "Country of Particular Concern" under the 1998 US International Religious Freedom

48 Ramadan Al-Sherbini, "Saudi Arabia in Renewed Bid to Empower Women in the Judiciary," *Gulf News,* June 16, 2020, https://gulfnews.com/world/gulf/saudi/saudi-arabia-in-renewed-bid-to-empower-women-in-judiciary-1.1592292753024.

49 Suan Al-Yaala, "For These Reasons, the Shura Council Refused to Appoint Women Judges," (Arabic) *Independent Arabic*, June 19, 2020, https://www.independentarabia.com/node/128216/لهذه-الأسباب-رفض-الشورى-تعيين-المرأة-سياسة/تقارير-قاضية-في-السعودية.

50 *Basic Law of Saudi Arabia* (1992), arts. 23–43.

51 *Basic Law of Saudi Arabia* (1992), art. 26.

52 Saudi Arabia International Religious Freedom Report, US Department of State (2019), available at https://www.state.gov/reports/2019-report-on-international-religious-freedom/saudi-arabia/.

Act since 2004 "for having engaged in or tolerated particularly severe violations of religious freedom."[53]

3. *Kuwait*

3.1. *Sharia in the constitutional and legal framework*

Kuwaiti society is deeply religious and conservative, and Islam is entrenched both in its Constitution and in the customs and tradition of the predominantly Muslim Kuwaiti population. Nevertheless, with the modern organization of the post-independence state, Kuwait adopted a legal system that was most influenced by the French civil law tradition, as adapted by Egyptian legal experts. The Constitution of Kuwait, adopted in 1962, became the first post-independence constitution in an Arab Gulf monarchy and its promulgation came about as a result of a participatory process that took place within the framework of a partially elected Constituent Assembly.[54] An initial document that was drafted by Egyptian legal expert Uthman Khalil Uthman became the basis of a complex set of negotiations between popularly elected members of the Assembly, government-appointed members, and the Emir.[55] Records of the discussion of the Constituent Assembly reveal careful and conscious efforts by the drafters to balance Kuwait's deeply traditional Muslim values with the desire – both of the rulers and of the dominant national civil society forces at the time – to create a "modern" constitutional system that would not devolve into theocracy.[56]

Article 2 of the 1962 Constitution of Kuwait establishes Islam as the religion of the state and provides that Islamic *sharia* is a main source of legislation. While the first part of the Article may be considered a symbolic declaration of principles, the second, source of law clause, raises significant questions with respect to the role of *sharia* in the legislative process and

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53 Ibid.

54 For an overview of the history and political context of the drafting of the Kuwaiti Constitution, see, e.g., Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*. Cambridge: Cambridge University Press, 2006: 129–186; Michael Herb, "The Origins of Kuwait's National Assembly." *LSE Kuwait Programme Paper Series* 39, 2016.

55 Ibid.

56 Constituent Assembly records are available in Arabic at http://www.kna.kw/clt-html5/run.asp?id=1568.

its relationship with other guarantees of citizens' equality and rights in the Kuwaiti Constitution. Additional constitutional guidance with respect to *sharia* appears in Article 18, which states that matters of inheritance shall be governed by *sharia* and Article 9, which declares religion, morality, and love of the homeland as the founding pillars of the family. The Constitution does not specifically define Islamic *sharia* or its scope of application, thereby leaving it to the domain of the courts to interpret and apply this provision. The Constitution is also silent on the question of the supremacy of *sharia* over other constitutional principles or provisions.

The phrasing used in the Constitution of Kuwait, declaring *sharia* to be "a" rather than "the" primary source of legislation has proven to be of significance to the application of *sharia* in lawmaking. The Explanatory Memorandum of the Constitution indicates that Article 2 was designed to guide the legislature towards adopting an Islamic perspective without being prohibited from introducing provisions that stem from other sources, as dictated by public policy needs of the time.[57] The Memorandum explains the rationale of not declaring *sharia* to be "the" main source of legislation in that this may conflict with practical needs that may require the state to adopt certain non-*sharia* based laws, especially in the areas of commerce, insurance, banking, loans, and criminal law.[58] Expectedly, debates also emerged as to whether Article 2 could be understood to indicate that the Constitution permitted the promulgation of laws that are inconsistent or in contravention with *sharia*. The explanatory Memorandum does not completely resolve this issue, which later on would be settled by the Kuwaiti Constitutional Court.[59] In practice today, *sharia* derived rules figure most prominently in the Kuwaiti Personal Status Laws, where both the *sunni* and *shia* versions of the law are based almost entirely on *fiqh* interpretations, in addition to Islamic banking regulations and some parts of the Penal Code.

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57 *Explanatory Memorandum to the Constitution of Kuwait* (1962), art. 2.

58 Ibid.

59 Islamists in Kuwait have repeatedly expressed their dismay at what they consider a tenuous commitment to Islamic *sharia* in the country's constitution and by the liberal interpretation of the court of Article 2. Islamist blocs in parliament, mainly the Muslim Brotherhood and the Salafis, have repeatedly suggested that Islamic *sharia* should be made "the" primary source of legislation in the constitution. Major campaigns to amend the Constitution continue to be organized but have been unsuccessful to date.

The Constitutional Court of Kuwait, established in 1973,[60] played the most significant role in setting the scope and guiding principles governing the application of *sharia* in the Kuwaiti legal system, and in particular, interpretation of Article 2 of the Constitution. It is now established in the jurisprudence of the Court that review of the constitutionality of legislation encompasses review for compatibility with Islamic *sharia* as well as interpreting the meaning of *sharia* under the Constitution and the law. This is of particular significance, and not without controversy, considering that the Kuwaiti Constitutional Court is composed of professional judges trained in law, rather than Islamic jurists or scholars. There is also nothing in Kuwaiti law that compels the Court to consult with an Islamic body or Islamic jurists in ruling over *sharia*-related constitutional controversies.

Kuwait's Constitutional Court has consistently held that Article 2 of the Constitution does not give rise to a duty to strike down laws simply because they may be deemed inconsistent with *sharia*, or its traditional interpretations. This bold standard was first established by the Court in 1992 in the context of a case that challenged the constitutionality of Articles 110 and 113 of the Kuwaiti Commercial Code, which permitted the charging of interest, widely considered as prohibited under *sharia* as a form or usury.[61] The Court rejected the challenge and held that, since Article 2 of the Kuwaiti Constitution declared *sharia* to be "a source" and not "the only" source of legislation, it was permissible under the Constitution to incorporate other sources of legislation and adopt rules that may be inconsistent with traditional interpretations of *sharia*.[62]

This line of reasoning was then affirmed by the Court in multiple cases that followed. One of the most well-known cases was a 2009 challenge that disputed the election of two women, Rula Dashti and Aseel Al-Awadhi, to the National Assembly on the grounds that they were unveiled. The petitioner, who was a competing candidate, argued that by not wearing the veil (*hijab*), the two women had violated the 2005 amendment to National Assembly Election Law of 1962, which stipulated that the exercise by women of their political rights was subject to the accepted rules and conditions of Islamic *sharia*.[63] The Court emphatically rejected the challenge and held that a law must be read narrowly in line with

60 *Kuwaiti Constitutional Court Law* (1973), as amended.

61 *Kuwait Commercial Code* (1980), arts. 110, 113.

62 *Case 3/1992/Kuwait Constitutional Court*, November 28, 1992.

63 The *National Assembly Elections Law of 1962* was amended by *Law 17 of 2005*, giving women the rights to suffrage. Dashti and Al-Awadhi were the first two women elected to the Kuwaiti National Assembly in its history.

the legislative will of the People's Assembly. Given that records of the legislative discussions did not include any reference to the meaning of *sharia* in the law, the Court declared that the term must be understood within the broader guidelines of the Kuwaiti Constitution, which "did not make Islamic *sharia* … a lone source of legislation or prevent the legislator from incorporating other sources as public interest may necessitate."[64] The Court noted further that Article 2 must be understood within the context of broader constitutional guarantees of personal freedoms, freedom of conscience, and non-discrimination.[65]

To rule on questions of *sharia* interpretation outside of courts, Kuwait established a Directorate of Iftaa within the Ministry of Endowments and Islamic Affairs.[66] This Directorate is responsible for issuing "official fatwas" – which generally follow the Maliki School of jurisprudence – and responds to questions related to Islam and *sharia* from other government institutions and from the general public. However, the influence of the Directorate of Iftaa on lawmaking remains limited, as the major Islamic currents within the country turn elsewhere for religious guidance. The Salafi movement, for example, which emerged as a strong actor in the Kuwaiti political scene starting in the early 1990s, typically turn to Salafi jurists in Saudi Arabia for *fiqh* answers, and the *shia* minority in Kuwait – representing about 20% of the population – largely turn to independent *shia mujtahids* in Iraq, Iran, Lebanon, and to a lesser extent, Bahrain. The Islamic Constitutional Movement, an offshoot of the Muslim Brotherhood, relies primarily on established Brotherhood ideological and religious sources for guidance. Furthermore, there is nothing in the Kuwaiti Constitution or law that obligates the government, legislature, or courts to consult the Directorate of Iftaa before passing legislation or adjudicating any matter.

The realm of personal affairs, or family law, remains the stronghold of *sharia*-based law in Kuwait, as in the vast majority of Arab states. Notwithstanding the secularization of almost all areas of law – save some criminal law (*hudood*) provision that retain Islamic influences – personal status laws continue to be based exclusively on *sharia* and *fiqh* interpretations.[67]

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64 Case 20/2008/Kuwaiti Constitutional Court, October 28, 2009.

65 Ibid.

66 This should not to be confused with the Directorate of Ifta'a and Tashri', primarily responsible for the drafting of legislation, http://site.islam.gov.kw/eftaa/Pages/aboutmanagement.aspx.

67 For a background on the historic evolution of Arab personal status laws and trajectories of reform and change, see Kristen Stilt, Salma Waheedi, et. al., "The

The Kuwaiti Personal Status Law of 1984 governs all matters relating to personal status, including marriage, divorce, custody, and inheritance, and is applicable to the majority *sunni* Muslim population in Kuwait. The law is based primarily on majority interpretations of the Maliki school of *fiqh* but also incorporates a compilation of rules taken from all four *sunni* schools.[68] In instances where the law does not sufficiently address a particular matter of personal status, the law instructs judges to rule in accordance with the Maliki rules and general principles.[69] Article 346 of the Personal Status Law specifies that the law applies to *sunni* Muslims who follow the Maliki School, which represent the majority of Kuwait's *sunni* population, whereas adherents to other schools, which practically means Kuwait's *shia* minority, shall be governed by "their own rules."[70] It was not until 2019 that a separate codified personal status law, Decree 24 of 2019, was issued to govern personal status matters of Kuwait's *shia* population.[71]

3.2. Islamic sharia and the Judiciary

There are no *sharia* courts in Kuwait. The Judiciary Law of 1990 organizes the court system and governs the jurisdiction of the different courts and all matters of judicial appointment, responsibilities, immunities, and dismissal. There are three levels of courts in Kuwait: courts of first instance (organized into minor courts, for small disputes, and major courts), courts of appeals, and a Cassation Court, in addition to the Constitutional Court which has exclusive jurisdiction over constitutional disputes and elections disputes.[72] Within each of the three court levels, specialized chambers are created to adjudicate civil, criminal, commercial, administrative, and personal status matters, and courts may establish additional specialized chambers as needed.[73]

Ambitions of Muslim Family Law Reform." *Harvard Journal of Law and Gender* 41, 2018: 302–342.

68 Maliki, Hanbali, Hanafi, and Shafi'i.

69 *Kuwait Personal Status Law* (1984), art. 343.

70 *Kuwait Personal Status Law* (1984), art. 346; Article 346 also states that the law shall apply to cases of non-Muslims if different parties to a case adhere to different religions or sects.

71 *Kuwait Jafari Personal Status Law* (2019).

72 *Kuwait Judiciary Law* (1990), art.3; *Constitutional Court Law* (1973).

73 *Kuwait Judiciary Law* (1990), arts. 4, 6-8.

The High Judicial Council and the Minister of Justice share the responsibility of appointing judges at all court levels in Kuwait. Article 20 of the Kuwaiti Judiciary Law (as amended in 1996), grants the Minister of Justice the primary responsibility for nominating new judges. New judges are generally nominated from amongst sitting public prosecutors and the High Judicial Council must then approve these nominations before an official appointment decision is issued by Emiri Decree.[74] Promotion of sitting judges to senior judicial positions, such as the positions of President and Vice-President of the Cassation Court and Presidents of the High Court of Appeals and Courts of First Instance, are also issued by an Emiri Decree based on a proposal of the Minister of Justice and consent of the High Judicial Council.[75] The Judiciary Law requires that a judge be a Muslim with a good reputation, but no special training in *sharia* is required beyond what is taught at the Faculty of Law in Kuwait.[76] Graduates of either the Faculty of Law or Faculty of Sharia, or their equivalent, may serve as public prosecutors and judges.[77]

The family court chambers in Kuwait, which have jurisdiction over all personal status matters, from the first instance level to the highest appeals level, operate as units or chambers within each respective court level. In 2015, Kuwait enacted a law that established family court chambers in each governorate, responsible for the application of the Personal Status Law and adjudication of all disputes relating to family matters.[78] After the 2019 promulgation of the Jafari Personal Status Law, separate Jafari and *sunni* family court chambers were created, each to apply its respective legislation.[79] Non-Muslims can request that courts apply the customary or religious laws of their own communities.[80] As in all other courts in Kuwait, judges of the family courts are not required to be Islamic jurists but may seek the expert advice of jurists or scholars trained in the relevant Islamic school of *fiqh*.

Up until recently, the judiciary in Kuwait has been exclusively the domain of male judges. In a historic move on July 5, 2020, the High Judicial Council approved a move by the Attorney General to promote eight wom-

74 *Kuwait Judiciary Law* (1990), art. 20.
75 Ibid.
76 *Kuwaiti Judiciary Law* (1990), art. 19.
77 Ibid.
78 *Kuwait Family Courts Law* (2015).
79 See Kuwaiti Ministry of Justice Services Portal, https://www.moj.gov.kw/AR/pages/DeptProcedure.aspx?ItemID=98.
80 *Kuwait Personal Status Law* (1984), art. 345A.

en prosecutors to the position of judges. The eight new judges were among 22 Kuwaiti women appointed as prosecutors in 2014.[81] This appointment came after a legal battle waged by Dalal Al-Hamdan, a Kuwaiti female applicant to the position of public prosecutor against the Ministry of Justice, which rejected her application with the justification that this position was reserved for men.[82] The applicant, who had fulfilled all the prerequisites for the position, brought her case to the Administrative Circuit of the High Civil Court,[83] arguing that the Ministry's practice was not justified by law – as the Judiciary Law does not exclude women from public prosecution or judicial appointments — and constituted gender-based discrimination in violation of the Constitution of Kuwait.[84] The High Court ruled in favor of the petitioner in appeal, after having discussed in some detail the constitutional basis for the decision – including the language of Article 2 that limits the application of *sharia* as one amongst many sources of law – and an acknowledgment of the diverse views of *sharia* scholars with respect to the permissibility of the appointment of women to the judiciary.[85] This was a groundbreaking decision at the time, and the promotion of these women to judicial positions became only a matter of time. Islamist lawmakers and conservative forces in Kuwait continue to express vehement opposition to the appointment of women to the judiciary, calling it "contrary to the nature of women," and in "opposition to *sharia*."[86]

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81 Habib Toumi, "Kuwaiti Women Poised to Become Judges." *Gulf News,* October 24, 2018, https://gulfnews.com/world/gulf/kuwait/kuwaiti-women-poised-to-become-judges-1.2293191.

82 "Historic Ruling Paves the Way for Appointing Kuwaiti Women as Public Prosecutors." (Arabic) *Al-Anba,* April 23, 2012, https://www.alanba.com.kw/ar/kuwait-news/incidents-issues/286203/23-04-2012--حكم-تاريخي-يمهد-لتعيين-المراة-الكويتية-وكيلة-نيابة/.

83 The claim had been previously rejected and then resubmitted for appeal. This court case was also not the first of its kind, as a previous case was brought by another female candidate to the position of public prosecutor and was rejected both in the first instance and in appeal.

84 Ibid.

85 Dalal Al-Hamdan v. Minister of Justice and Undersecretary of Justice, *Administrative Case 3134 of 2011*.

86 See Samir Salama, "Salafis Oppose Appointment of Women as Judges in Kuwait." *Gulf News,* July 3, 2020, https://gulfnews.com/world/gulf/kuwait/salafis-oppose-appointment-of-women-as-judges-in-kuwait-1.72390852; Alma Hassoun, "Kuwait: Why the Delay in Appointing Women to the Judiciary?" (Arabic) *BBC Arabic,* July 2, 2020, https://www.bbc.com/arabic/middleeast-53257876.

3.3. Religious freedoms

The Constitution of Kuwait of 1962 includes several provisions guaranteeing equality of citizens and non-discrimination on the basis of religion. Article 8 of the Constitution provides that the state shall guarantee security, tranquility and equal opportunity to all citizens, and Article 29(1) on Religion, Dignity, and Freedom establishes a right to non-discrimination on the basis of religion.[87] It provides, in part, that all people are equal in human dignity and in public rights and duties before the law, regardless of their religion.[88] Freedom of belief and religion is further emphasized in Article 35, which states that freedom of belief is unrestricted and that the state shall protect freedom in the observance of religious rites established by custom, provided such observance does not conflict with morals or disturb public order.[89] It is important to note two possible grounds for restriction of religious freedoms here: first, the Explanatory Memorandum of the Constitution states that "religion" in the freedom of religion clause refers to Abrahamic religions, although it explains that nothing in the Constitution demands restricting the practice of other religions but rather leaves the matter to the discretion of the legislator.[90] Second, conditioning religious practice upon "not disturbing the public order or morals" provides grounds for the legislator to enact laws that restrict the freedom of religious practice and worship using this very broad and undefined rationale. Finally, the Nationality Law of 1959 prohibits the naturalization of non-Muslims, even though there are natural-born Christian Kuwaiti citizens.[91]

The Penal Code of 1960 includes provisions that may be used to target free expression of religious beliefs, including prohibitions on contempt of any religion and expressing opinions that may offend, disrespect, or belittle any religion, its tenets, or rituals.[92] The law does not prohibit proselytism, but proselytizing by non-Muslims may be prosecuted under Penal Code provisions that prohibit contempt of religion. In practice, freedom of religion in Kuwait is broadly guaranteed to both *sunni* and

87 *Constitution of Kuwait* (1962), arts. 8, 29(1).
88 *Constitution of Kuwait* (1962), art. 29(1).
89 *Constitution of Kuwait* (1962), art. 35.
90 Explanatory Memorandum to the *Constitution of Kuwait* (1962), art. 35.
91 *Kuwait Nationality Law* (1959), art. 4.
92 *Kuwait Penal Code* (1960), arts. 109-113.

shia Muslims, who practice their rituals freely,[93] although there have been cases when preachers have been sanctioned for engaging in political speech or sermons that were deemed to be in violation of the Penal Code's prohibitions of offensive speech.[94] In past years, a number of activists and journalists were also convicted and sentenced for blasphemy and offensive speech.[95]

Christians in Kuwait are permitted to practice freely, within the general bounds of avoiding public disorder or offending Islam, and there are recognized Christian churches in Kuwait. Aside from Bahrain, Kuwait is the only other Arab Gulf monarchy with a citizen Christian population, estimated at 260 individuals.[96] According to the US State Department's Religious Freedom Report, adherents of non-Abrahamic religions have generally reported that they are able to practice their religious rites in private spaces without government interference, as long as they do not disturb neighbors or violate public assembly regulations. There are no Hindu or Sikh temples, despite the presence of significant numbers of Hindu and Sikh expatriate workers in Kuwait.[97]

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93 According to official statistics, out of an estimated total population of 4.42 million, 75% is Muslim, whereas the citizen population is about 99.9% Muslim (Population Statistical Report, Kuwait General Statistics Bureau (2019), https://www.csb.gov.kw/Pages/Statistics?ID=67&ParentCatID=1). It is estimated that Sunnis make up 70% of Kuwait's Muslim population, while Shias account for about 30% (Kuwait International Religious Freedom Report, US Department of State (2019), https://www.state.gov/wp-content/uploads/2020/06/KUWAIT-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf); the percentage of Shi'a includes Ismaili's and Ahmadis.

94 Kuwait International Religious Freedom Report, US Department of State (2019), https://www.state.gov/wp-content/uploads/2020/06/KUWAIT-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf.

95 See, e.g., Kuwait International Religious Freedom Report, US Department of State (2018), https://www.state.gov/wp-content/uploads/2019/05/KUWAIT-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf.

96 Ismaeel Naar, "An Inside Look at the Native Christian Population of Kuwait." *Al-Arabiya*, December 25, 2017, https://english.alarabiya.net/en/features/2016/12/27/An-inside-look-at-a-Gulf-Christian-community.

97 Kuwait International Religious Freedom Report (2019), supra note 94.

The Changing Constitutional Framework of Church-State Relations in Europe

Rainer Grote

Abstract
Although the Christian religion has lost its once-dominant place in European societies as they have taken on a more secular, religiously diverse character in the post-World War II era, the constitutional principles and rules governing the relationship between state and church have remained remarkably stable in most parts of non-Communist Europe. They can be grouped into three main categories, depending on the form and degree of cooperation or separation they provide for in the relationship between the established Church(es) and the state. By contrast, the task of accommodating the new religious groups including Muslims which are an important feature of the increasing religious diversity of European societies within the existing constitutional settlements on the relationship between the state and religion has largely been left to the legislature and the courts. This has allowed new meta-norms to penetrate the constitutional space of the European states, particularly the guarantees in the European Convention of Human Rights on religious liberty in its individual as well as collective dimensions and the principle of non-discrimination on religious grounds.

1. *Introduction: The centrality of the state-church relationship to the constitutional systems of European states*

The relationship between the state and religious groups and organizations has been central to the emergence of the constitutional state in modern Europe. It has rightly been claimed that the "constitutional connections between church and state are part of Europe's history, whether they are retained or rejected", and that the existence of a constitutional connection between church and state is a "common thread within West Europe".[1]

1 Grace Davie, *Europe: The Exceptional Case. Parameters of Faith in the Modern World*. Darton & Longman &Todd Ltd., 2002: 2 and 12.

While in some countries this relationship has been a highly conflictual one during important periods of history, as in Germany in the Reformation era or in France following the Revolution, in other countries its legal accommodation and institutionalization has taken place without major disruption. As the path to modern statehood has not been uniform, the regulation of the central aspects of the relationship between state and church in the constitutional law of the various European countries has not followed a uniform model, either. On the contrary, it appears as if this is one of the areas of constitutional regulation which has been more deeply marked by the particularities of the constitutional history of the respective country than other areas, e.g. fundamental rights. Although the Christian religion has lost its once-dominant place in European societies as they gradually took on a more secular, religiously more diverse character in the post-World War II era, the central principles and rules concerning the constitutional relationship between state and church have remained remarkably stable in most parts of non-Communist Europe (see Section 2), if only because a consensus in the question whether and how to reform the existing rules proved difficult to achieve (Section 3). This has meant that constitutional practice has increasingly turned to the interpretation and application of the fundamental right to freedom of religion in its individual and as well as collective dimension to find adequate solutions to the new, pressing questions concerning the proper role of the church in public life of secular liberal democracies (Section 4). As a result, the struggle on the proper role of religion in public life in Europe today concerns less the individual right to religious freedom than the legal position of the different denominations, especially of the more recently arrived and those at odds with the traditional parameters shaped by the long period of dominance of Christian denominations (Section 5) The discussion on how the new religious diversity can be accommodated in constitutional and legal terms is thus far from over (Section 6).

2. Regulation of the state-church relationship in European constitutions

The regulation of the state-church relationship has historically been central to the constitutional and political identity of European states. This is still reflected in a number of European constitutions which assign a privileged

role to the Christian religion in its Catholic, Protestant or Orthodox variety.[2]

The Protestant religion has traditionally been accorded a prominent place in the constitutional arrangements of the Northern European countries, particularly in the Scandinavian countries and the United Kingdom. Article 4 of the Danish Constitution of 1953 declares that the Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State. The King as Head of State shall be a member of the Evangelical Lutheran Church (Article 6). According to Article 66, the Constitution of the Evangelical-Lutheran Church of Denmark shall be regulated by an act of Parliament. However, the promise of a synodical constitution for the Church of Denmark which would give it autonomy to freely decide on all ecclesiastical matters and to establish a central church council that could speak on behalf of the church was never honored, with the consequence that still today the administration of church matters is in the hands of the government, through the Ministry of Ecclesiastical Affairs.[3] As in Denmark, no freedom of religion exists for members of Sweden's royal family. According to Article 4 of the Swedish Act of Succession, "the King shall always profess the pure evangelical faith, as adopted and explained in the unaltered Confession of Augsburg and in the Resolution of the Uppsala meeting of the year 1593, princes and princesses of the Royal House shall be brought up in that same faith and within the Realm. Any member of the Royal Family not professing this faith shall be excluded from all rights of succession." Article 4 of the Norwegian Constitution of 1814 is equally categorical: "The King shall at all times profess the Evangelical-Lutheran religion."

In the United Kingdom, the monarch is by constitutional statute – the Act of Settlement of 1701 – required to be "in communion with the Church of England", of which he/she serves as Supreme Governor since the adoption of Act of Supremacy of 1534. At the same time, the monarch is also a member of a reformed, Presbyterian church north of the English border, in Scotland.[4] The business of the Church of England

2 Gerhard Robbers, "State and Church in the European Union." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 679; Russell Sandberg and Norman Doe, "Church-State Relations in Europe." *Religion Compass* 1.5, 2007: 561 and 563.

3 Niels Valdemar Vinding, "State and Church in Denmark." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 90.

4 David McClean, "State and Church in the United Kingdom." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 657.

is closely bound up with the business of the State. Many senior church appointments involve Crown patronage, though this power is in practice exercised by government officials acting in close consultation with the church authorities, thus ensuring that the appointments are not subject to political influence.[5] Two archbishops and 24 diocesan bishops of the Church of England are members of the House of Lords. By convention, these spiritual peers do not speak or vote on purely political issues. While this arrangement has been criticized by some, it has been defended by others not only on the basis of tradition and the close links between the established Church of England and the state, but also with regard to the substantial contribution the spiritual peers, who do not owe allegiance to any political party, make to debate on often sensitive moral and social issues, such as housing, divorce, abortion, embryology, homosexuality, and human fertilization.[6]

An even stronger place is accorded to the Eastern Orthodox Church in the Greek Constitution of 1975. Article 3 refers to the Greek Orthodox Church as the "prevailing" religion in Greece, a terminology which is not meant to grant the Orthodox Church superiority over all other religious communities but to reflect the fact that the vast majority of Greeks (over 90%) are baptized Orthodox Christians.[7] Article 3 represents a constitutional acknowledgement of the unique role the Orthodox clergy and the Orthodox Church have played in preserving Greek language, culture and identity during the four centuries of Turkish rule.[8] The freedom of religion for the believers of other faiths is guaranteed by Article 113 which declares the freedom of religious conscience to be inviolable. However, the constitutional guarantee of the freedom of religion is framed in somewhat restrictive terms. The practice of rites of worship extends only to 'known religions' (i.e. those which do not have secret teachings or dogmas), and it may not offend the public order or the good usages, a restriction which is more likely to be applied to Muslim, Catholic, Protestant or Jewish rites in an overwhelmingly Orthodox environment than to the practices of the dominant Orthodox majority religion.

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5 McClean, "State and Church in the United Kingdom": 664.

6 Hilaire Barnett, *Constitutional and Administrative Law*, 13th edition. Routledge, 2020: 387.

7 Lina Papadopoulou, "State and Church in Greece." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 171.

8 See Philipos K. Spyropoulos and Theodore P. Fortsakis, *Constitutional Law in Greece*, 3rd edition. Kluwer Law International, 2017: para. 721, who note that Greece has the greatest degree of religious homogeneity of any European country.

While they go not so far as to recognize a particular religious community as "state", "national", "established", or "folk" church, a number of other European constitutions still acknowledge certain Christian communities as privileged cooperation partners. This is the case frequently in countries whose religious culture has been deeply marked by a centuries-long close affiliation with the Catholic Church, like Spain, Italy, or Austria. While Article 16 of the Spanish Constitution of 1978 declares that there shall be no state religion, it also exhorts the public authorities to take the religious beliefs in Spanish society (which continues to be heavily dominated by Catholics)[9] into account and shall in consequence maintain appropriate co-operation with the Catholic Church and the other religious confessions. Similarly, a distinctive feature of the Italian Constitution of 1947 is the privileged status it accords the Roman Catholic Church. While the principles of freedom and equality of all religious confessions are explicitly enshrined in Article 8, the Constitution recognizes the special position of the Roman Catholic Church by declaring in Article 7 that, like the state, the Catholic Church is within its own order not only independent, but sovereign. Although the wording of Article 7 does not expressly confer upon Roman Catholicism the status of "official" or "state religion", a very similar result has been achieved by incorporation of the Lateran Pacts by virtue of paragraph 2 of the same provision. The Lateran Pacts[10] ended the church-state conflict caused by the annexation of the Papal States and Rome during the unification of Italy and the establishment of a liberal national state. In the Conciliation Treaty, Italy recognized the sovereign authority of the Holy See over the Vatican City[11] and reaffirmed the principle that "the Catholic Apostolic Roman religion is the only State religion".[12] At the same time the Concordat between the Catholic Church and the Italian state provided for religious education in state primary and secondary schools.

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9 A survey published by the Centro de Investigaciones Sociólogicas in October 2017 counted 67.6% of the population as Catholics and 3.1% as followers of another religion, with the rest being non-believers or atheists, see Ibán C. Ibán, "State and Church in Spain." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 195.

10 The Lateran Pacts consist of a treaty of conciliation, a financial convention and the Concordat between the Catholic Church and the Italian state. The financial convention is sometimes presented not as a separate agreement but as an annex to the Conciliation Treaty.

11 *Conciliation Treaty*, art. 3.

12 *Conciliation Treaty*, art. 1.

In Austria the state and the religious communities are partners on an equal footing, each acknowledging the independence and autonomy of the other. The principles governing the relationship between state and church have been laid down in a number of different enactments. The status of the Catholic Church is specified above all by the Concordat of 1933 and a number of further laws that regulate the relationship between the Austrian state and the Holy See in various areas. Article 5 of the Concordat guarantees the continued existence of the Faculties of Catholic Theology at the Universities of Vienna, Graz, Innsbruck and Salzburg. The Catholic Church has also made use of the legislation ending the state monopoly in University education to establish a Theological Private University in Linz.[13]

Somewhat different is the situation in Germany, the country in which the Reformation originated. Its constitutional law thus has had to accommodate the Catholic as well as the Protestant religious communities which have both a deeply rooted and strong presence in the country. This need is reflected in the constitutional rules on the relationship between the state and religious groups in Article 140 of the Basic Law which incorporates the historical compromise reached on this thorny issue in the Weimar Constitution. According to the relevant article of the Weimar Constitution, "religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same status upon application, if their constitution and the number of their members give assurance of their permanency." The article's primary purpose was to spare the traditional churches, the Catholic Church and the Protestant churches, the status of mere private associations, the latter often being organized as "state churches" at the level of the principalities which had historically composed the German Empire. Given their important functions and relevance at the time, such a private status of the two main Christian communities was widely seen as inadequate by the drafters of the Weimar Constitution. The relevant provisions of the Weimar Constitution carried over into the Constitution of the Federal Republic of Germany therefore recognize the traditional importance of the main Christian denominations and allow for close coop-

13 Richard Potz, "State and Church in Austria." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 448, 450.

eration in matters such as religious instruction in the public school system, the church tax and military chaplaincy.[14]

At the other hand of the spectrum, French constitutional law codifies the result of the protracted historical struggle for full emancipation of the state from the overbearing influence of the Catholic church which had been initiated by the Jacobins in the French Revolution at the end of the 18th century and brought to a – from their point of view – successful conclusion by the radical Republicans of the Third Republic at the beginning of the 20th century. The secular character of the French Republic is now enshrined in Article 1 of the 1958 Constitution: "*La France est une République indivisible, laïque…*". *Laicité* implies the strict neutrality of the Republic in all religious matters. The Republic shall respect all beliefs but not identify itself with any of them, nor shall it remunerate persons of any faith.[15] The most important statutory expression of the principle of secularity, or *laicité*, in the French tradition, is the Act on the Separation of the State and the Churches of December 1905. The Law famously declares that the Republic neither recognizes, nor salaries, nor subsidizes any religion. In particular, the principle imposes a strict duty of religious neutrality on all public services, including the educational services, in the exercise of their functions.

3. Perseverance of constitutional regulations of the state-church relationship

As described above, the integration of religion into the state, in one way or the other, was central to the emergence of the modern "secular" European state, and was not achieved without sometimes violent conflict. European states have therefore been reluctant to touch the constitutional settlement on state and religion, even if it does no longer correspond to the needs of fast-changing, multi-religious and often increasingly secular societies. Constitutional reforms addressing the basic relations between state and religion have therefore been slow and piecemeal (England, Norway, Sweden) whereas in other countries change has been limited to statutory legislation and jurisprudential practice (Italy, France).

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14 Gerhard Robbers, "State and Church in Germany." In: *State and Church in the European Union*, 3rd edition, edited by Gerhard Robbers. Nomos, 2019: 110.

15 On the interpretation of the principle of *laicité* by the French Conseil constitutionnel see *CC 2012-297*, *QPC*, February 21, 2013.

In England, it was only in 2013 that the *Succession to the Crown Act 2013* ended the disqualification of a person who marries a Roman Catholic from the line of succession to the throne. In Norway, reforms adopted on the occasion of the bicentenary of the Norwegian *Grunnloven* have been more comprehensive. The provision that the Evangelical Lutheran Church shall be the official religion of the state was removed from the Norwegian Constitution by the Constitutional Reform of 2012 and replaced by a general commitment to Norway's "Christian and humanist heritage" (*Grl.* § 2). Similarly, the obligation of Norwegians professing the Evangelical-Lutheran religion to raise their children in the same faith has disappeared from the constitutional text. Though the Church of Norway, an Evangelical-Lutheran Church, will remain the established Church of Norway and will as such be supported by the State, this support is no longer an exclusive privilege of the Evangelical-Lutheran Church. In addition to guaranteeing the freedom of religion to all inhabitants § 16 now provides for public support of all religious and belief communities "on equal terms." The special links between the highest representatives of the state and the Evangelical-Lutheran religion have been severed. § 4 still requires the King to profess the Evangelical-Lutheran religion, but his constitutional duty "to uphold and protect" that religion has been abolished. The King has lost the competence to appoint and dismiss the holders of ecclesiastical offices which he exercised – in consultation with the government – until the 2012 reforms. Moreover, the requirement in § 12 that more than half of the members of the Council of State, i.e. of the Norwegian Government, must profess the Evangelical-Lutheran religion was also dropped.

Similarly, in Sweden, the Lutheran Church remained the state church until 2000 when it was finally disestablished. However, the Swedish monarch must still profess the "pure evangelical faith", although he/she is now allowed to marry a non-evangelical partner.

In Italy, the privileged status accorded to the Catholic Church under the 1947 Constitution became more controversial over the years, and negotiations to modify the relations between state and church were initiated in the late 1960s. After seventeen years of negotiation, a new concordat was concluded in 1984 which ended the status of Roman Catholicism as the established state religion and eliminated many of the other privileges of the Church, such as compulsory religious education in schools and exemptions from civil law jurisdiction granted to priests, while confirming the freedom of the Church to pursue its charitable, educational and pas-

toral endeavors.[16] A number of other issues, such as regulations applied to ecclesiastical property as well as various financial matters, were left to a special commission which was able to reach an agreement in a protocol signed in November 1984. In the protocol, the Vatican and the Italian Government agreed to cancel state subsidies for clerical salaries, although generous tax breaks were provided to taxpayers in return for contributions to the bishops' funds from which the salaries were paid. In addition, churches and seminaries open to the public would receive tax benefits, and the state promised to support the Church in the maintenance of religious buildings and works of art open to the public.[17]

In France, the principle of *laicité* has come increasingly under pressure in the public education system since the 1990s when pupils and students began to openly wear symbols of their religious affiliation like headscarves or refused to attend certain classes, like biology or physical education, which they considered to be at odds with their religious beliefs. After much argument and litigation, including before the *Conseil d'Etat*, the French Parliament finally enacted the Act on Secularity and Conspicuous Religious Symbols in Schools.[18] It bans the wearing of conspicuous religious symbols in French public primary and secondary schools (but not in universities). The law – which was not challenged before the Constitutional Council (*Conseil constitutionnel*) – can be seen as a reaffirmation of the principle of *laicité* in the public education system. However, it leaves some room for compromise in daily school life as it does not prohibit *any* religious garb or symbol but only those of a *conspicuous* character.

4. The shift from an institutional to a rights-based approach: The growing influence of human rights law

The traditional focus on the institutional relationship between state and church is increasingly sidelined in many contemporary European societies by the concept of religion as a basic freedom. As such it has been incorporated in all contemporary European constitutions. In addition, freedom of religion has been included in the *European Convention of Human Rights*

16 Maria Elisabetta DeFranciscis, *Italy and the Vatican: The 1984 Concordat between Church and State*. Verlag Peter Lang, 1989 : 142–146.

17 DeFranciscis, *Italy and the Vatican*: 146–149.

18 *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*, *Journal officiel 65* of March 17, 2004 : 5190.

(*ECHR*, art. 9) and the *Charter on Fundamental Rights of the European Union* (art. 10). At the same time, Article 17 of the Treaty on the Functioning of the European Union contains a guarantee of non-interference by the EU with the regulatory frameworks that have been established in the Member States for state-church relations: "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."

Article 9 of the European Convention on Human Rights, in particular, has played an increasingly important role in the regulation of state-church relations in the Member States of the Council of Europe. While the Convention enjoys constitutional rank only in a few Member States, Article 9 influences the interpretation of the corresponding constitutional liberties also in those countries which have incorporated the *ECHR* into the domestic legal system by way of ordinary statute, as all states have an international obligation to give effect to freedom of religion as defined by *ECHR* (art. 9), and can be taken before the European Court of Human Rights if the domestic authorities, including the domestic courts, fail to do so. While the focus of Article 9 is on the freedom of the individual to choose, change and manifest his/her religion in public or private,[19] it also expressly covers the collective dimension of religious liberty, i.e. the right to practice the religion of one's choice "either alone or in community with others." This does not by itself call into question the various types of constitutional regulation of state-church relations as they have developed in the Member States Europe since the Reformation. The European Court of Human Rights has expressly endorsed the position of the former European Commission on Human Rights that a State Church system cannot by itself be considered as a violation of Article 9 of the Convention as such a system already existed in several Member States when the Convention was drafted and when they became parties to it.[20]

However, the turn to an individualist understanding of religious freedom is supported at the level of the individual Member States by a weakening of the traditional link between collective (national) identity and a specific religious affiliation, a trend which tends to delegitimize the established privileged legal relationships between the state and the traditional Christian churches. The European Human Rights Commission acknowledged as much in its already cited opinion in the *Darby* case. Here it noted, that while Member States remain free to maintain an existing State

19 See *Metropolitan Church of Bessarabia 45701/99*: para 114.
20 *Darby v. Sweden* A 187 (1990), Commission Report: para. 45.

Church system, they must, in order to satisfy the requirements of Article 9 of the *ECHR*, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or prohibited from leaving, a state church.[21] The lack of such safeguards has given rise to several successful complaints against Greece, which in Article 13(2) of the Constitution explicitly prohibits proselytism, a provision which is likely to work to the disadvantage of the minority religious groups rather than to the detriment of the Orthodox Church in a country where 90% of the total population already are Orthodox Christians. As a matter of fact, the initial version of the provision was confined to the protection only of the Orthodox Church.[22] The amended provision may no longer be discriminatory within the meaning of *ECHR* (art. 14), still its broad interpretation by the Greek courts to the detriment of minority religious groups has led to several rulings against Greece by the European Court of Human Rights for violation of *ECHR* (art. 9), which in the interpretation of the Court in principle also includes the right to convince others to join one's religious community.[23]

The jurisprudence concerning the application of Article 13(2) of the Greek Constitution also has implications for the interpretation of the provision in Article 3 that the Greek Orthodox Church of Christ is the prevailing religion in Greece. Some Greek authors have understood the reference to the "prevailing" status of the Orthodox religion as meaning that the Greek Orthodox faith is the official religion of the Greek state, that the church which embodies this faith has its own legal status, and that it is treated by the state with special concern and in a favorable manner which is not extended to other faiths and religions.[24] However, this view does no longer seem to be accepted by contemporary Greek doctrine which stresses that, especially with regard to the official status of the Orthodox religion and the preferential treatment of the Greek Orthodox Church by the state such interpretation is hardly consistent with either the constitutional principle of (religious) equality or the protection of religious freedom in

21 See n. 20.

22 Spyropoulos and Fortsakis, *Constitutional Law in Greece*: para. 715.

23 *Kokkinakis v. Greece* A 260-A (1993) (concerning proselytizing activities by Jehova's Witnesses); *Larissis and Others v. Greece* 1998-I (concerning proselytizing activities by members of the Pentecostal Church in the Greek air force).

24 Charalampos Papasthatis, "State and Church in Greece." In: *State and Church in the European Union*, 1st, edited by Gerhard Robbers. Nomos, 2005: 117.

combination with the prohibition of discrimination on religious grounds in *ECHR* (arts. 9 and 14).[25]

5. *The new challenge: Genuine religious equality in religiously heterogeneous societies*

Some time ago a leading Italian scholar observed that while the Italian legal order is in line with the main provisions of international law and the principles contained in most of the constitutions of the other Western countries as far as the individual rights to religious freedom and equality are concerned, the picture grows more complex when one looks at the legal position of the different religious denominations active in Italian society. In this domain, he argued, the Italian system of concordats and agreements discriminates in some ways among the various denominations, and this, in turn, may have an impact on the legal position of individual members of the various denominations.[26] He went on to characterize the law governing the relationship between the Italian state and the different religious communities as a three-tiered system in which the most prominent position is held by the Catholic Church, on the basis of the preferential treatment secured by the church in the agreements of 1984 (see III. above) and numerous other regulations in ordinary law. The religious communities that have come to an agreement with the state occupy an intermediate position. This category includes both groups which have existed in Italy for a long time, like the Jews and the Protestants, and more recent groups which have no characteristics incompatible with Italian law. They are guaranteed a position equivalent, if not equal, to that of the Catholic Church. The lowest tier is formed by groups who have only recently settled in Italy and whose doctrines and practices are perceived to be in conflict with public order, although some of them, like Muslims and Jehovah's Witnesses, have a significant number of adherents. These groups are regulated by *Law 1159 of 1929* and the general law on associations.[27] The religious groups in the lowest tier are excluded from some important

25 Papadopoulou, "State and Church in Greece": 175.

26 Silvio Ferrari, "The Emerging Pattern of Church and State in Western Europe: The Italian Model." *Brigham Young University Law Review* 1995: 421 and 430.

27 *Law 1159 of 1929* establishes that religious groups registered in Italy will benefit from the same privileges as groups with charitable and educational purposes, including important tax privileges, see Ferrari, "The Italian Model": 433.

privileges which are granted to those churches and religious communities that have the benefit of a concordat or agreement.[28]

As the author, Silvio Ferrari, also notes, the three-tiered system developed as a result of Italian history and culture, but is hardly unique to Italy. Other European countries use similar multi-level classifications.[29] In Austria, the way in which followers of a denomination can obtain legal recognition as a religious association is regulated by the *Recognition Act* (*AnerkennungG*) 1874. According to Section 1 of the Act, recognition as a religious association will be granted to the followers of a previously legally unrecognized denomination under the condition that religious teaching, service, statutes and chosen names do not contain anything illegal or morally offensive, and that at least one cult community is created in accordance with the requirements of the *Recognition Act*. However, in 1998 an additional condition was added – that the denomination represents at least 2% of the Austrian population – which has significantly limited the number of suitable candidates for recognition.[30] In addition, the law on the religious activities of the "historically recognized" churches and religious societies is not found in the *Recognition Act*, but is developed by way of special laws. This tends to favor the established Christian churches, and namely the Catholic Church. For the Catholic Church, the special law is to be found in the Concordat 1933 and additional and complementary treaties which, among other things, give the Catholic Church a guarantee that it may make laws, decrees and orders within its own field of competence without hindrance, and that the institutions of the Catholic Church with legal personality according to Canon Law also enjoy public law personality in the sphere of State law.[31]

The situation is similar in Germany, with the difference that the "historical" Protestant Churches in Germany enjoy a position not only equivalent, but equal to that of the Catholic Church. These treaties and agreements supplement the rules laid down in Article 140 of the Basic Law with reference to the *Weimar Constitution* (art. 137), according to which every religious community can receive the status of a public law corporation provided it can prove through its bye-laws and the number of its members that it is a permanent community. Other religious communities receive their legal capacity as a result of civil law.[32] However, important parts of

28 Ferrari, "The Italian Model": 430.
29 Ferrari, "The Italian Model": 430.
30 Potz, "State and Church in Austria": 440.
31 Potz, "State and Church in Austria": 441.
32 Robbers, "State and Church in Germany": 113.

the law governing the activities of religious communities in Germany are found in the many concordats and treaties which the Federal Republic of Germany and the various *Länder* have established with the Churches in Germany. In relation to the Catholic Church, the *Reichskonkordat* of 1933 is the essential basis, which is recognized as a treaty under international law. Church-State treaties with the Evangelical Church are *sui generis* but are treated as being in a category similar to that of international treaties. The subject matter of the concordats and treaties concern the cooperation between the State and the Churches, the guarantees and arrangements for religious education in public schools, the theological faculties, the military chaplains and the position of the churches in the public sphere, such as the financing of religious parishes.[33] While treaties or agreements also exist with a whole range of smaller religious congregations, including Jewish as well as some Muslim communities, such communities – apart from the Jewish communities which for historical reasons occupy a special place in German public life – will often have less clout than the traditional Catholic and Protestant Churches to extract significant concessions from the State through these agreements.

Even in countries which have implemented a system of separation which was initially directed against the powerful position of a traditional religion by subjecting all religious communities equally to private law regulation, as in France, recent practice has shown that the public authorities are similarly likely to struggle with the accommodation of unsettling aspects of the new religious diversity in society. Even in such a system ordinary legislation may be couched in terms which, while formally applying to all citizens, are directed against the religious practices of some groups and not others. This had been demonstrated by the controversy on the Law on the ban of face veils from the public sphere in France, which went right up to the European Court of Human Rights.[34]

6. *Conclusion: The elusive goal of religious equality*

This incomplete survey has shown that the constitutional and legal systems of the European states retain a regulatory framework for the relation

33 Robbers, "State and Church in Germany": 111.

34 *SAS v. France (GC)*, Reports 2014-III, 291. On the ruling see Christoph Grabenwarter, "Das Urteil des EGMR zum französischen Verbot der Burka." In: *Islam, Recht und Diversität*, edited by Stephan Hinghofer-Szalkay and Herbert Kalb. Verlag Österreich, 2018: 523.

between the state and religious groups which have been marked by the central place the Christian religion has occupied in these countries for many centuries. Traditionally, these systems have been grouped in three main categories: the State Church systems (which are mainly found in Northern Europe but also include Greece), separation systems (for which France provides the most important example), and hybrid or cooperation systems which combine the formal separation of state and church with the recognition of a multitude of common tasks that link state and church activity (a model which has often been embraced by countries with a strong Catholic tradition and population).[35] In recent times, however, these distinctions have increasingly been criticized as having more to do with historical theory than sociological reality.[36] On the one hand, the systems recognizing a religious affiliation as state religion or official religion have often made considerable efforts to disentangle State business from Church business in recent decades, as in England, Norway or Sweden. On the other hand, the formal separation of State and Church often hides, particularly in Catholic states, a clear legal favoring of the Roman Catholic Church, on the basis of a Concordat between State and Catholic Church (as in Italy or Austria) or even without one (Belgium).[37]

Despite the increasing religious diversity of many European societies, the formal changes to the existing constitutional regulations of the state-church relationship have been slow to arrive and mostly been limited in scope. This is due to the strength of tradition and the relatively high barriers to constitutional amendments, but also to the lack of consensus on the principles and rules which should govern the relationship between state and the religious communities, old as well as new, in the 21st century, in the light of increasing religious diversity and a more individualist understanding and practice of religion in many segments of contemporary society.

As a consequence, the task of defining the new "rules of the game" has mostly been left to legislation and court practice. This has allowed new meta-norms to penetrate the constitutional space of the European states. In the field of religion, these norms are primarily to be found in international and human rights law. Particularly the guarantees in the *ECHR* have started to exercise a transforming influence on Member States'

35 Robbers, "State and Church in the European Union": 679.
36 Sandberg and Doe, "Church-State Relations in Europe": 565.
37 Sandberg and Doe, "Church-State Relations in Europe": 568.

constitutional and legal systems.[38] While formally respectful of the existing institutional arrangements in the State-church relations of Member States, the European Court of Human Rights' jurisprudence has made it more difficult to maintain existing public preferences in favor of established religious communities and to burden non-traditional communities with excessive restrictions and regulatory requirements. This can be seen as part of a gradual process creating the legal conditions for religiously more open societies which is far from completion. It is all the more difficult as the religious freedom of the various faiths and their followers also has to be balanced with the fundamental liberties of the important and growing part of the population which do not embrace any religious faith at all.

38 Potz, "State and Church in Austria": 437, concerning the Austrian case.

The Jurisprudence of the European Court of Human Rights on *Sharia* Law[1]

Angelika Nußberger and Rike Sinder

Abstract
Islam and *sharia* are central topoi in the jurisprudence of the European Court of Human Rights. Their importance is ever more increasing. Diverse factors contribute to this development, among them migration, Islamism and the growing number of Member State laws regulating religious dress, be it in public space, be it in the workplace or in schools. The European Court of Human Rights has thus been charged with the elaboration of a nuanced and sophisticated jurisprudence vis-à-vis Islam and *sharia* not only with regard to freedom of religion, but also – and maybe even more so – freedom of expression. Throughout the Court's case law, the high level of respect for the Member States' margin of appreciation in questions concerning the relationship between church and State is just as discernible as is the concern for pluralism and democracy within the Member States of the Council of Europe. Against the background of these competing concerns, the Court has set up a coherent system of human rights protection.

1. Introduction

The human rights protection system elaborated in Strasbourg after World War II defines itself as "European" – it is a *European* Court that interprets a *European* Convention. There has been a controversial political debate about the question of Islam being a part of European culture. Yet, there can be no doubt that the European legal space embraces Islam and *sharia*. Not only is it a majority religion in some of its Member States, but also an important minority religion in many others. Inter-religious dialogue with Islam is not a new phenomenon, but goes back to the roots of the system, not least because Turkey was one of the founding members of

1 This article is based on an elaborate version of an intervention at the Conference in Beirut on "Mapping Constitutional Control in the MENA region. Recent Developments, Challenges and Reform Trends", April 15–17, 2019.

the Council of Europe. Due to migratory movements and the intensified cultural exchange in a globalised world, the question of how to live up to the ideal of pluralism and tolerance in more and more diverse European societies becomes even more urgent in present times.

It is not always well understood what *sharia* means. Etymologically, the Arabic term *sharia* designates the road to the watering place.[2] In the birthplace of Islam – the desert – this path is doubtlessly an existential one. In the course of history, the term thus came to denote the path to be followed by the believer. In this sense it refers to the rules and regulations governing the lives of Muslims as derived from Quran and *sunna*.[3] For lack of a single authority responsible for the discovery, interpretation and codification of Islamic law, there is a wide variety of (diverse and sometimes even diverging) concepts claiming divine sanction. These concepts originate from different sources: from the individual believer who is, in his opinion at the very least, treading on the path indicated by Allah; from the (Muslim) State that codified Islamic law and wants to see it applied to its citizens be it at home be it abroad; from a group of people claiming religious authority for its action.

The European Court of Human Rights has been confronted with numerous concepts of *sharia* in various contexts and has – over the years – developed a sophisticated and balanced approach to the different notions and elements of Islamic law. When asked to decide upon the application of Islamic personal status laws, the Court gave a general and utmost negative assessment of *sharia* law. This oft-criticized approach has, however, recently been omitted in a judgment in which it could (according to some commentators) have played a role (2.1.2.). An assessment of the jurisprudence on the specific guarantees of the Convention reveals, however, that less general and thus more significant assessments of *sharia* law prevail. Even though the freedom of religion would seem to be the first and foremost point of reference for the Court's assessment of the diverse concepts relating to *sharia* law (2.1.3.), the Court has actually developed its most sophisticated jurisprudence in these matters with regard to the freedom of expression (2.2.1.). When focusing on Article 10 jurisprudence, the wide variety of Islamic concepts that are brought before the Court can be fathomed – and the sophistication of the Court's answers appreciated. In these cases, the Court's jurisprudence on Islam is, in fact, very similar to the one

2 Cf. Abdal-Haqq 2002: 33. Pei 2013 argues that a certain bias could be overcome if Article 9 were considered in conjunction with Article 14.

3 Calder 1997: 321.

on Christian religions (2.2.2.2.). The diversity of concepts emerging from *sharia* is thus mirrored in the Court's jurisprudence.

2. The case-law on Muslims and Islamic Law

2.1. Scepticism and incompatibilities between the convention philosophy and Islam

The European Court of Human Rights is frequently discredited as Islamophobic. It is reproached for "contributing to the negative stereotyping of public manifestations of the Islamic faith" and charged with a "simplistic and reductive reading of Islamic rules and traditions".[4] This charge is mostly based upon the Court's general assessment of *sharia* law on the one hand and its jurisprudence concerning the freedom of religion and its application to Islam on the other. The cases cited in support of this allegation are *Dahlab v. Switzerland*,[5] *Leyla Şahin v. Turkey*,[6] *Dogru v. France*[7] and *Refah Partisi (The Welfare Party) and others v. Turkey*.[8]

2.1.1. Critical assessment of sharia in the political context

In its oft-quoted *Refah Partisi (The Welfare Party) v. Turkey* judgment from 2003 the Court held that

> "sharia, *which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it.* […] *It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on* sharia, *which clearly diverges from Convention values, particularly with regard to its criminal*

4 Cebada Romero 2013: 75.
5 *Dahlab v. Switzerland* (decision on admissibility), no. 42393/98, February 15, 2001.
6 *Leyla Şahin v. Turkey* (Grand Chamber of the Court), no. 44774/98, November 10, 2005.
7 *Dogru v. France*, no. 27058/05, December 4, 2008.
8 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), nos. 41340/98, 41342/98, 41343/98 and 41344/98, February 13, 2003. A summary of this critique can be found in Power-Forde 2016: 576 –577, and Kayaoglu 2014: 346; Cebada Romero 2013: 83, fn. 39, refers to *Refah Partisi (The Welfare Party) and Others v. Turkey* and *Dogru v. France*.

> *law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.* […] *In the Court's view, a political party whose actions seem to be aimed at introducing* sharia *in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole convention*."[9]

The Grand Chamber was charged with the question whether the prohibition of a political party propagating a plurality of legal systems – for instance concerning personal status laws – was compatible with the European Convention of Human Rights. *Refah Partisi* had envisaged a system in which some Islamic private-law rules were to be applied to the Muslim population of Turkey. The Court argued that such a system "goes beyond the freedom of individuals to observe the precepts of their religion". It further postulated that such a system "suffers from the same contradictions with the Convention system as the introduction of *sharia*".[10] The freedom of religion was thus considered "a matter of individual conscience […] quite different from the field of private law, which concerns the organisation and functioning of society as a whole".[11]

The *Refah Partisi* judgment has been widely criticized. The "incidental assessment" of Islam was considered "wholly unsatisfactory". It was said to provide "worrying guidance to those countries that look to the European Court as the upholder of fundamental rights and freedoms".[12] The judgment was considered a product of European fear of the establishment of an Islamic regime in Turkey rather than a serious concern for democracy.[13]

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9 *Refah Partisi (The Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 72, July 31, 2001; affirmatively quoted in *European Court of Human Rights* (Grand Chamber of the Court), *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), § 123; also quoted in *Kasymakunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, § 111, March 14, 2013.

10 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), § 127.

11 Ibid, § 128.

12 Hughes 2016: 152; see also Kayaoglu 2014: 347–348.

13 Schilling 2004; McGoldrick 2009 criticizes the judgment mainly for its generality that does not pay due attention to the different elements and concepts comprised under the *sharia*-heading.

2.1.2. Neutral assessment of sharia in inheritance and family law

When Molla Sali lodged a complaint against the Greek application of Islamic inheritance law before the Court, the judgment was thus widely anticipated. The applicant – herself a member of the Muslim minority in Western Thrace – was the widow of a Muslim who had made a will in her favour. The will had been drawn up in accordance with the relevant provisions of the Greek Civil Code. The deceased's sisters then challenged the validity of the will, whereupon the Greek courts decided that Islamic law was applicable in this case due to Greece's international obligations under the Treaties of Sèvres and Lausanne. According to Islamic law, the will was invalid and thus the widow was entitled but to one-quarter of the estate.[14]

Rather than assessing Islamic inheritance law, the Grand Chamber considered the case under Article 1 of Protocol No. 1. It argued that the widow's "proprietary interest in inheriting from her husband was of a sufficient nature and sufficiently recognised to constitute a 'possession'".[15] According to the Court, the Greek decision upholding the application of *sharia* in this particular case interfered with the applicant's rights under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1: Her situation was relevantly similar to that of a beneficiary of a will made by a non-Muslim testator, but she was nevertheless treated differently on the basis of the testator's religion.[16] The interference could, in the Court's view, not be justified, because the measure was not proportionate to the aim pursued.[17] According to the wording of the Treaties of Sèvres and Lausanne, Greece was not obliged to apply *sharia* law.[18] In this context, the Court adopted a differentiated approach with regard to the application of Islamic law within a framework of legal pluralism. It held with reference to a case concerning the legal status of Alevi in Turkey[19] that

> "*freedom of religion does not require the Contracting States to create a particular legal framework in order to grant religious communities a special*

14 *Molla Sali v. Greece* (Grand Chamber of the Court), no. 20452/14, § 36, December 19, 20018.
15 Ibid, §§ 130–131.
16 Ibid, § 141.
17 Ibid, § 143.
18 Ibid, § 151.
19 *İzzettin Doğan and Others v. Turkey* (Grand Chamber of the Court), no. 62649/10, § 164, April 26, 2016.

> *status entailing specific privileges. Nevertheless, a State which has created such a status must ensure that the criteria established for a group's entitlement to it are applied in a non-discriminatory manner*."[20]

The Court thus decided the case on the basis of general reflections on discrimination and refrained from referring to prior jurisprudence where *sharia* law on the whole had been found incompatible with the European Convention of Human Rights. Instead, it focused upon the minority's right to free self-identification that was considered to be "of cardinal importance in the field of protection of minorities". In the Court's assessment it was thus not the application of *sharia* law in itself that constituted the interference, but the lack of a voluntary opt-in into ordinary law,[21] that is the "right to choose not to be treated as someone belonging to a minority."[22] Consequently, the Court appreciated the entry into force of a Greek law allowing recourse to a *mufti* in matters of marriage, divorce and inheritance but with the agreement of all those concerned.[23]

Not unlike the (unanimous) *Refah Partisi* judgment the (likewise unanimous) *Molla Sali* judgment gave rise to critical interpretations. One commentator in the French newspaper "*Le Figaro*" argued that the Court had "opened the door towards the application of the *sharia*" on European soil and suggested that the Court's newly revealed prudence with regard to Islam was an answer to Erdoğan's threat to reduce Turkey's financial contributions to the Council of Europe.[24] Yet another commentator considered the decision to "demonstrate a softening of Europe's position vis-à-vis Islam" as it has left the "overheated and fearful post-9/11 environment" behind.[25]

In fact, the *Molla Sali* approach fits better with the other case law concerning elements of Islamic law that has gradually been developed by the Court.[26] For instance, the Court has never expressed reservations against the application of Islamic law when it was called upon as the law of another State in matters of private international law. In *Refah Partisi*, the Court already took note of the fact that *sharia* law can be applied in all Member States of the Council of Europe as a source of foreign law in the event

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20 *Molla Sali v. Greece* (Grand Chamber of the Court), § 155.
21 Ibid, § 157.
22 Raimondi 2019: 8; see also Cerna 2019: 280; see for a critique of this understanding of minority rights McGoldrick 2019: 543–566.
23 *Molla Sali v. Greece* (Grand Chamber of the Court) § 160.
24 Puppinck 2018, translation by the authors.
25 Cerna 2019: 281.
26 For a more solid analysis see Afroukh 2019.

of a conflict of laws.[27] The Court has thus for instance recognized the Islamic prohibition of adoption. It did not find a violation of Article 8 of the Convention when a Member State opted for the application of *kafāla*[28] to children originating from Muslim States who themselves codified the prohibition of adoption.[29]

2.1.3. Cautious approach to sharia in freedom-of-religion cases

The Court has time and again reiterated that the freedom of religion is "one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned".[30] Yet, it is true that quite a few applications invoking freedom of religion were dismissed with reference to the margin of appreciation doctrine.[31] Due to the strict separation of *forum internum* and *forum externum* and the higher degree of protection afforded to the former,[32] specifically Islamic religious practices can be deprived of the Convention's protective mechanisms.[33]

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27 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court) § 82.

28 *Kafāla* is the Islamic alternative to adoption. It is a type of legal guardianship for abandoned or orphaned children that does not – in contrast to adoption – establish filiation between the child and the guardian, with repercussions most notably with regard to naturalization procedures and inheritance, see with special emphasis on the French legal situation Boursicot 2010.

29 *Kafāla* is also mentioned in Article 20 of the United Nations Convention on the Rights of the Child, of November 20, 1989. See for *kafāla* in the jurisprudence of the European Court of Human Rights, *Harroudj v. France*, no. 43631/09, October 4, 2012, and *Chbihi Loudoudi and Others v Belgium*, no. 52265/10, December 16, 2014.

30 *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court), § 90; *Kokkinakis v. Greece*, no. 14307/88, § 31, May 25, 1993, and *Buscarini and Others v. San Marino* (Grand Chamber of the Court), no. 24645/94, § 34, February 18, 1999.

31 Kayaoglu thus remarks that the Court did not find a single violation of Article 9 until 1993. Most applications did not even reach the Court as the Commission first rejected them as inadmissible; see Kayaoglu 2014: 347; see for the margin of appreciation ibid, 349; Cebada Romero 2013: 83; see also below, 3.1.

32 Cf. Kayaoglu 2014: 348.

33 This is mainly due to the specific structure of Islam and the importance attributed to religious practice, cf. ibid, 348; see also Carolyn Evans 2010: 167–168.

The Court has thus consistently upheld headscarf bans.[34] In *Karaduman v. Turkey*, a student who had finished her studies at Ankara University was refused a certificate because she did not want to provide a photograph of herself without a headscarf. The Commission did not even see an interference with Article 9 because the applicant had freely chosen to attend a secular university.[35] When a primary school teacher who had converted to Islam was prevented from wearing a headscarf in class, the Court acknowledged an interference with Article 9, but nevertheless considered the measure to be justified under Article 9 § 2 namely due to the risk of proselytizing.[36] In *Leyla Şahin v. Turkey* a medical school student applied to the Court after she had been banned from wearing the headscarf at university. The Court considered the ban to be necessary in a democratic society as the national authorities find themselves "in principle better placed than an international court to evaluate local needs and conditions".[37] The Court also considered the expulsion of French school girls who refused to take off their veils in physical education classes to be justified.[38] Likewise, the complaints brought before the Court by French secondary school students concerning the ban of the headscarf in French schools were dismissed as manifestly ill-founded.[39] In *Ebrahimian v. France*, the Court did not find a

34 *Karaduman v. Turkey*, no. 16278/90, Commission decision of May 3, 1993; see also *Bulut v. Turkey* (decision on admissibility), no. 18783/91, May 3, 1993.

35 *Karaduman v. Turkey*; see also Cumper and Lewis 2008: 607–608.; Hughes 2016: 136–137.

36 *Dahlab v. Switzerland*; for a critical assessment see Cumper and Lewis 2008: 608–609; Gallala 2006: 600–601; Carolyn Evans considers the "perfunctory treatment" as "common for religious freedom cases brought by religious minorities in Europe", Carolyn Evans 2010: 165. See for a critique of the Court's reasoning Cebada Romero 2013: 96. Concerning university professors, the decision was upheld in *Kurtulmuş v. Turkey* (decision on admissibility), no. 65500/01, January 24, 2006; the application was dismissed as manifestly ill-founded. See for the different *rationes* of the two cases Nigro 2011: 548.

37 *Leyla Şahin v. Turkey* (Grand Chamber of the Court), § 121; see also *S.A.S. v. France*, no. 43835/11, § 129, July 1, 2014; see for a critique of *Leyla Şahin v. Turkey* Gallala 2006: 603–604; Hughes thus talks of an "overly deferential attitude of the Court to state parties' assertions in cases concerning Article 9 of the Convention", Hughes 2016: 144. This jurisprudence stands in contrast in particular to a decision of the UN Human Rights Committee. In *Hudoyberganova v. Uzbekistan*, the Committee held that a headscarf ban imposed upon university students violated the freedom of religion guaranteed by Article 18 of the International Covenant on Civil and Political Rights, CCPR/C82/D/931/2000, January 18, 2005.

38 *Dogru v. France*; *Kervanci v. France*, no. 31645/04, December 4, 2008.

39 *Aktas v. France* (decision on admissibility), no. 43563/08, June 30, 2009; *Bayrak v. France* (decision on admissibility), no. 14308/08, June 30, 2009; *Gamaleddyn v.*

violation in the non-renewal of a contract for a social worker in a hospital based upon her refusal to take off her headscarf.[40] In 2014, the Grand Chamber upheld the French ban of full-face veils such as *burqa* and *niqab* in all public places.[41] While the majority opinion considered that "living together" could be linked to the legitimate aim of the protection of the rights and freedoms of others,[42] the Dissenting Opinion argued that "living together" did "not fall directly under any of the rights and freedoms guaranteed within the Convention";[43] otherwise restrictions on rights would be virtually unrestricted and could be based on any lifestyle motive. The majority, by contrast, took into account the French government's point that "the possibility of open interpersonal relationships […] forms an indispensable element of community life within the society in question".[44] In 2017, the Court accepted compulsory mixed swimming lessons for students below the age of puberty with the aim of integrating foreign pupils.[45] In fact, until recently the only symbol that was granted the protection of Article 9 was a cross worn by an airline employee because

France (decision on admissibility), no. 18527/08, June 30, 2009; *Ghazal v. France* (decision on admissibility), no. 29134/08, June 30, 2009; cf. Power-Forde 2016: 585–586. See for a similar reasoning *Köse and 93 Others v. Turkey* (decision on admissibility), no. 26625/02, January 24, 2006. A complaint lodged by a woman who was not authorized to enter the French consulate premises because she had refused to remove her veil for the purpose of an identity check was also dismissed as manifestly ill-founded, *El Morsli v. France* (decision on admissibility), no. 15585/06, March 4, 2008.

40 *Ebrahimian v. France*, no. 64846/11, November 26, 2015; see for a critique of this judgment Garahan 2016.

41 *S.A.S. v. France* (Grand Chamber of the Court), no. 43835/11, July 1, 2014; see for an assessment of the ban Powell 2013, who argues that – in line with the decision in *Ahmet Arslan and Others v Turkey* (no. 41135/98, February 23, 2010) – a full-face veil ban was not in conformity with the Convention.

42 *S.A.S. v. France* (Grand Chamber of the Court), no. 43835/11, §§ 121–122, July 1, 2014; see for a critique Steinbach 2014: 409–410, 428–429; see for a summary of the critique Trispiotis 2016: 581 and 591.

43 *S.A.S. v. France* (Grand Chamber of the Court), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, § 5; see for a critique of the notion of "living together" Wade 2018.

44 *S.A.S. v France* (Grand Chamber of the Court), § 122.

45 *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, January 10, 2017; see also Plessis 2018: 523.

it was considered "discreet and cannot have distracted from her professional appearance".[46]

Furthermore, the Court held in *Kalaç v. Turkey* that the compulsory retirement of military personnel for practicing Islam in a way that conflicted with "an established order reflecting the requirements of military service"[47] did not violate the Convention. The Court argued that "in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account".[48] The Commission had previously decided that a teacher could not reasonably expect to be exempt from working on Fridays when this clashed with his religious obligation to attend the mosque.[49]

Two cases, however, deserve being mentioned in more detail for they break with what so far seemed to be settled case-law. In 2010, the Court finally found a violation of Article 9: In *Ahmet Arslan and Others v. Turkey*, the Court was confronted with a complaint lodged by the members of a (Muslim) religious group called *Aczimendi tarikatı* who had been convicted under a Turkish law banning religious garment in public. The group had met in Ankara in front of a mosque and subsequently walked through the city in October 1996 for the purpose of a religious ceremony. The group members were wearing a turban, black "salvar" trousers and a black tunic and were carrying sticks. While the Court held that the protection of the secular order was a legitimate aim,[50] it argued that the jurisprudence on civil servants could not be taken into account since the applicants were ordinary citizens.[51] It further took note of the fact that the applicants were sanctioned for garments worn in "public places open to all". The

46 *Eweida and Others v. The United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, § 94, January 15, 2013. The wearing of a cross could, however, be limited with a view to protecting health and safety on a hospital ward, ibid, § 99.

47 *Kalaç v. Turkey*, no. 20704/92, § 28, July 1, 1997.

48 Ibid, § 27.

49 *X v. United Kingdom*, no. 8160/78, Commission decision of March 12, 1981. The Court distanced itself from this "freedom to resign"-doctrine in *Eweida and Others v. The United Kingdom*: § 83: "Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate"; cf. Power-Forde 2016: 595–596.

50 *Ahmet Arslan and Others v. Turkey*, no. 41135/98, § 43, February 23, 2010.

51 Ibid, § 48.

regulation was thus neither limited to public buildings, nor did the applicants proselytize. Rather, the ceremony seemed to be a mere "curiosity".[52] The necessity of the limitation to the freedom of religion in a democratic society was thus not sufficiently substantiated. What sets *Ahmet Arslan* apart from the other headscarf cases (with the exception of the – later – judgment in *S.A.S. v. France*) is that it concerned religious attire worn in the public sphere.[53]

In December 2017, the Court finally found another violation of Article 9 in a case concerning religious dress. The complaint was lodged by an applicant who had been summoned as a witness in a trial concerning members of a local "Wahhabi/Salafi" group who had previously attacked the United States Embassy in Sarajevo. One police officer had been wounded in the attack.[54] For religious reasons, the applicant refused to remove his skullcap[55] before the trial chamber in disregard of an order by its President. He was thus convicted of contempt of court and sentenced to a fine that was later converted to a thirty days prison sentence as the applicant failed to pay the fine. The Court first considered that the case was to be distinguished from cases concerning the wearing of religious symbols and clothing in the workplace. Just as in *Ahmet Arslan*, the applicant was a private citizen, who is "normally not under such a duty".[56] Furthermore, the punishment was considered disproportionate to the applicant's behaviour:

> "*Unlike some other members of his religious group* […] *the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. There is no indication that the applicant was not willing to testify or that he had a disrespectful attitude. In these circumstances, his punishment for contempt*

52 Ibid, §§ 49–50, translation by the authors.

53 Powell 2013: 138; Tulkens 2014: 516; Power-Forde thus considers the decision to be a "shift away from the demands of a strict secularims", Power-Forde 2016: 593.

54 *Hamidović v. Bosnia and Herzegovina*, no. 57792/15, § 6, December 5, 2017.

55 It is, of course, questionable, whether a skullcap is indeed an Islamic symbol. The Court, however, generally refrains from assessing objectively whether a certain manifestation of religion is indeed required by that religion when the applicant says for her or him the issue is of a religious nature; see *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 92, October 5, 2006: "The Court points out that, according to its constant case-law, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate"; see Malcolm Evans 2010: 348.

56 *Hamidović v. Bosnia and Herzegovina*, § 40.

> *of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society*."[57]

From these two cases a second line of reasoning with regard to Article 9 can be discerned: When limitations on religious dress of ordinary citizens are at stake – outside the work context – the margin of appreciation seems to be rather smaller.

The protection of Muslims' practices and world views within a pluralist society is, however, not only based on freedom of religion. It is worth looking into the Court's jurisprudence on Islam and *sharia* law with regard to other rights and freedoms, in particular freedom of expression, in order to see a fuller picture.

2.2. Openness towards a world view based on Islam

2.2.1. Islam v. Islamism in freedom-of-speech-cases

The Court's jurisprudence on the freedom of expression tries to draw a line between those (critical) opinions a democracy has to tolerate and the limitations it may impose to secure its own persistence. To this end, it distinguishes (with regard to Islam) between Islamism and calls for a violent form of *jihad*[58] on the one hand and opinions that are "shocking", but nevertheless have to be tolerated on the other hand. Another group of cases concerns the protection of Muslims and Islam against (blasphemous) right-wing political agitation.

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57 Ibid, § 42.

58 Etymologically, *jihad* means but a struggle, "an effort directed towards a determined objective". For many Muslims in Europe this means "an effort directed upon oneself for the attainment of moral and religious perfection". However, some Muslims understand the duty to *jihad* to comprise "military action with the object of the expansion of Islam and, if need be, of its defence" (Tyan 1991: 538). The struggle with (Islamist) terrorism runs as a central thread through the recent and not so recent jurisprudence of the Court relating to Islam. In fact, even with regard to the headscarf, the Court was prepared to acknowledge the government's argument that the veil was "a symbol of political Islam" (*Leyla Şahin v. Turkey* (Grand Chamber of the Court), §§ 35, 111; see also Cumper and Lewis 2008: 602 et seq., 610 et seq. Tulkens thus observes that "[i]n the case law of the Court today […] the main limitations to the right of religious freedom [and also the freedom of thought or conscience] are motivated by the need to protect democratic societies from the danger of Islam", Tulkens 2014: 509).

The freedom of expression can – also with regard to Muslim or Islamist opinions – be restricted. In extreme cases the applicant can even be deprived of the right to free speech according to Article 17. In other cases, however, even radical opinions may come to enjoy the protection of Article 10.

In *Leroy v. France*, the applicant was a cartoonist who had published a drawing symbolizing the attacks on the World Trade Center in a Basque left-wing newspaper on 13 September 2001 with the caption "We have all dreamt of it … Hamas did it" – this being a parody of the Sony slogan "We all dreamt of it … Sony did it". Thereupon the applicant was convicted for glorifying terrorism and sentenced to a fine of 1500 Euros. The Court chose not to take recourse to Article 17 arguing that the drawing was not such a non-equivocal justification of terrorism that it could be deprived of the guarantees of Article 10.[59] Nevertheless, the Court did not find a violation of Article 10. It considered the conviction to be justified according to Article 10 § 2, especially when taking into account the impact such a drawing could have had on the public order in the Basque country.[60] It argued that the drawing did not – as was put forward by the applicant – criticize American imperialism but actually glorified its violent destruction.[61]

This case can be contrasted with the Court's treatment of cases concerning the dissemination of radically Islamist opinions. In *Fouad Belkacem v. Belgium*, the applicant – the leader and spokesperson of the organisation "Sharia4Belgium" – had uploaded a number of videos on YouTube in which he had said that "the Muslims are here to dominate […] and the true religion is here to dominate the world, to reign over all systems". "I do not call upon the Muslims to fight, but that will nevertheless be the consequence. Allah legitimizes all forms of defence. We are not Christians we do not turn the other cheek when struck. We seek the confrontation. […]. Our honour outweighs our life". He continued saying "I ask Allah to make the *mujtahidūn* come to the doors of Brussels as quickly as possible to teach a lesson to those non-believers because they really have to learn a lesson". And further: "*Umma*, dear people, it is enough […]. The dialogue of the 'please sit down at one table, peace, blablabla…' is over. It's over. Today, we have to talk about *jihad* […]. Today, we have to talk about the *sharia*".[62] The applicant was then sentenced to one year and six months of

59 *Leroy v. France*, no. 36109/03, § 27, October 2, 2008.
60 Ibid, § 45.
61 Ibid, § 43.
62 *Fouad Belkacem v. Belgium*, no. 34367/14, § 4, June 27, 2017, translation by the authors.

imprisonment and a fine of 550 Euros. The prison sentence was suspended.[63] The Court applied Article 17 in this case, arguing that "such a general and vehement attack contradicts the values of tolerance, social peace and non-discrimination that underlie the Convention".[64] The applicant was thus deprived of the protection of Article 10 because he wanted to turn the guarantee against its purpose.[65]

The Court indeed has a fine line to walk in these cases and it has already (and only shortly after 9/11) stepped in in order to protect calls for *sharia* by devout Muslims. In a 2003 case, *Gündüz v. Turkey*, the applicant – a leader of an Islamic sect – had been invited to a talk show that was broadcasted on television. In the course of the talk show, he said with regard to Turkish secularism that "democracy in Turkey is despotic, merciless and impious […]. This secular […] system is hypocritical". He continued calling a child born in a marriage that had been concluded before a council official a "piç [bastard]" and when asked whether they wanted "to destroy democracy and set up a regime based on *sharia*" he answered: "Of course, that will happen, that will happen…".[66] Following this television broadcast, the applicant was sentenced to two years of imprisonment and a fine for inciting people to hatred and hostility. In this case, the Court found a violation of Article 10. It afforded the State a certain margin of appreciation "when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion"; the State may thus legitimately include "an obligation to avoid as far as possible expressions that are gratuitously offensive to others […] and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".[67] The Court then reiterates its findings from *Refah Partisi*, namely, that "*sharia* […] clearly diverged from Convention values". However, it considers that the "mere fact of defending *sharia*, without calling for violence to establish it, cannot be regarded as 'hate speech'". The Court furthermore takes into account that the "applicant's extremist views […] were expressed in the course of a pluralistic debate".[68] This is thus clearly what sets *Gündüz* apart from *Fouad Belkacem*: Müslüm Gündüz never propagated a violent overthrow of

63 Ibid, §§ 8–13.
64 Ibid, § 33.
65 Ibid, § 36.
66 *Gündüz v. Turkey*, no. 35071/97, § 11, December 4, 2003.
67 Ibid, § 37.
68 Ibid, § 51.

the democratic system and he was well-prepared to see his views contested by others in a plural and democratic forum.

2.2.2. The protection of religious groups against hate speech

2.2.2.1. The Court's jurisprudence on hate speech against Muslims

The Court was not only asked to judge on (pro-)Islamist hate speech, but also on anti-Muslim hate speech. In fact, when charged with the protection of Muslim minorities against right-wing agitation, the Court is rather more quickly in applying Article 17[69] as becomes clear when looking at *Norwood v. The United Kingdom*. The applicant – a Regional Organiser for the British National Party – had displayed a large poster in the window of his first-floor flat between November 2001 and January 2002 that had been supplied by the British National Party, showing a photograph of the Twin Towers in flame with the caption "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. Following this incident, the applicant was charged and sentenced to a fine of 300 GBP. The Court applied Article 17 and thus dismissed the application:

> "[*T*]*he words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination*."[70]

The Court has upheld this position on anti-Muslim hate speech in a 2018 judgment. In this case, the applicant had been convicted of "disparaging religious doctrines" and sentenced to a fine of 480 Euros after she had – in a public seminar offered for free to young voters by the Austrian Freedom Party Education Institute – said that "Muhammad […] was a warlord, he had many women […] and liked to do it with children. And according to our standards he was not a perfect human." She further summarized a chat she had had with her sister and in which she had said: "A 56-year-old and a

69 Cf. Hong 2010: 108.

70 *Norwood v. The United Kingdom* (decision on admissibility), no. 23131/03, November 16, 2004.

six-year-old? […] What do we call it, if it is not paedophilia?"[71] Unlike the *Norwood* case, the Court considered the criminal conviction to amount to an interference with Article 10.[72] However, the Court considered that the duties and responsibilities according to Article 10 § 2 comprise, in the context of religious beliefs,

> "*the general requirement to ensure the peaceful enjoyment of the rights guaranteed unter Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane* […]. *Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures*."[73]

Concerning the necessity of the measures imposed, the State was afforded a wide margin of appreciation so as to be able to take the positive obligation under Article 9 of the Convention into account.[74]

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71 *E. S. v. Austria*, no. 38450/12, § 13, October 25, 2018.

72 Ibid, § 39.

73 Ibid, § 43.

74 Ibid, § 44. The Court had argued in the same line in *I. A. v. Turkey* concerning a novel that was considered blasphemous. The owner of the publishing house had been sentenced to a fine (amounting to the equivalent at the time of 16 USD), *I. A. v. Turkey*, no. 42571/98, § 13, September 13, 2005; for the width of the margin of appreciation see § 25; see for a critique Kuhn 2019: 142, who argues that "the Strasbourg Court's concern about the degree of provocation to devout Muslims generated by the impugned novel overlooks the fact that Turkey has a large majority of practicing Muslims, who cannot plausibly be said to face marginalization through such inflammatory comments."
The protection of Muslim sentiments against blasphemous opinions meets its limits in Article 1 of the Convention, namely with regard to the concept of "jurisdiction": Thus, the Court denied the Convention's protection to Moroccan applicants who sought redress against the Dutch caricatures of the Prophet Muhammad that had been published in the *Morgenavisen Jyllands-Posten* in 2005 for they did not come within Danish jurisdiction. The Court considered that "the words 'within their jurisdiction' in Article 1 must be understood to mean that a State's jurisdictional competence is primarily territorial". For lack of a "jurisdictional link between any of the applicants and the relevant member State" the Court dismissed the application as unfounded, *Ben El Mahi and Others v. Denmark* (decision on admissibility), no. 5853/06, December 11, 2006.

Blasphemy regulations are thus generally afforded a wide margin of appreciation by the Court. This margin is overstepped only when the interference with the freedom of expression weighs particularly heavy and the religious interests at stake cannot be considered particularly worthy of protection. In *Aydın Tatlav v. Turkey*, for instance, a journalist had published a five-volume work called "The reality of Islam". The work contained passages like "Islam is an ideology lacking confidence in itself so much, as is revealed in the cruelty of its sanctions. […]. It […] conditions [children] from their youngest age with stories of paradise and hell" or "All these truths concretise the fact that God does not exist, that it is the conscience of an illiterate person who created Him. [….] This God who gets involved with anything, including the question how many lashes are to be inflicted upon the adulterer, which body part of the thief is to be amputated".[75] Over the course of four years, a total of 16,500 books has been published. The first four editions did not give rise to any complaints. After a complaint had been lodged in 1997, the author was prosecuted for "making a publication destined to profane one of the religions". As to his defence, the author argued that his book ought to be read as a scientific treatise on the religions and the prophets. He further claimed to distinguish between the individual person's belief and those who wanted to direct a state according to religion, criticising but the latter.[76] Nevertheless, he was sentenced to twelve months of imprisonment and a fine. The prison sentence was later converted. Upon the complaint raised before the European Court of Human Rights, the Chamber found a violation of Article 10. Even though the Court afforded a wide margin of appreciation to the State in matters concerning religious hate speech, Turkey had overstepped its margin in this case: The work contained but "a dose of lively criticism": "This is the critical point of view of a non-believer with regard to religion in the socio-political field". The Court could not, however, observe an "insulting tone directed at the person of the believer, nor an injurious attack at sacred symbols".[77] The Court put special emphasis on the deterrent effect a criminal conviction may have on authors and editors and thus on safeguarding the "pluralism indispensable for the healthy evolution of a democratic society".[78]

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75 *Aydın Tatlav v. Turkey*, no. 50692/99, §§ 9–12, May 2, 2006, translation by the authors.
76 Ibid, § 13, translation by the authors.
77 Ibid, § 28, translation by the authors.
78 Ibid, § 30, translation by the authors.

2.2.2.2. The Court's jurisprudence on hate speech against Christians

These cases on anti-Muslim hate speech stand in line with the Court's jurisprudence on anti-Christian hate speech. The level of protection afforded to the former does not fall short of the one allotted to the latter. Two different lines of argument can be discerned here: firstly, one on creative or artistic expression concerning movies or billboards with blasphemous content, and, secondly, one on journalistic or scholarly religiously offensive speech concerning articles, books and the like.[79] The latter is – just as in the case of anti-Muslim hate speech – afforded a larger degree of protection due to its tremendous importance for a vital and plural democracy.[80] Nevertheless, the protection is not unlimited.

Creative or artistic expression

The basic tenets regarding the protection of artistic expression were outlined in the 1994 case *Otto-Preminger-Institut v. Austria*. The applicant operated a cinema in Innsbruck and wanted to show the film "Das Liebeskonzil" that was based on a play written by Oskar Panizza in 1894. The play portrays God as "old, infirm and ineffective" and prostrating himself before the devil, Jesus Christ as a "mummy's boy" of minor intelligence and the Virgin Mary as an "unprincipled wanton" coquetting with the devil, who, upon Mary's request, spreads syphilis among man as a punishment for their sins.[81] Panizza himself never saw the play on stage: He was sentenced to one year of imprisonment for blasphemy and exiled thereafter. The play remained banned in Germany. It took until 1969 that the book was published. It was put on stage in London the following year and another 11 years later in Rome, where it caused a scandal among the theatre community.[82]

79 See for this distinction and the different level of protection afforded to the two Kuhn 2019: 120. Kuhn attributes the distinction to the fact that in cases concerning scholarly or journalistic speech, "it is easier for the Strasbourg Court to identify elements of the expression which engage the public interest", whereas with regard to artistic or creative expression "offensive elements are often unqualified and presented without context", Kuhn 2019: 125.

80 See also below, 3.2.

81 *Otto-Preminger-Institut v. Austria*, no. 13470/87, §§ 20–22, September 20, 1994.

82 Kahn 2011: 420.

Upon the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor initiated criminal proceedings against the applicant's manager, who was charged for "disparaging religious doctrines". The film was subsequently seized. The Court did not find a violation of Article 10. It argued that States may limit the freedom of expression so as to guarantee the enjoyment of the freedom of religion:

> "*The respect for the religious feelings of believers as guaranteed in Article 9* […] *can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society*."[83]

A State may thus legitimately limit those expressions "that are gratuitously offensive to others".[84]

The Court ruled along the same lines in *Wingrove v. The United Kingdom*. The applicant, a film director, wrote a script and directed the making of a video entitled "Visions of Ecstasy". The video was inspired by the life and writings of St Teresa of Avila, who is said to have experienced powerful ecstatic visions of Jesus Christ and who, in the video, is played by a youthful actress dressed as a nun. In the first part of the video, the nun is dressed loosely in a black habit, stabs her hand with a nail and spreads her blood over her naked breasts. Subsequently, she spills a chalice of communion wine and licks it up from the ground. In the second part of the video, St Teresa is approached by a near-naked woman said to represent St Teresa's psyche (even though this is not clear from watching the video). The woman caresses St Teresa's feet and legs, her midriff and her breasts and finally exchanges passionate kisses with her. This sequence alternates with a second one in which St Teresa kisses the body of the crucified Christ, who is himself lying on the ground.[85] After having been submitted to the British Board of Film Classification (that is, the authority responsible for determining whether a video can be lawfully sold, hired out or otherwise supplied to the public) by the applicant, the Board rejected the application, arguing that the video breached the criminal law of blasphemy. According to the Board's reasoning, it is not blasphemous to publish opinions hostile to the Christian religion. Such

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83 *Otto-Preminger-Institut v. Austria*, § 47.

84 Ibid, § 49; see for the role of the margin of appreciation in this case Cox 2016: 208; the judgment was criticised for its recourse to Article 9 so as to protect the majority religion, see Janis 2015: 82 and 89.

85 *Wingrove v. The United Kingdom*, no. 17419/90, §§ 8–9, November 25, 1996.

speech, however, meets its limits when the manner of presentation "is bound to give rise to outrage at the unacceptable treatment of a sacred subject".[86] The Court did not find a violation of Article 10, since the video concerned a matter "liable to offend intimate personal convictions within the sphere of morals". The margin of appreciation afforded to the Member State was thus considered to be wide.[87]

Nevertheless, interferences with the aim of protecting religious sentiments remain subject to the Court's supervision. Thus, in *Sekmadienis Ltd. v. Lithuania* the Court actually found a violation of Article 10. The case concerned an advertising campaign introducing a clothing line that included visual advertisements that were displayed in public areas in Vilnius. The first advertisement showed a long-haired young man, wearing a halo, several tattoos and a pair of jeans. A caption added read "Jesus, what trousers!" The second advertisement showed a young woman wearing a white dress, a headdress with flowers in it and also a halo, with a caption added reading "Dear Mary, what a dress!" The third advertisement showed both the man and the woman together, wearing the same clothes and accessories as in the other two advertisements. The caption added read "Jesus [and] Mary, what are you wearing!"[88] The authorities decided that the advertisement had breached the Law on Advertising and imposed a fine upon the company since it exceeded "the limits of tolerance". It argued that "using the name of God for commercial purpose is not in line with public morals". Rather, "the inappropriate depiction of Christ and Mary in the advertisements" was said to encourage "a frivolous attitude towards the ethical values of the Christian faith".[89] In spite of the wide margin of appreciation[90] the Court considered the interference not to be necessary in a democratic society. It argued that the Member State failed to explain "why the reference to religious symbols in the advertisements was offensive, other than for the very fact that it had been done for non-religious purposes".[91] Furthermore, the high number of individual complaints could not be taken into account in the assessment since "freedom of expression also extends to ideas which offend, shock or disturb". In a "pluralistic democratic society" also those exercising their religious

86 Ibid, §§ 12–13.
87 Ibid, §§ 57–58. See for a critique of the *Otto-Preminger-Institut* and *Wingrove* judgments Petersen 2017: 112–113.
88 *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, §§ 6–9, January 30, 2018.
89 Ibid, §§ 18 et seq.
90 Ibid, § 73.
91 Ibid, § 79.

freedom "must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".[92]

Journalistic or scholarly religiously offensive speech

By contrast, the Court is more likely to find a violation of Article 10 when (journalistic or scholarly) speech is at issue. In *Giniewski v. France*, the applicant was an author who had published an article entitled "The obscurity of error" concerning the papal encyclical "The Splendour of Truth". He argued that Catholic "scriptural anti-Judaism and the doctrine of the 'fulfilment' [*accomplissement*] of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation [*accomplissement*] of Auschwitz took seed".[93] The Criminal Court found the applicant guilty of "publicly defaming a group of persons on the ground of membership of religion" and ordered him to pay a fine.[94] The Court approached the case from the *Otto-Preminger-Institut* finding in arguing that according to Article 10 § 2 expressions may be banned that are "gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".[95] However, it parted ways with *Otto-Preminger-Institut* with regard to the democratic value of the publication: In the Court's view, the author "sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust" and thus made "a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate […] without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought".[96] In this context, the Court considered it "essential in a democratic society that a debate […] should be able to take place freely".[97]

Likewise, the Court found a violation of Article 10 when a journalist and film critic was convicted for the defamation of other persons' belief and sentenced to a fine. The applicant had – in response to a Slovak Arch-

92 Ibid, § 81.
93 Ibid, § 14.
94 *Giniewski v. France*, no. 64016/00, § 15, January 31, 2006.
95 Ibid, § 43.
96 Ibid, § 50.
97 Ibid, § 51.

bishop's critique of a poster that he considered blasphemous – published an article in which he fervently criticised the Archbishop. The poster in question was an advertisement for the movie "The People vs. Larry Flynt" depicting the main character of the movie with a US flag around his hips as crucified on a woman's pubic area dressed in a bikini.[98] In response to a TV broadcast of a declaration made by the Archbishop the applicant wrote about him that "[t]his principal representative of the first Christian church has not even as much honour as the leader of the last gypsy band in his bow!" and continued urging all "decent Catholics" to leave "the organisation which is headed by such an ogre".[99] With a view to the "slang terms and innuendoes with oblique vulgar and sexual connotations" in the article the Court held that it was "not required to assess the journalistic quality of the article".[100] It further argued that the interference with the freedom of expression was not "necessary in a democratic society": Only the person of the Archbishop had been severely criticised; the Court was not persuaded that the applicant had also "discredited and disparaged a sector of the population on account of their Catholic faith".[101] The Archbishop, in turn, had withdrawn from the criminal proceedings and publicly pardoned the applicant.[102]

The high level of protection generally afforded to (religious or religiously offensive) speech only meets its limits when a particular democratic value is no longer discernible, as in the case of advertisement. In *Murphy v. Ireland*, the applicant was a pastor who wanted to see a religious advertisement for a video presentation at the Irish Faith Centre during the Easter week transmitted via radio. The Independent Radio and Television Commission, however, stopped the broadcast with reference to a law banning religious advertising. The High Court upheld the decision arguing that "Irish people with religious beliefs tend to belong to particular churches and that being so religious advertising coming from a different church can be offensive to many people".[103] Most particularly, "religion has been extremely divisive in Irish society in the past" which Parliament may legitimately take into account. The Court endorsed this reasoning with reference to the wide margin of appreciation in religious matters.[104]

98 *Klein v. Slovakia*, no. 72208/01, § 8, October 31, 2006.
99 Ibid, § 12.
100 Ibid, § 49.
101 Ibid, § 51.
102 Ibid, § 53.
103 *Murphy v. Ireland*, no. 44179/89, § 12, July 10, 2003.
104 Ibid, §§ 67, 73.

2.2.3. Criticism and context

The Court's hate speech jurisprudence has been widely criticized. Regarding the *Otto-Preminger-Institut* judgment, critics evoked the return of the Inquisition.[105] The protection that is granted to Muslims in cases of anti-Muslim hate speech is by some considered to be a first step towards the establishment of *sharia* law inside Europe, as it is closely related to Islamic blasphemy laws.[106] In Islamic law, blasphemy is punishable by death.[107] Not quite asking for the death penalty but nevertheless striving for a fiercer criminalisation of blasphemy, Muslim majority nations have (through the Organisation of Islamic Cooperation, the OIC) – for several years – pushed for a provision against "defamation of religions" in public international law.[108]

However, even in classical Islamic law, there has been a (long since forgotten) distinction between (illegitimate) blasphemy and (legitimate) rebellion, that is "dissent for a just cause".[109] Religiously offensive speech was thus considered to be legitimate, when "the voices of religio-political opposition or dissent possess[ed] some reasonable, even if mistaken, interpretation of the law or facts that made them honestly believe in the need to rebel".[110] The one who was "truth-seeking" was thus privileged over the "deliberately oppositional or unjustifiably transgressant".[111] The gratuitously-offensive-test on the one hand and the privileges afforded to speech acts that are considered to be of a certain political value on the other do not seem too far from this. If someone were to defame Islam in a gratuitously offensive manner (as a "deliberately oppositional or unjusti-

105 See for a summary of the critique Brown 2001: 539.

106 Durie considers them to be "but one element in a broader societal transformative process of Islamization", Durie 2012: 394.

107 The Muslim who committed blasphemy was (in a time when citizenship was religion-based) considered an apostate and thus no longer intelligible for the Muslim State. In this context, those who "left Islam were announcing a religious non-alignment that suggested hostilities or accompanied military escalation against Muslims". Blasphemy was thus considered to be an act of treason (see Rabb 2012: 146 et seq.; Rabb 2015: 448 et seq.). The Christian living under Islamic rule, by contrast, is considered to have renounced the *dhimma*-covenant that grants members of book religions state protection, cf. Durie 2012: 396.

108 See Leo, Gaer and Cassidy 2011: 769–884. The project has been widely criticised by those who did not want to lend added credibility to strict anti-blasphemy laws in Muslim countries, see Kahn 2011: 405 et seq.

109 Rabb 2012: 152 et seq.

110 Ibid, 153.

111 Ibid.

fiably transgressant") and without any democratic added value (that is, "for a just cause") in violation of the anti-blasphemy laws of the Member State, the European Court of Human Rights would probably not object to a reasonable fine.

3. *Protection of religious pluralism in a difficult environment*

The Court's jurisprudence on Islamic law and Muslims is thus complex and manifold: Whilst the protection of the freedom of religion is to be seen in the context of a large diversity of state-religion models in Europe (with a wide margin of appreciation afforded to the States) the protection of other freedoms (including the freedom to exercise Islam without being subjected to hate speech) is not so much dependent on the respective constitutional framework. The differentiation of protective standards is therefore not arbitrary or whimsical; it is not – as has often been claimed – due to some Islamophobic bias in the Court's jurisprudence. It is rather the result of the constitutional context, but also of the purpose, drafting process and wording of the Convention itself.

3.1. *Plurality of state-religion models in Europe*

The relatively restrictive jurisprudence of the Court in freedom-of-religion cases comes from the wording of the Convention and its drafting process as well as the large variety of solutions to freedom of religion challenges represented in the different Member States. The separation of *forum internum* and *forum externum*, for instance, is not attributable solely to the Court: The Convention itself distinguishes between *forum internum* (Article 9 § 1) and *forum externum* (Article 9 § 2) and affords the latter a lesser degree of protection as it can be restricted by law.[112] In the course of the Preparatory Sessions for the Covenant of the Court Islam actually became a major point of concern namely for Turkey, who proposed several amendments to the freedom of religion in order to protect its secular heritage

112 In fact, this stands in line with a long tradition with regard to the freedom of religion. Article 9 of the *ECHR* was immediately drawn from Article 18 of the 1948 Universal Declaration of Human Rights, which was, in turn, based upon national traditions of human rights, see Janis 2015: 78.

against a perceived Islamic threat.[113] Even though the Turkish demands were eventually defeated, the State's concern nevertheless persists in the Court's jurisprudence: France and, at least until very recently, Turkey are the two strongest proponents of a radically secularist approach and thus indirectly widen the margin of appreciation for all other Member States.[114]

Due attention should also be given to the fact that in freedom of religion cases (at least those concerning the manifestation of religion according to Article 9 § 2 of the Convention) a balance has to be struck between positive and negative religious freedom. The European Court of Human Rights has to offer a solution that does not only fit the specific situation in a single Member State but claims validity in all European States adhering to the Convention.[115] It thus does well to respect a wide margin of appreci-

113 Cf. Council of Europe 1976: 184 and 196; Council of Europe 1977: 26. On p. 80 the Turkish expert explains:
"*I would however like to state here, for what it may be worth, that the legislative measures relating to the 'tekkés,' the 'médressés' and the Moslem religious orders are in no way intended to place restrictions on freedom of religion. I must emphasise that this freedom has always been respected in Turkey to the widest possible extent. A large number of writers from Western countries have borne testimony to this fact. It must, however, be pointed out that in the course of our history a number of attempts at reform and modernisation have been frustrated by stubborn resistance on the part of certain persons or groups of persons who wished to keep the population in ignorance for their own ends. In its determination to go through with those reforms which have justly won the sympathy of the whole world, the Republic of Turkey has therefore been obliged to start by abolishing the Moslem orders and their archaic institutions. If it had neglected to take this necessary step, its efforts would doubtless be doomed to failure once again, and my country would not be entitled to take its place among the Member States of the Council of Europe and share with them their fundamental conception of modern European civilisation*."; Kayaoglu 2014: 353–354.

114 Hughes for instance laments that, in *Kavakçi v. Turkey*, no. 71907/01, § 43, April 5, 2007), "the Court did not engage with the applicant's arguments regarding the headscarf and again capitulated to Turkey's assessment of the importance of secularism in that country", Hughes 2016: 146 et seq. Plessis suggests a distinction between "doctrinal secularism" which "refers to the form of secularism where it becomes a political aim to exclude religion from the public sphere" on the one hand and "political secularism" on the other. The French ban of the full-face veil is – in this narrative – considered as a shift from political secularism to doctrinal secularism, Plessis 2018: 510–511; cf. Steinbach 2014: 421; Steinbach 2017: 624–624; see for the role of secularism in the jurisprudence of the Court in general Fokas 2015: 61.

115 Cf. Nußberger 2017: 420–421.

ation in this field.[116] As *Joseph Weiler* – the representative of the third party interveners in *Lautsi v. Italy*[117] – argued:

> "*What is so interesting about the European constitutional doctrinal landscape is that whilst insisting on Freedom of Religion and Freedom from Religion, it allows a rich diversity in the constitutional iconography of the state and different forms of entanglement of religion in its public life: from fully established churches to endorsed churches to cooperative arrangements as well as, of course, to states in which laïcité is part of the definition of the state, as in France*."[118]

The Court's jurisprudence on the freedom of religion can thus be read in this light as the attempt to respect this "constitutional doctrinal landscape" so characteristic for Europe. As *Giovanni Bonello* put it in his Concurring Opinion to *Lautsi v. Italy*: "No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity."[119] The Court has thus time and again held that "national authorities have direct democratic legitimation and are […] in principle better placed than an international court to evaluate local needs and conditions".[120]

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116 See for a critique Carolyn Evans 2010: 168–170.

117 *Lautsi and Others v. Italy* (Grand Chamber of the Court), no. 30814/06, March 18, 2011.

118 Weiler 2010: 3; see for the variety in terms of religious dress Cumper and Lewis 2008: 600.

119 *Lautsi and Others v. Italy* (Grand Chamber of the Court), no. 30814/06, March 18, 2011, Concurring Opinion of Judge Bonello, § 1.1; see also Nußberger 2018: 71–72; Janis 2015: 93.

120 *Maurice v. France* (Grand Chamber of the Court), no. 11810/03, § 117, October 6, 2005; this holds true even more so when the relationship between Church and State is at stake, *Cha'are Shalom Ve Tsedek v. France* (Grand Chamber of the Court), no. 27417/95, § 84, June 27, 2000; *Wingrove v. The United Kingdom*, § 58; *Leyla Şahin v. Turkey* (Grand Chamber of the Court), § 109; *Izzettin Doğan and Others v. Turkey* (Grand Chamber of the Court), § 112. The State is thus – in Article 9 cases – afforded a wide margin of appreciation with regard to the "necessity" of a limitation, *S.A.S. v. France* (Grand Chamber of the Court), § 129; see for a critique of the margin of appreciation doctrine in this case *S.A.S. v. France* (Grand Chamber of the Court), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom: §§ 16–17. As Carlo Ranzoni put it in his Dissenting Opinion to *Hamidović*: "The domestic situation is likely to reflect historical, cultural, political and religious sensitivities, and an international court is not well placed to resolve such disputes", *Hamidović v. Bosnia and Herzegovina*, Dissenting Opinion of Judge Ranzoni, § 6.

3.2. Protection of democracy as priority

By contrast, a considerably narrower margin of appreciation is afforded to States with a view to the protection of democracy. The underlying goal of the Convention comes to the fore in several cases concerning Islam, most particular in the ones on hate speech: Securing democracy and pluralism within the Member States of the Council of Europe.[121] The Preamble already refers to the goal of "an effective political democracy" and Articles 8–11 can only be limited when "necessary in a democratic society".[122] Thus, the wide margin of appreciation in matters of religion is exceeded only when the State assesses "the legitimacy of religious beliefs or the ways in which those beliefs are expressed" for this constitutes – according to the Court – an interference with the requirements of a "pluralist democratic society".[123] On the other end of the scale, Islamists are deprived of speech rights under the Convention as soon as they advocate the (violent) overthrow of a democratic system.[124]

Thus, the Court argued in *S.A.S. v. France* that

> "[*p*]*luralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position*."[125]

The majority opinion restricts this requirement for tolerance. The full-face veil does not – in their opinion – require toleration. The Dissenting Opin-

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121 See also Trispiotis 2016: 594–595.

122 See *United Communist Party of Turkey and Others v. Turkey* (Grand Chamber of the Court), no. 133/1996/752/951, § 45, January 20, 1998.

123 *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, § 54, October 9, 2007.

124 Cf. *Hizb Ut-Tahrir and Others v. Germany* (decision on admissibility), no. 31098/08, June 12, 2005; *Kasymakhunov and Saybatalov v Russia*, nos. 26261/05 and 26377/06, § 104, March 14, 2013; *Refah Partisi (The Welfare Party) and Others v. Turkey* (Grand Chamber of the Court): § 99; see also for limitations to the freedom of expression imposed upon an association whose aim it is "to make the first contacts and establish good relations with extraterrestrials" and to this end propagates a system of government it calls "geniocracy" (which is "a doctrine whereby power should be entrusted only to those individuals who have the highest level of intellect"), *Mouvement Raëlien Suisse v. Switzerland* (Grand Chamber of the Court), no. 16354/06, July 13, 2012.

125 *S.A.S. v. France* (Grand Chamber of the Court), § 128.

ion, however, criticizes this "selective pluralism" in arguing that "there is no right not to be shocked or provoked by different models of cultural or religious identity". The Dissenting Opinion thus refers to the Court's jurisprudence concerning the freedom of expression, where the Convention protects not only those opinions "that are favourably received or regarded as inoffensive or as a matter of indifference, but also […] those that offend, shock or disturb".[126]

Despite this controversy, the requirements of a stable democracy actually seem to determine most of the idiosyncrasies of the Court's jurisprudence vis-à-vis *sharia* law that might, – at first sight – qualify rather as inconsistencies.[127] For the frictions between the (jurisprudence on) freedom of religion on the one hand and the (jurisprudence on) freedom of expression on the other hand point towards the underlying idea that freedom of expression can be guaranteed everywhere in the same way whatever the constitutional setting, whereas freedom of religion is a sensitive issue within the respective constitutional model. Yet, religious opinions are between the two different concepts and thus put them to a test.

4. Conclusion

The Court stresses subsidiarity in freedom-of-religion cases. This is true not only, but in particular with regard to Muslims as Islam is more "practice-centric" than "creed-centric"[128] and the Convention protects the *forum internum* more than the *forum externum*. Thus, time and again the Court has upheld headscarf bans and argued, that Muslims are free to resign from their job when the employer's requirements cannot be reconciled with the religious ones. Nevertheless, the Court has a very protective approach to Islam in its jurisprudence on hate speech, although, there as well, limits to what is tolerable in a democratic society, are necessary. The Court has to

126 *S.A.S. v. France* (Grand Chamber of the Court), Joint Partly Dissenting Opinion of Judges Nussberger and Jäderblom, § 5, quoting *Stoll v. Switzerland* (Grand Chamber of the Court), no. 69698/01, § 101, December 10, 2007; *Mouvement raëlien suisse v. Switzerland* (Grand Chamber of the Court), § 48; see also Nußberger 2018: 66–68.

127 This critique can be found in *Leyla Şahin v. Turkey* (Grand Chamber of the Court), Dissenting Opinion of Judge Tulkens: § 9; see also Carolyn Evans 2010: 182, and Hughes 2016: 145.

128 Kayaoglu 2014: 348.

walk a fine line between upholding the values of pluralism and protecting a peaceful living-together.

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Annex

Constitutional Courts and Councils in the Middle East and North Africa: Basic Facts and Figures

Anja Schoeller-Schletter and Robert Poll

This section aims to provide basic information on a selection of constitutional review bodies in the region, mostly constitutional courts and councils. Whenever possible, the data was checked by members of the respective institutions or legal experts from the country.

1. Algeria: Constitutional Council
2. Bahrain: Constitutional Court
3. Egypt: Supreme Constitutional Court
4. Iraq: Federal Supreme Court
5. Jordan: Constitutional Court
6. Kuwait: Constitutional Court
7. Lebanon: Constitutional Council
8. Mauritania: Constitutional Council
9. Morocco: Constitutional Court
10. Palestine: Supreme Constitutional Court
11. Tunisia: Constitutional Court

1. Algeria: Constitutional Council / المجلس الدستوري

1.1. Organization

Established: 1989 (predecessor 1963-1965)

Legal Basis: *Constitution of 2016* (amended in November 2020 allowing for the establishment of a "constitutional court"); Regulation Establishing the Operating Rules of the Constitutional Council of April 8, 2016, and its amendments (*Rules of Procedure*); Presidential decrees, e.g., Presidential Decree No. 89-143 of August 7, 1989, on the Rules Related to the Organization of the Constitutional Council, and its amendments.

Members: 12 (*Constitution*, art. 183)

Nomination: In accordance with the internal rules of each appointing organism

Appointment: President of the Republic (4), People's National Assembly (2), Council of the Nation (2), Supreme Court (2), Council of State (2) (*Constitution*, art. 183)

Qualification: Min. age 40, min. practice 15 years; higher education of legal sciences, magistracy, lawyer at Supreme Court, Council of State or in one of the State's higher positions (*Constitution*, art. 184).

Term: 8 years, non-renewable (*Constitution*, art. 183)

Rotation: Partial renewal, every 4 years 6 members (*Constitution*, art. 183)

Removal options: Yes (*Rules of Procedure*, art. 88)

Retirement age: No

Formations: Always *en banc*

1.2. Jurisdiction

Review of Legislation: Organic laws, *ex-ante* (mandatory) (*Constitution*, arts. 141, 144; Internal Regulations, art. 2); Legislation, *ex-ante* (*Constitution*, arts. 144, 187). Legislation, *ex-post* (*Constitution*, art. 188)

Review of Executive Acts: No

Review of Constitutional Amendments: Yes, alternative to referendum (*Constitution*, art. 210)

Review of Treaties: Yes (*Constitution*, arts. 186, 190)

Review of Elections: Yes (*Constitution*, art. 182)

Review of Disputes: No (*Constitution*, art. 79)

Const. Interpretation: No

Advisory Opinions: Treaties, laws and regulations (*Constitution*, arts. 186, 210)

Other competences: Revision of Parliament's rules of procedure (*Constitution*, art. 186, *Regulations*, art. 3); declaration of presidential and parliamentary vacancies (*Constitution*, arts. 102, 117); in case of vacancy of Presidency of Republic and the Council of Nation, the Pres. of the Constitutional Council assumes functions of Head of State (*Constitution*, art. 110)

Advisory role: Armistice agreements and peace treaties (*Constitution*, art. 111); parliamentary mandate extension (*Constitution*, art. 120); dissolution of Parliament (*Constitution*, art. 147); monitoring of referenda and elections (*Constitution*, art. 182)

1.3. Procedures

Case load per year: Organic laws: 3; Legislation, *ex-post*: 2; Review of Elections: 36 (*2019)

Average duration: Legislation: 30 days; Court referral: 4 months and optional 4 months' one-time extension (*Constitution*, art. 189)

Initiated by: Organic Laws: President of the Republic (*Constitution*, art. 186); Legislation, *ex ante*: President of the Republic, President of the Council of the Nation, President of the People's Assembly, Prime Minister, 40 members of the People's National Assembly, 30 members of Council of the Nation (*Constitution*, art. 187); Legislation, *ex post*: Referral by Supreme Court, Council of State (*Constitution*, art. 188)

Expedited procedure: Yes (*Constitution*, art. 189)

Oral Proceedings: Yes (*Rules of Procedure*, art. 23)

Reporting Judge: Yes, one or more (*Rules of Procedure*, art. 36)

Court fees: No

1.4. Decisions

Needed Majority: Absolute majority, quorum: 9, casting vote in case of tie: President (*Rules of Procedure*, arts. 40, 41)

Decisions in name of: The Constitutional Council

Published in: Official journal, and website (*Rules of Procedure*, art. 96)

Voting results: Not published

Dissenting opinions: Not published

Decision effect: Binding, *erga omnes* (*Constitution*, art. 191)

Decision subject: (In)valid, *ex nunc* (*Constitution*, art. 191)

Executory: Immediately (*Constitution*, art. 191)

Declaratory Decisions: Yes

2. Bahrain: Constitutional Court / المحكمة الدستورية/

2.1. Organization

Established: 2002

Legal Basis: *Constitution of 2002*, art. 106; Law 27 of 2002 Establishing the Constitutional Court (*Constitutional Court Law*); Law 38 of 2012 Amending the Constitutional Court Law; Law 42 of 2002 Concerning the Judicial Authority (*Judicial Authority Law*), Law 13 of 1973 Governing Pensions of Government Employees

Members: 7 (*Constitution*, art. 106)

Nomination: Supreme Council of the Judiciary, recommendation only (*Constitution*, art. 33 lit. h)

Appointment: King, Royal order (*Constitutional Court Law*, art. 3; *Constitution*, art. 33 lit. h)

Qualification: Bahraini citizen with full legal capacity, but Arab non-citizens may be appointed by exception, good reputation and sound character, min. age 40 years, legal qualification, min. practice 15 years (*Constitutional Court Law*, art. 4)

Term: 5 years, renewable once (*Constitutional Court Law*, art. 3, as amended 2012)

Rotation: No (*Constitutional Court Law*, art. 3, as amended 2012)

Removal options: Yes, disciplinary action by a disciplinary panel established by the Supreme Council of the Judiciary (*Constitutional Court Law*, art. 9; *Judicial Authority Law*, arts. 34–42)

Retirement age: 70, but may be extended to 75 by exception pursuant to a Royal order (Law 13 of 1973, art. 1 lit. g)

Formations: *En banc* or by presence of Court President and minimum of 4 other members (*Constitutional Court Law*, art. 28)

2.2. Jurisdiction

Review of Legislation: Draft Laws, *ex-ante*; Laws and Regulations, *ex-post* (*Constitution*, art. 106; *Constitutional Court Law*, art. 18)

Review of Executive Acts: No

Review of Constitutional Amendments: No

Review of Treaties: Yes, by review of ratification law (*Constitution*, art. 37)

Review of Elections: No

Review of Disputes: No

Const. Interpretation: No

Advisory Opinions: No

Other competences: Review of disputes relating to implementation of Constitutional Court rulings (*Constitutional Court Law*, art. 32)

2.3. Procedures

Case load / year: Varies by year (minimum was 2, maximum 24)

Average duration: Not available

Initiated by: Legislation, *ex-ante*: King; Legislation, *ex-post*: By request of the Prime Minister, President of the Shura Council, President of the Chamber of Deputies; by Court referral; by request of a party to an ongoing court dispute (*Constitutional Court Law*, arts. 17, 18)

Expedited procedure: No

Oral Proceedings: No, unless the Court determines a need for oral arguments (*Constitutional Court Law*, art. 25)

Reporting Judge: No

Court fees: Yes, 500 BD, approx. 1,326 USD (*Constitutional Court Law*, art. 27)

2.4. Decisions

Needed Majority: Absolute majority, in the case of equal division of votes, the side on which the President of the Court votes prevails (*Constitutional Court Law*, art. 28)

Decisions in name of: The King (*Judicial Authority Law*, art. 5)

Published in: The Official Gazette (*Constitutional Court Law*, art. 31)

Voting results: Not published

Dissenting opinions: Not published

Decision effect: Binding, *erga omnes* (*Constitution*, art. 106; *Constitutional Court Law*, art. 31)

Decision subject: (In)valid, *ex tunc* (*Constitution*, art. 106; *Constitutional Court Law*, art. 30)

Executory: Immediately, set by court (*Constitution*, art. 106; *Constitutional Court Law*, art. 30)

Declaratory Decisions: n/a

3. Egypt: Supreme Constitutional Court / المحكمة الدستورية العليا

3.1. Organization

Established: 1969 (as "Supreme Court", renamed 1979)

Legal Basis: *Constitution of 2014*; Law 48 of 1979 Governing the Operations of the Supreme Constitutional Court, and its amendments (*Law 48 of 1979*)

Members: "sufficient number of members", currently 12 (*Law 48 of 1979*, art. 3)

Nomination: Chief Justice, General Assembly of the Court, each 50 percent (*Law 48 of 1979*, art. 5)

Appointment: By presidential decree, after consultation with Supreme Council of the Judicial Bodies (*Law 48 of 1979*, art. 5)

Qualification: Minimum age 45 years, member of Supreme Court, counselor of equivalent for minimum 5 years, law professors for minimum 8 years, attorneys-at-law with practice before Court of Cassation, high administrative court for minimum 10 years (*Law 48 of 1979*, art. 4)

Term: Until retirement

Rotation: No

Removal options: Referral to retirement by the Court's General Assembly, disciplinary tribunal (*Law 48 of 1979*, art. 19)

Retirement age: 70 (*Law 48 of 1979*, art.14)

Formations: Always *en banc*

3.2. Jurisdiction

Review of Legislation: Yes, *ex-post*, laws and regulations (*Law 48 of 1979*, art. 25 I)

Review of Executive Acts: No

Review of Constitutional Amendments: No (*Law 48 of 1979*, art. 25 I)

Review of Treaties: Yes, *ex-post*, as laws (*Constitution*, art. 151; *Law 48 of 1979*, art. 25)

Review of Elections: No

Review of Disputes: Yes, jurisdictional disputes (*Law 48 of 1979*, art. 25 II)

Const. Interpretation: Yes, laws, presidential decrees with force of law (, arts. 26, 33)

Advisory Opinions: No

Other competences: Final Judgement in cases where two or more other judicial bodies have produced contradictory judgements (*Law 48 of 1979*, arts. 25 III and 32)

3.3. Procedures

Case load / year: No information

Average duration: No information

Initiated by: Legislation: court referral (*Law 48 of 1979*, art. 29). Jurisdictional Disputes: any interested party (*Law 48 of 1979*, art. 31); Const. Interpretation: by Minister of Justice upon request of Prime Minister, Speaker of the People's Assembly, Supreme Council of Judicial Bodies (*Law 48 of 1979*, art. 33)

Expedited procedure: No

Oral Proceedings: Optional, if deemed necessary (*Law 48 of 1979*, art. 44)

Reporting Judge: Commissioner's body (*Law 48 of 1979*, arts. 21–24 and 39–40)

Court fees: Yes, only in cases of court referral (25 EGP/approx. 1.59 USD), with exemption option (*Law 48 of 1979*, arts. 52–54)

3.4. Decisions

Needed Majority: Absolute majority, quorum 7 (*Law 48 of 1979*, art. 3)

Decisions in name of: The People (*Law 48 of 1979*, art. 46)

Published in: Official Gazette (*Law 48 of 1979*, art. 49)

Voting results: Not published

Dissenting opinions: No

Decision effect: Binding, *erga omnes* (*Constitution*, art. 195)

Decision subject: (In)valid, *ex tunc*

Executory: Immediately, set by court

Declaratory Decisions: No

4. Iraq: Federal Supreme Court / المحكمة الاتحادية العليا

4.1. Organization

Established: 2005

Legal Basis: *Constitution of 2005*; Law 30 of 2005 by order of the transitional Government; Law of Administration for the State of Iraq for the Transitional Period of 8 March 2004 (*TAL*)

Members: 9 (*TAL*, art. 44)

Nomination: High Judicial Council

Appointment: President (Decree)

4.2. Jurisdiction

Review of Legislation: Yes, *ex-post* (*Constitution*, art. 93.1; *TAL*, art. 44)

Review of Ex. Acts: Yes (*TAL*, art. 44)

Review of Constitutional Amendments: No

Review of Treaties: No

Review of Elections: Yes, single mandates (*Constitution*, art. 52.2)

Review of Disputes: Yes, executive, jurisdictional (*Constitution*, arts. 93.4, 7 and 8; *TAL*, art. 44)

Const. Interpretation: Yes (*Constitution*, art. 93.2)

Other competences: Approve final results of parliamentary elections (*Constitution*, art. 93.6); Resolve accusations against the President of the Republic, the Prime Minister, or Ministers (*Constitution*, art. 93.5); Review legal challenges against rulings of Administrative Court, appellate Court (*TAL*, art. 44)

4.3. Procedures

Case load / year: 48 (Review), 122 (Cassation Cases), 33 (Consultations) (*2009)

Initiated by: Legislation: Government, individuals (*Constitution*, art. 94.3)

4.4. Decisions

Decision effect: Binding, *erga omnes* (*Constitution*, art. 94)

5. Jordan: Constitutional Court / المحكمة الدستورية/

5.1. Organization

Established: 2012

Legal Basis: *Constitution of 1952*; Law 15 of 2012 concerning establishing the Constitutional Court (*Constitutional Court Law*)

Members: 9 (*Law 15 of 2012*, art. 5)

Nomination: Process unknown

Appointment: King (*Law 15 of 2012*, art. 5)

Qualification: Jordanian nationality, no other nationality, min. age 50 years, judge at Court of Cassation, High Court of Justice, professor of law at university, lawyers with min. practice 15 years, one member "specialist" to whom the conditions of Senate membership apply (*Constitution*, art. 61; *Law 15 of 2012*, art. 6)

Term: 6 years, non-renewable (*Constitution*, art. 58; *Law 15 of 2012*, art. 5)

Rotation: Partial renewal, every 2 years 3 members (*Law 15 of 2012*, art. 5)

Removal options: Yes, Royal Decree on recommendation by 6 members (*Law 15 of 2012*, art. 21)

Retirement age: No

Formations: always *en banc*

5.2. Jurisdiction

Review of Legislation: Laws, regulations: *ex-post* (*Constitution*, art. 59; *Law 15 of 2012*, arts. 9 and 11)

Review of Executive Acts: No

Review of Constitutional Amendments: No

Review of Treaties: No

Review of Elections: No

Review of Disputes: No

Const. Interpretation: Yes (*Constitution*, art. 59; *Law 15 of 2012*, art. 17)

Advisory Opinions: No

Other competences: No

5.3. Procedures

Case load / year: 4–7

Average duration: 120 days (*Law 15 of 2012*, arts. 10, 12)

Initiated by: Legislation: Senate, House of Representatives, Council of Minister, court referral, filtered by Court of Cassation (*Constitution*, art. 60; *Law 15 of 2012*, arts. 9, 11); Constitutional interpretation: Council of Ministers, majority of one of the chambers of the legislature (*Constitution*, art. 59; *Law 15 of 2012*, art. 17)

Expedited procedure: No

Oral Proceedings: No

Reporting Judge: No

Court fees: Yes, 50 JOD, approx. USD 70 (*Law 15 of 2012*, art. 36; *Regulations 67 of 2019 on Fees for Challenging Constitutionality*)

5.4. Decisions

Needed Majority: 5, quorum: 7 (*Constitution*, art. 19)

Decisions in name of: The King (*Constitution*, art. 59)

Published in: Official Gazette (*Constitution*, art. 59; *Law 15 of 2012*, art. 16)

Voting results: Published

Dissenting opinions: Not published

Decision effect: Binding, *erga omnes* (*Law 15 of 2012*, art. 15)

Decision subject: (In)valid, e*x tunc* (*Law 15 of 2012*, art. 15)

Executory: Immediately (*Constitution*, art. 59; *Law 15 of 2012*, art. 15)

Declaratory Decisions: No

6. Kuwait: Constitutional Court / المحكمة الدستورية /

6.1. Organization

Established: 1973

Legal Basis: *Constitution of 1962*, art. 173; Law 14 of year 1973 Establishing the Constitutional Court (*Constitutional Court Law*); Law 109 of 2014 Amending the Constitutional Court Law; Law 23 of 1990 Organizing the Judiciary, amended 1996 (*Judiciary Law*); Law 10 of 1996 Amending the Judiciary Law; Law 14 of 1977 Concerning Grades and Salaries of Judges and Public Prosecutors; 1974 Decree (no number) Issuing the Bylaws of the Constitutional Court; 1974 Decree (no number) with Respect to Judicial Fees

Members: 5, and 2 substitutes (*Constitutional Court Law*, art. 2)

Nomination: Supreme Judicial Council (*Constitutional Court Law*, art. 2)

Appointment: Emiri Decree (*Constitutional Court Law*, art. 2)

Qualification: Kuwaiti Citizenship, Judge at Court of Appeal or Court of Cassation (*Constitutional Court Law*, art. 2)

Term: For life

Rotation: No

Removal options: Non-removable except pursuant to disciplinary action by a disciplinary council. Display action may be initiated by request of the Minister of Justice, President of the Court, or Public Prosecutor (*1996 Amendment to the Judiciary Law*, arts. 23, 40 and 41)

Retirement age: 70, mandatory (*Law 14 of 1977*, art. 9)

Formations: Always *en banc* (*Constitutional Court Law*, art. 3)

6.2. Jurisdiction

Review of Legislation: Laws, decrees, regulations: *ex-post* (*Constitutional Court Law*, art. 1)

Review of Ex. Acts: No

Review of Constitutional Amendments: No

Review of Treaties: Yes, *ex-post*

Review of Elections: Yes (*Constitutional Court Law*, art. 1)

Review of Disputes: No

Const. Interpretation: Yes (*Constitutional Court Law*, art. 1)

Advisory Opinions: No

Other competences: No

6.3. Procedures

Case load / year: No official numbers, estimate 30–40 cases

Average duration: 3–6 months

Initiated by: Legislation: 1) By request from the National Assembly or Council of Ministers, 2) court referral or by request of party to an ongoing court dispute, 3) original constitutional challenge by any natural or legal (e.g. corporate) person with a direct personal interest affected by the law, decree, or regulation in question; Elections: Any person with a specific personal interest in the election. Constitutional Interpretations: Request by the National Assembly or Council of Ministers (*Constitutional Court Law*, art. 4; 2014 Amendment; *Constitutional Court Bylaws*, art. 1)

Expedited procedure: No

Oral Proceedings: No, unless the Court determines a need for oral arguments (*Constitutional Court Bylaws*, art. 11)

Reporting Judge: No

Court fees: Yes, 50 KD, winning party is reimbursed for court fees (*Judicial Fees Decree* of 1974); direct appeals by individuals 5,000 KD, approx.16,000 USD

6.4. Decisions

Needed Majority: Absolute Majority (*Consitutional Court Law*, art. 3)

Decisions in name of: The Emir of Kuwait (*Constitution*, art. 53)

Published in: Official Gazette (*Consitutional Court Law*, art. 3; *Constitutional Court Bylaws*, art. 19)

Voting results: Not published

Dissenting opinions: Published (*Consitutional Court Law*, art. 3; *Constitutional Court Bylaws*, art. 17)

Decision effect: Binding, *erga omnes* (*Consitutional Court Law*, art. 1)

Decision subject: (In)valid, *ex tunc* (*Consitutional Court Law*, art. 6)

Executory: Immediately (*Consitutional Court Law*, art. 6)

Declaratory Decisions: Yes, constitutional interpretation on request by National Assembly or Council of Ministers (*Consitutional Court Law*, art. 4; *Constitutional Court Bylaws*, art. 1)

7. Lebanon: Constitutional Council / المجلس الدستوري

7.1. Organization

Established: 1993

Legal Basis: *Constitution of 1926*, art. 19; Law 250 of July 14, 1993, on the Establishment of the Constitutional Council, and its amendments (*Law 250 of 1993*); Law 243 of August 7, 2000, regarding the Rules of Procedures of the Constitutional Council (*Law 243 of 2000*)

Members: 10 (*Law 250 of 1993*, arts. 2 and 3; *Law 243 of 2000*, art. 2)

Nomination: Personal submission of candidacy to President of the Constitutional Council (*Law 250 of 1993*, art. 3 par. 2)

Appointment: Parliament (5), Council of Ministers (5) (*Law 250 of 1993*, art. 2)

Qualification: Lebanese citizenship (min. 10 years), minimum age 50, maximum age 74, practice of 25 years as honorary magistrates, university teachers of law, political/administrative sciences, lawyers (*Law 250 of 1993*, art. 3)

Term: 6 years, non-renewable (*Law 250 of 1993*, art. 3; *Law 243 of 2000*, art. 3)

Rotation: Complete renewal (*Law 250 of 1993*, art. 4)

Removal options: No, but automatic resignation if member misses three consecutive sessions or dual mandate (*Law 243 of 2000*, art. 19)

Retirement age: No

Formations: Always *en banc*

7.2. Jurisdiction

Review of Legislation: Laws: *ex-post*, within 15 days of publication (*Law 250 of 1993*, arts. 1–18)

Review of Executive Acts: No

Review of Constitutional Amendments: No

Review of Treaties: Yes, by review of the ratification law

Review of Elections: Yes, within 24 hours of publication of results for the presidential elections/ 30 days from proclamation of results for parliamentary elections (*Law 250 of 1993*, art. 23)

Review of Disputes: No

Const. Interpretation: No

Advisory Opinions: No

Other competences: Reception of declarations of wealth submitted by the President of the Republic, Speaker of Parliament, Prime Minister, Ministers and MPs.

7.3. Procedures

Case load / year: up to 7

Average duration: 1 month (legislation), 6–8 months (elections)

Initiated by: Legislation: President of the Republic, Speaker of the Parliament, President of Ministers Council, 10 MPs; Legislation related to matters of religious freedom, education and practice, in addition to personal status laws: Heads of religious communities in addition to other competent authorities (*Law 250 of 1993*, art. 19)

Expedited procedure: No

Oral Proceedings: No

Reporting Judge: Yes (*Law 250 of 1993*, art. 20; *Law 243 of 2000*, art. 35)

Court fees: No

7.4. Decisions

Needed Majority: 7 judges, quorum: 8 (*Law 250 of 1993*, art. 12)

Decisions in name of: The Constitutional Council

Published in: Official Gazette (*Law 243 of 2000*, art. 52)

Voting results: Published

Dissenting opinions: Published (*Law 243 of 2000*, art. 12)

Decision effect: Binding, *erga omnes* (*Law 250 of 1993*, art. 13; *Law 243 of 2000*, art. 52)

Decision subject: (In)valid, *ex tunc* (*Law 250 of 1993*, art. 22; *Law 243 of 2000*, art. 37)

Executory: Immediately (*Law 250 of 1993*, art. 13; *Law 243 of 2000*, art. 51)

Declaratory Decisions: No

8. Mauritania: Constitutional Council / المجلس الدستوري

8.1. Organization

Established: 1991

Legal Basis: *Constitution of 1991*; Ordinance 92-04 of February 18, 1992, on the Organic Law of the Constitutional Council, amended 2018 (*Ordinance Organic Law*); Decree 92-043 PR of August 22, 1992 (*Decree Rules of Procedure*)

Members: 9 (*Constitution*, art. 81)

Nomination: In accordance with the internal rules of each appointing organism

Appointment: President of the Republic (4); President of the National Assembly (4); President of the Senate (2) (*Constitution*, art. 81)

Qualification: Minimum age 35 years (*Constitution*, art. 81)

Term: 9 years / not-renewable (*Constitution*, art. 81)

Rotation: Partial renewal (Every 3 years 3 members) (*Constitution*, art. 81)

Removal options: Yes, by majority vote of Council members, compulsory resignation in case of mandate/activity incompatible with Council membership or loss of civil and political rights, or physical disability that permanently prevents the exercise of functions (*Ordinance Organic Law* arts. 10, 11; *Decree Rules of Procedure,* art. 5)

Retirement age: No

Formations: Always *en banc*

8.2. Jurisdiction

Review of Legislation: Organic laws, regulations: mandatory *ex-ante*; Laws: *ex-ante*; Pre-constitutional laws which have not been modified, *ex-post* (*Constitution*, art. 86, 102)

Review of Executive Acts: No

Review of Constitutional Amendments: No

Review of Treaties: Yes (*Constitution*, art. 79)

Review of Elections: Yes (*Constitution*, arts. 49, 84)

Review of Disputes: No

Const. Interpretation: No

Advisory Opinions: Yes (*Constitution*, art. 39; *Ordinance Organic Law*, art. 52)

Other competences: Overseeing referendum and proclaim results (*Constitution*, art. 85); Supervising the election of the President (*Constitution*, art. 26); declaration of presidential vacancy (*Constitution*, art. 40); receivability of legislative proposals (*Constitution*, art. 62)

8.3. Procedures

Case load / year: No information

Average duration: 1 month (*Constitution*, art. 86)

Initiated by: Legislation: *ex-ante*: President of the Republic, President of the National Assembly, President of the Senate, 1/3 National Assembly members, 1/3 Senate members (*Constitution*, art. 86); *ex-post*: Individual complaint (*Constitution*, art. 102); Treaties: President of the Republic, President of the National Assembly, President of the Senate, 1/3 Senate members; Elections: Registered voters, candidates (*Constitution,* art. 79; *Ordinance Organic Law*, art. 33)

Advisory opinions: President (*Constitution*, art. 39; *Ordinance Organic Law Constitutional Council Law*, art. 52)

Expedited procedure: 8 days, on request of President (*Constitution*, art. 86)

Oral Proceedings: No

Reporting Judge: Yes

Court fees: No

8.4. Decisions

Needed Majority: 4 (*Ordinance Organic Law* , art. 14)

Decisions in name of: The Constitutional Council

Published in: Official Gazette

Voting results: Not published

Dissenting opinions: No

Decision effect: Binding, *erga omnes* (*Constitution*, art. 87)

Decision subject: (In)valid, *ex tunc* (*Constitution*, art. 87)

Executory: Immediately

Declaratory Decisions: No

9. Morocco: Constitutional Court / المحكمة الدستورية

9.1. Organization

Established: 2011

Legal Basis: *Constitution of 2011;* Organic Law 066-13 of August 13, 2014 establishing the Constitutional Court (*Organic Law 066-13*)

Members: 12 (*Constitution*, art. 130)

Nomination: Secretary-General of Superior Council of Ulema (1, appointed by King), Bureau of each Parliamentary Chamber (*Constitution*, art. 130)

Appointment: King (6), Chamber of Councilors (3), Chamber of Representative (3) (*Constitution*, art. 130)

Qualification: Minimum practice 15 years, notable persons, high knowledge (formation) in juridical domain, of judicial competence, doctrinal and administrative (*Constitution*, art. 130)

Term: 9 years, non-renewable (*Constitution*, art. 130)

Rotation: Partial renewal, every 3 years 4 members (*Constitution*, art. 130)

Removal options: Yes, Royal decree on recommendation by 6 members (*Constitution*, art. 130; *Organic Law 066-13*, art. 12)

Retirement age: No

Formations: Always *en banc*

9.2. Jurisdiction

Review of Legislation: Organic laws, parliamentary rules of procedure, *ex-ante* (mandatory) (*Constitution*, art. 132); Other Laws, *ex-ante* (on initiative); Laws, *ex-post* (incidental) (*Constitution*, art. 133)

Review of Executive Acts: No

Review of Constitutional Amendments: No

Review of Treaties: Yes (*Constitution*, art. 55; *Organic Law 066-13*, art. 24)

Review of Elections: Yes, elections, referendum (*Constitution*, arts. 132 and 174)

Review of Disputes: Yes, parliamentary receivability of proposal, domain of law (*Constitution*, art. 79)

Const. Interpretation: No

Advisory Opinions: Yes, on decrees modifying legislation (*Constitution*, art. 73)

Other competences: Parliamentary vacancies (*Constitution*, art. 61)

9.3. Procedures

Case load / year: 23 (2019)

Average duration: Legislation: 30 days; Elections: 1 year (*Constitution*, art. 121; *Organic Law 066-13*, art. 26)

Initiated by: Legislation: King, Head of Government, President of Chamber of Representatives, President of Chamber of Councilors, 1/5 of members of Chamber of Representatives, 40 members of Chamber of Councilors, Court referral. Treaties: King, Head of Government, President of Chamber of Representatives, President of Chamber of Councilors, 1/6 of members of Camber of Representatives, 30 members of Chamber of Councilors (*Constitution*, arts. 132, 133)

Expedited procedure: Yes, 8 days, on demand of government (*Constitution*, art. 132)

Oral Proceedings: Optional, if deemed necessary (*Organic Law 066-13*, art. 18)

Reporting Judge: Yes (*Organic Law 066-13*, art. 17)

Court fees: No

9.4. Decisions

Needed Majority: 8, quorum: 9 (*Organic Law 066-13*, art. 17)

Decisions in name of: The King (*Organic Law 066-13*, art. 17)

Published in: Official Gazette (*Organic Law 066-13*, art. 17)

Voting results: Not published

Dissenting opinions: Not published

Decision effect: Binding, *erga omnes*

Decision subject: (In)valid, *ex nunc*

Executory: Immediately

Declaratory Decisions: No

10. Palestine: Supreme Constitutional Court / المحكمة الدستورية العليا

10.1. Organization

Established: 2016

Legal Basis: *Constitution of 2016*, *Law of the Supreme Constitutional Court* (*Law on the SCC*)

Members: 9, at least (*Law on the SCC*, art. 1.1)

Nomination: First formation: High Judicial Council, Minister of Justice (consultation); Subsequent nominations: General Assembly of High Constitutional Court (recommendation) (*Law on the SCC*, art. 5)

Appointment: President of the State of Palestine (*Law on the SCC*, art. 5)

Qualification: Minimum age 40 years, current or former member of Supreme Court for at least 3 years, current judge of a Court of Appeal for at least 7 years, current or former univ. professor for at least 3 years, co-professor for 6 years, assoc. professor for 9 years, practicing lawyer for at least 20 years, member of public prosecution for at least 15 years as Chief Prosecutor (*Law on the SCC*, art. 4)

Term: 6 years, non-renewable (*Law on the SCC*, art. 2)

Rotation: Partial renewal, every 2 years 3 new members (in accordance with the amendment of the law by *Act 7 of 2019*). The appointment of 3 members of the Court shall be made every two years as from the date of 1/6/2017 (*Law on the SCC*, art. 2)

Removal options: By decision of President of National Authority upon recommendation of the Court's General Assembly, losing the legal capacity or competence, disability due to any reason to perform the tasks, crime that violates honor or trust by a definitive judgment, even if rehabilitated (*Law on the SCC*, art. 21); Referral to Retirement by the Court's General Assembly, Disciplinary Tribunal (*Law on the SCC*, art. 16)

Retirement age: No

Formations: Always *en banc*, (*Law on the SCC*, art. 2)

10.2. Jurisdiction

Review of Legislation: Laws, regulations: *ex-post* (*Law on the SCC*, art. 24.1)

Review of Executive Acts: No

Review of Constitutional Amendments: No

Review of Treaties: No

Review of Elections: No

Review of Disputes: Yes, Executive and Jurisdictional (*Law on the SCC*, art. 24.2 C – 4)

Const. Interpretation: Yes (*Law on the SCC*, art. 24.2 A)

Advisory Opinions: No

Other competences: Resolution and settlement of an appeal concerning the legal incompetence of the president (*Law on the SCC*, art. 24.5); explaining legislation in cases where there is a conflict in execution (*Law on the SCC*, art. 24.2 A and B)

10.3. Procedures

Case load / year: 38 (*2019)

Average duration: Within 1 year

Initiated by: Legislation: court referral (*Law on the SCC*, arts. 27, 28); interpretation: Minister of Justice on request of President or Head of the Legislative Council, or head of the High Judicial Council, or of whom constitutional rights were violated (*Law on the SCC*, art. 30)

Expedited procedure: No

Oral Proceedings: Yes, not mandatory (*Law on the SCC*, art. 36)

Reporting Judge: No

Court fees: Yes (100 JOD, approx. 141 USD), with exemption option (financial incapability) (*Law on the SCC*, arts. 45.1, 46)

10.4. Decisions

Needed Majority: Absolute majority, quorum: 7 (*Law on the SCC*, arts. 2.4, 10)

Decisions in name of: Arab Palestinian People (*Law on the SCC*, arts. 38)

Published in: Official Gazette (*Law on the SCC*, art. 53)

Voting results: Yes

Dissenting opinions: Yes

Decision effect: Binding, *erga omnes* (*Law on the SCC*, art. 41.1)

Decision subject: (In)valid, *ex tunc* (*Law on the SCC*, art. 41.1–3)

Executory: Immediately

Declaratory Decisions: No

11. Tunisia: Constitutional Court / المحكمة الدستورية

11.1. Organization

Established: Pending

Legal Basis: *Constitution of 2014*, arts. 118–124; *Organic Law 2015-50 of December 3, 2015 Related to the Constitutional Court* (*Organic Law*)

Members: 12 (*Constitution*, art. 118; *Organic Law*, art. 7)

Nomination: By the President of the Republic (*Organic Law*, art. 14)

Appointment: President of Republic (4), Assembly of the Representatives of the People (4), Supr. Judicial Council (4) (*Constitution*, art. 118; *Organic Law*, arts. 10–13)

Qualification: Tunisian citizenship for minimum 5 years, minimum age 45, no partisan responsibilities, not been candidate in any elections in past 10 years, not been subject to disciplinary action, clean criminal record; 9 legal experts with minimum practice 20 years: university professors, senior judge, lawyer registered at Court of Cassation, other legal experts with doctorate (or equivalent); 3 experts from other fields with doctorate (or equivalent) (*Constitution*, art. 118; *Organic Law*, art. 8)

Term: 9 years, non-renewable (*Constitution*, art. 118; *Organic Law*, art. 18)

Rotation: Partial renewal, every 3 years 4 members (*Constitution*, art. 118; *Organic Law*, art. 18)

Removal options: By two thirds of the court's members in case that a member loses any of the conditions required to be a candidate for the Constitutional Court or breaches the duties imposed on him/her by the law on the Constitutional Court (*Organic Law*, art. 20)

Retirement age: No

Formations: Always *en banc*

11.2. Jurisdiction

Review of Legislation: Laws: *ex-ante*, within 7 days of ratification (*Constitution*, arts. 120 and 122; *Organic Law*, arts. 45–53); *ex-post* (*Constitution*, arts. 120 and 123; *Organic Law*, arts. 54–61)

Review of Executive Acts: No

Review of Constitutional Amendments: Yes: *ex-ante* (*Constitution*, arts. 120 and 144; *Organic Law*, arts. 40–42)

Review of Treaties: Yes, *ex-ante* (*Constitution*, art. 120; *Organic Law*, art. 43)

Review of Elections: No

Review of Disputes: Yes, between President and Head of Government (*Constitution*, art. 101; *Organic Law*, arts. 74–76)

Const. Interpretation: No

Advisory Opinions: No

Other competences: Review of State of Emergency (*Constitution*, art. 80; *Organic Law*, arts. 72–73); Declaration of presidential vacancy (*Constitution*, art. 84; *Organic Law*, arts. 69 and 70); Impeachment of President (*Constitution*, art. 88; *Organic Law*, arts. 65–68); Review of Rules of Procedure of Assembly of the Representatives of the People (*Constitution*, art. 120; *Organic Law*, arts. 62–64); Interim President takes oath in front of the CC (in the event of dissolution of the Assembly of representatives of the people) (*Constitution*, art. 85; *Organic Law*, art. 71)

11.3. Procedures

Case load / year: –

Average duration: Legislation (*ex ante*), Constitutional Amendments, Treaties: 45 days (*Constitution*, art. 121; *Organic Law*, arts. 42, 44 and 52); Legislation (*ex post*): 3 months (*Constitution*, art. 123; *Organic Law*, art. 60); Disputes: 7 days (*Constitution*, art. 101; *Organic Law*, art. 76)

Initiated by: Legislation, *ex ante*: President of the Republic, Head of Government, 30 Members of Assembly of the Rep. of the People (*Constitution*, arts. 120, 122; *Organic Law*, arts. 45–53). Legislation, *ex post*: Court referral (*Constitution*, arts. 120, 123; *Organic Law*, art. 61). Constitutional Amendments: President of the Assembly of the Representatives of the People (mandatory) (*Constitution*, arts. 120,144; *Organic Law*, art. 42). Treaties: President of the Republic (mandatory) (*Constitution*, art. 120; *Organic Law*, art. 43)

Expedited procedure: Yes, legislation, *ex ante*: 2 days (*Organic Law*, art. 52)

Oral Proceedings: Yes (*Organic Law*, art. 36)

Reporting Judge: Yes, 2 (*Organic Law*, art. 38)

Court fees: No

11.4. Decisions

Needed Majority: Absolute majority (*Constitution*, art. 121; *Organic Law*, arts. 5, 60)

Decisions in name of: The People (*Organic Law*, art. 5)

Published in: Official Gazette, and on Website (*Constitutional Court Law*, art. 5)

Voting results: Not published

Dissenting opinions: No, but option to publish comment on decision by the court in a specialized legal journal (*Organic Law*, art. 27)

Decision effect: Binding, *erga omnes*, exception: electoral laws (*Organic Law*, art. 7)

Decision subject: (In)valid, *ex nunc*, *ex tunc* (electoral laws) (*Organic Law*, art. 60)
Executory: Immediately
Declaratory Decisions: No

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