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The place of the Army in North African Constitutions:

A Comparative Study in Law comparing Algeria, Egypt,
Libya, Morocco and Tunisia

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The place of the Army in North African Constitutions:

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In North Africa, the last four years have been marked by Egypt's 2019 Constitutional amendments that conferred on its army the task of "safeguarding the constitution and democracy, maintaining the foundations of the state and its civilian nature, the gains of the people, and the rights and freedoms of the individual", Algeria's 2020 constitutional amendment which entrusted to the army the mission of preserving "the vital and strategic interests of the country" (art. 30, 4), and the new Tunisian Constitution of 2022 which does not mention anymore the obligation of absolute neutrality by which the armed forces had been bound.

Those recent changes mark a clean break from the democratic demand for a "civilian, not a military state" that had resonated in North Africa as well as in the Middle East. The opinion of the military is not an opinion like any other because if they "can express their opinion and seek to enforce it, it would be at the expense of forgetting that if they do so, they will break all opposition and the State itself: because they are armed."¹ The subordination of armed forces to civilian authority was already a source of concern to the Romans, who demilitarised Italy within the boundaries of the Rubicon so that "arms yield to the toga",² whereas with the advent of modern constitutionalism, and in order to prevent the resurgence of Caesarism, the 1780 Massachusetts Constitution proclaimed that "the military power shall always be held in an exact subordination to the civil authority and be governed by it" (art. 17).³ More recently, and on an international level, the UN Human Rights Committee considered that "the military should remain accountable to relevant national civilian authorities"⁴ whereas on a regional level, the 2007 African Charter on Democracy, Elections and Governance ratified by Algeria⁵ stipulates that "State Parties shall strengthen and institutionalize constitutional civilian control over the armed and security forces to ensure the consolidation of democracy and constitutional order" (art. 14, § 1).

1 Maurice Duverger, *De la dictature*, Paris, Julliard, 1961, p. 89.

2 "But as the gown is the emblem of peace and tranquillity, and arms on the contrary are a token of disturbance and war, speaking after the manner of poets, I wished this to be understood that war and tumult were to yield to peace and tranquillity." Cicero, *Against Piso*, XXX.

3 While in the France of 1791 Mirabeau's project for the Declaration on Human rights provided that "the military [shall] be subordinate to the civil power of the State" (art. 19), which found its translation in the 1791 Constitution in a provision according to which "The public force is essentially obedient; no armed body may deliberate" (Title IV, art. 12)

4 HRC, Resolution 19/36, "Human rights, democracy and the rule of law", April 19, 2012, A/HRC/RES/19/36, 16; VI.

5 Algeria is the only country of the region to have ratified the charter: Presidential Decree 16-255, September 27, 2016 relative to the ratification of African Charter on Democracy, Elections and Governance adopted by the Chiefs of States and Governments of the African Union, Adis Abeba (Ethiopia); January 30, 2007, JORA n. 59, October 9, 2016, pp. 4-12.

Yet, the army holds a prominent place in the Algerian and Egyptian Constitutions, as can be seen in the preambles to both documents through the abundant historical references to the revolutionary legitimacy of the army and its role in the national construction of both countries. In the wake of the 2013 military coup led by general Abdel Fattah al-Sissi to overthrow the civilian president Mohamed Morsi, the preamble to the 2014 paid a tribute to Mehmet Ali who “founded the modern Egyptian state with a national army as its pillar”⁶ and then to “the leader Gamal Abdel Nasser while celebrating “the July 23, 1952 revolution”, that is the coup carried out by the Free Officers against the dynasty of Albanian descent which had ruled the country until then, a coup which had established the Free Officers at the head of the state since then. If the 2012 Constitution abandoned reference to July 23, as if in an attempt to turn the page on the military dictatorship it had given birth to, the 1956, 1964 and 1971 Constitutions had referred to it, but by presenting it, in the first two, as the result of the people’s will and, in the third one, as the offspring of “the alliance of the working forces of our perevering people” (1952, “Preamble”, art. 2; 1964; “Preamble”, parag. 1; and 1971, “Preamble”, parag. 9). However, the 2014 Constitution now invokes Nasser’s direction, that is that of a military according to whom the army had played on that day the role of the avant-garde,⁷ the people appearing simply in the background as a support to the revolution. The preamble also glorifies the manner in which Egypt’s “patriotic army delivered victory to the overwhelming popular will in the “Jan 25 – June 30” Revolution” (2019, preamble, art. 10), thus referring to both the 2011 revolution that had put an end to the presidency of General Hosni Mubarak and the 2013 counter-revolution that had brought to an end the short period of democratic openness marked by the access to power through the ballot box of the Muslim Brotherhood. The 2019 constitutional amendment, of legislative initiative, made it possible to go further, by making the army the guardian of the Constitution (art. 200, parag. 1).⁸

In Algeria, those historical references already appear in the 1963 and the 1976 Constitutions, in which the National Popular Army (NPA) is described as the inheritor of the National Liberation Army (1963, preamble, parag. 10; 1976, art. 82) thus basing its legitimacy on the war for independence (1954-1962).⁹ This legitimacy thus secured, the country witnessed in 1962 a coup led by the Chief of General Staff colonel Houari Boumediene, head of the frontier army, against the Provisional Government of the Algerian Republic and the NLA of the interior wilayas, a coup that was constitutionalised in the Fundamental Law of 1976 as a “historical redress” (preamble, parag. 3). The army nonetheless went through a depoliticisation in the 1980s which the 1989 Constitution provisioned for by suppressing all historical references to the NLA and to the 1965 coup.

6 In the same vein, see an article published in the journal of the Ministry of National Defence in Algeria, according to which “as it is known, all the armies of the world are considered as the backbones of their States. If they fall, the nations are destroyed and condemned to disappear. The history of humanity since ancient times provide tens of examples that testify to this fact”: “Réalité de ‘Madania machi aâskaria’”, *El-Djeich*, n. 692, March 2011.

7 Gamal Abdel Nasser, *The Philosophy of the Revolution*, Cairo, Mondiale Press, p. 19.

8 V. Nathalie Bernard-Maugiron, “Les amendements constitutionnels de 2019 en Egypte: vers une consécration de la dérive autoritaire du régime” [“The 2019 constitutional amendments in Egypt: Towards a Consecration of the Regime’s Authoritarian Drift”], *RFDC*, vol. 121, n. 1, 2020, pp. 3-19, and ICI, *Egypt Constitutional Amendments: Unaccountable Military, Unchecked President and a Subordinated Judiciary*, Ap 2019, p. 8.

9 In fact, accordingi the leaders of the post-Independence army, “by filiation, the PNA inherited the features of the NLA; hence, it could not constitute a separate body from the party; as an avant-garde force, it would be a component of the party”: Michel Camau, *La notion de démocratie dans la pensée des dirigeants maghrébins*, preface by Charles Debbasch, Paris, CNRS, 1971, p. 338.

However, it is the 2016 Constitution which, one quarter of a century after the military intervention that had interrupted the 1992 electoral process in order to dismiss the Islamic Salvation Front (ISF), made reference again to the NLA by making of the PNA its “successor” (2020; preamble, parag. 20)¹⁰. Since this amendment, the preamble now mentions the “quintessential role” of the PNA in the fight against “the plague of terrorism” (Preamble, 20) or what came to be called the Black Decade of the 1990s which had caused between 100000 and 200000 deaths, while also consecrating “the Peace and National Reconciliation” (2020, parag. 8) which confers impunity upon state agents involved in the “national tragedy”¹¹. As to the 2020 constitutional amendment,¹² born out of a presidential initiative, it was the opportunity for the Ministry of National Defence to reject an amendment proposed in the preliminary draft of May 2020 according to which the Hirak of February 22, 2019 had acted “in full cohesion with its People’s National Army”¹³. The September final draft, adopted by referendum on November 1, 2020, opted for the use of the expression “the original popular Hirak” (preamble; 10), as if to better distinguish the movement that was simply opposed to President Abdelaziz Bouteflika from the one which more generally demanded “a radical change of the system”, notably by means of a “civilian, not military state”.

Elsewhere, the Libyan, Moroccan and Tunisian Constitutions have never made reference to the historical role of their armies. In Morocco, the reason for such an omission is that the army is subordinate to the military authority of the King. The future King Hassan II asserted as early as 1957 that “political neutrality must be the dogma of military morality”¹⁴, a neutrality “at the service of the Throne against the parties”¹⁵. The Moroccan monarchy would indeed succeed in asserting itself, both against the NLA after Algeria’s independence and against the Royal Armed Forces

10 This is how Lakhdar Bouregaa, former commander of the NLA in Wilaya IV during the national liberation war was placed under custody at the age of 86 for having said, in a speech given in June 2019, that the NPA was the heir to the NLA and that in order for it to become popular, it had to join the Hirak. He was eventually charged with “offence to a public body” and sentenced to pay a fine of 100000 dinars (Penal Code, art. 144 bis & 146): T. Bir Mourad Rais, Lakhdar Bouregaa, May 7, 2020, n. 20/00004. The presidential decree 22-217 of June 8, 2022 came later, to to consecrate August 4 as the ‘National Popular Army Day’ (art. 1, parag. 1), thus commemorating the “date of reconversion of the National Liberation Army into the People’s National Army” (art. 1, parag. 2): JORA n. 39, June 8, 2022, p.5.

11 Decree 2006-01 of February 2006 implementing the Charter for Peace and National Reconciliation, JORA n. 11 of February 28, 2006, pp. 3-7. See Mouloud Boumghar, “‘Concorde civile’ et ‘Réconciliation Nationale’ sous le sceau de l’impunité : le traitement par le droit algérien des violations graves des droits de l’homme durant la guerre civile des années 1990” [“‘Civil concord’ and ‘National Reconciliation’ sealed with impunity: the treatment by Algerian law of the serious violations of human rights committed during the civil war of the 1990s”], RIDC, vol. 67, n. 2; 2015; pp. 349-407.

12 Presidential Decree 20-442 of December 2020 relative to the promulgation in the official gazette of the Democratic and Popular Republic of Algeria of the constitutional revision adopted the November 1, 2020 referendum, JORA n. 82, December 30, 2020, pp. 2-49. See V. Messensen Cherbi, “La révision constitutionnelle de 2020 en Algérie : un ultra-présidentialisme militarisé de jure” [“The 2020 Constitutional Amendment in Algeria: A de jure militarised Ultra-Presidentialisation”], ISSR, April 2021, p. 9, & ICJ, Flawed and Inadequate. Algeria’s Constitutional Amendment Process. A Briefing Paper, October 2020, p. 9.

13 Proposition 181: An expert committee in charge of drafting propositions for a constitutional amendment, Propositions présentées dans le cadre du débat général autour du projet de révision de la Constitution [Propositions presented in the framework of the general debate around the constitutional amendment draft], September 5, 2020, pp. 42-43.

14 Jean-Jacques Régnier & Jean-Claude Santucci, “Armée, pouvoir et légitimité au Maroc”, Elites, pouvoir et légitimité au Maghreb, Paris, CNRS, 1973, p. 169.

15 Michel Camau, op. Cit., pp. 351-359.

(RAF) after the failure of the attempted coups of July 10, 1971 and August 16, 1972. The occupation of the Western Sahara, starting with the November 6, 1975 “Green march”, helped divert the army’s attention towards a conflict that has since opposed Morocco to the Polisario Front. The most recent plebiscitary Constitution of 2011,¹⁶ initiated by the King, is thus but a consolidation of the status quo.

In Tunisia, the independence was marked by the political figure of Habib Bourguiba, a lawyer by trade, whose October 14, 1965 speech lays out the rejection of the politicisation of the army because “when involved in electoral controversies and campaigns, the military let themselves be carried away by their own views on the government’s policy and end up being involved in the struggle over power and, under the impression of serving the good and fighting evil, would use their weapons to impose solutions of their choice”¹⁷. Even if it was eventually a general, Zine el-Abidine Ben Ali, who overthrew Bourguiba by recourse to a “medical” coup on November 7, 1987, the transition was essentially to the advantage of security forces. The marginalisation of the army thus propelled it to popularity during the 2011 revolution about which General Rachid Ammar declared that the army would stand as its guarantor.¹⁸ The Tunisian army would nonetheless be used by President Kais Said in his July 25, 2021 coup¹⁹ against the Parliament and the 2014 Constitution ratified by the National Constituent Assembly elected in 2011.²⁰ One year later, on July 25, 2022, Said ratified through referendum his own constitution project²¹ in which the presidential initiative shows itself in the concentration of the prerogatives relative to national defence in the hands of the President.

As for Libya, the coup carried out by the “Free Officers” on September 1, 1969 and the ensuing dictatorship of Muammar Kadhafi that would last until 2011 did not result in reverence for of the army, neither in the 1969 Constitutional Proclamation, nor in the Green Book. Under the Libyan guide, the regular army was overshadowed by a general militarisation of society and the “emergence of a military-tribal complex”²². Colonel Kadhafi went indeed as far as to declare the dissolution of the army in 1995 – a decision that has nonetheless remained without effect.²³ If his fall in 2011 made

16 Dahir 1-11-91 of July 29, 2011, relative to the promulgation of the text of the Constitution, Bulletin Officiel of July 30, 2011, pp. 1902-1928. See Saidy Brahim, “La structure des relations civilo-militaires au Maroc”, La Constitution marocaine de 2011. Analyses et commentaires, Paris, L.G.D.J, 2012, pp. 139-170.

17 Nicole Grimaud, La Tunisie à la recherche de sa sécurité, Paris, PUF, 1995, p. 96.

18 “L’armée ‘garante de la révolution, fidèle à la Constitution’” [“The army, ‘guarantor of the revolution and faithful to the Constitution’”], La Dépêche, January 24, 2011.

19 See CADHP, Ibrahim Ben Mohamed Ben Ibrahim Belghuith c. République Tunisienne, September 22, 2022, n. 0017/2021 & LCI, “Tunisia: President’s power grab is an assault on the rule of law”, July 26, 2021.

20 Constitution de la République Tunisienne, JORT [Constitution of the Republic of Tunisia, Official Gazette], February 10; 2014, pp. 363-367. See also Rfaa Ben Achour, “La Constitution tunisienne du 27 janvier 2014”, RFDC, vol. 100, n. 4, 2014, pp. 783-801.

21 Constitution of the Republic of Tunisia, JORT numéro spécial [Constitution of the Republic of Tunisia, Official Gazette of the Republic of Tunisia, special number], August 18, 2022, pp. 2474-2491? See also Rfaa Ben Achour, “Tunisie: le retour au pouvoir autocratique” [“Tunisia: The Return to Autocratic Power”], RFDC, vol. 132, n. 4, 2022, pp. 1001-1018 & ICJ, “Codifying Autocracy: The Proposed Tunisian Constitution in Light of International Law and Standards”, July 2022, p. 11.

22 Said Haddad, “Aux sources du paradoxe libyen: militarisation de la société et marginalisation de l’armée” [“At the Sources of the Libyan Paradox: Militarisation of Society and Marginalisation of the Army”] in Les armées dans les révolutions arabes: positions et rôles, Rennes, PUR, 2015, p. 101.

23 Ibid. p. 102.

possible the election of an ad hoc Constituent Assembly, the draft Constitution the latter produced in 2017 has still not been put to effect.²⁴

Therefore, notwithstanding the symbolic dispositions mentioned above, what is the place of the army in the Constitutions of North African countries, namely Algeria, Egypt, Libya, Morocco and Tunisia, notably in the relations between military and civilian authorities?

In order to bring this study to completion, it is necessary to study military interventions in the political affairs of the aforementioned countries (I) by interrogating relations of subordination the armies of the region have towards civilian authorities.

I. The constitutional interferences of the military in political life

On a constitutional level, military interventions in political affairs are marked mainly not only by the recognition of the authority of the military as arbitrator (A), but also by other mechanisms, such as their power to form the security and defence councils and military courts and define their missions (B) or even to control the Ministry of Defence (II. B. 1)

A. Through the recognition of the army's authority as a moderator.

1- From an army that stood as guarantor of socialism in Algeria and Egypt in the 1960s to constitutional depoliticisation starting from the 1980s.

In Algeria and Egypt, very much in the fashion of other socialist countries,²⁵ the army was constitutionally militant in the 1960s and 70s, by virtue of its role as the guardian of socialism. The Algerian army would thus take part in "the political, economic and social activities" according to the 1963 Constitution (art. 8, 1), while the 1976 National Charter would make of it "the first shield of the socialist state"²⁶ and the Constitution produced the same year "the shield protecting the revolution" (art 82, 2) and the "instrument of the Revolution" (82, 2) contributing to the "edification of socialism" (82, 2)²⁷. In the same vein, Egypt's 1964 and 1971 Constitutions entrusted to the army the task of protecting the gains of socialism (art. 23 and 180, 1 respectively)²⁸.

24 See Nedra Cherif, "Libya's Constitution: Between Conflict and Compromise", European University Institute, March 2021, p. 24; also ICJ, The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws, December 2015, p. 90; & Sara Zanotta, "Constitution-Making in Libya after the Fall of Gaddafi: the Role of National Bodies and International Actors", Nuovi Autoritarismi e Democrazie, vol. 3, n. 2, 2021, pp. 56-48.

25 Patrice Gérard, Les systèmes politiques des Etats socialistes. Le modèle soviétique. Paris, Cujas, 1975, p. 94.

26 Decree 76-57 of July 1976 relative to the publication of the national charter, JORA n. 61, July 30, 1976, p. 742.

27 Messensen Cherbi, "L'armée algérienne est-elle un gardien de la Constitution?" Du rôle de bouclier de la révolution socialiste à celui de garant des intérêts vitaux et stratégiques du pays" ["Is the Algerian Army a Guardian of the Constitution? From the Role of the Shield of the Socialist Revolution to that of guarantor of the Vital and Strategic Interests of the Country"], RFDC, vol? 128, n? 4, December 2021, pp. 51-55.

28 Likewise, in the Middle East, the Syrian Constitution of 1973 provided until 2012 that the mission of "the armed forces and other defence institutions" was to "protect the Revolution's objectives of unity, freedom and socialism" (art. 11), whereas in another context, the Iranian Constitution has since 1979 entrusted to the army the mission of preserving "the regime of the Islamic Republic of the country" (art. 143).

The Algerian and Egyptian armies were later to undergo a constitutional depoliticisation marked by the abandonment of their roles as guardians of socialism, in 1989 in Algeria²⁹ and in 2007 in Egypt³⁰. However, in Algeria, when the electoral process, which would result in the victory of the Islamic Salvation Front (ISF) was interrupted on January 12, 1989, it was an opportunity for the state to pressure two committees of experts to propose that the army become the guardian of the Constitution. This is how, in 1993, a committee of experts, named “Algeria 2005”, suggested that “in addition to its classic missions, the Algerian army must be declared in the future constitution as the guardian of public institutions and in charge of safeguarding the continuity and the permanence of the state as well as of its republican and pluralist form”,³¹ whereas in 1996 a secret committee of experts proposed making the army “the guarantor of the constitutional order”³². However, neither of those propositions was retained in the 1996 Constitution. They would indeed constitute a “real political and legal revolution” by “bringing out the PNA from the political clandestineness in which it has been evolving for a long time, by bringing it to light”³³. As for Egypt, the 2007 depoliticisation did not last long, since “in 2011, after the fall of Hosni Mubarak, and while the Supreme Council of the Armed Forces was constitutionally acting as interim government, the army already tried to attribute to itself the role of the guarantor of constitutional legitimacy”³⁴.

2- Repoliticisation through the constitutionalisation of the military’s role as arbiter: the Egyptian and Algerian amendments of 2019 and 2020.

Though the coup in Egypt took place in 2013, the 2014 Constitution allotted to the army only the conventional duty to “to protect the country, preserve its security and the integrity of its territories” but it was the 2019 amendment that entrusted to it the duty to “maintain the Constitution, democracy, the basic of civil state, as well as the people’s gains, rights and freedoms” (200, 1). The amendment served not only to legitimise the 2013 coup but also to preclude any potential election result that would go against the vague principles which the army had the authority to interpret as it chose. In fact, “if the July 2013 military intervention to depose President Mohamed Morsi was carried out outside constitutional regulations, {the army} could take advantage of this provision to constitutionally legitimise any similar intervention”³⁵. On July 7, 2022, a military judge, the General Salah Mohamed Abdel-Magid Youssef, was appointed as a member of the Constitutional Court³⁶.

29 See Myriam Ait-Aoudia, “Dépolitisation de l’armée et fin du régime du parti unique en Algérie en 1989. Retour sur un impensé” [“Depoliticisation of the Army and the End of the One-Party Regime in Algeria in 1989. Reconsidering an Ignored Event”], *Les armées dans les révolutions arabes: positions et rôles*, Rennes, PUR, 2015, pp. 33-46.

30 See Nathalie Bernard-Maurignon, “The 2007 Constitutional Amendments in Egypt, and their Implications on the Balance of Power”, *Arab Law Quarterly*, vol. 22, n° 4, 2008, pp. 397-417.

31 Mohamed Boussomah, *Documents constitutionnels et politiques: 1919-2018*. Vol II, Alger, OPU, 2019, p. 185.

32 Ibid. p. 347.

33 Mohamed Boussomah, *L’opération constituante de 1996*, Alger, OPU, 2012, p. 104.

34 Nathalie Bernard-Maurignon, “Les amendements constitutionnels de 2019 en Egypte: vers une consécration de la dérive autoritaire du régime”, *op. cit.* p. 16.

35 Ibid. p. 17.

36 Presidential Decree 304 of the year 2022, *Official Gazette* n. 27 of July 7, 2022, pp. 2-3. See Rana Mamdouh, “Militarizing the Supreme Constitutional Court”, *Mada*, July 22, 2022.

In Algeria, President Bouteflika's will to stay in power for a fifth term triggered popular ire and gave birth to the Hirak. However, no existing constitutional counter-power could stand in the way of the President and it is the de facto power of the army that allowed it to compel him to resign "immediately" on April 2, 2019³⁷. Thus, the army overstepped its functions, since the 1989 Constitution had defined its mission as that of "It ensur[ing] the defence of the country's unity and the territorial integrity as well as [...] protect[ing] its terrestrial and air space, and the various areas of its maritime space" (2016, art. 28, 2 & 3). The 2020 constitutional amendment was an opportunity to make the army the guarantor of "the vital and strategic interests of the country in accordance with constitutional dispositions" (art. 30, 4), thus building upon a proposal made by the Ministry of National Defence,³⁸ itself similar to a declaration made by the late General Gaid Salah in which he had stated that the army "would always be the loyal guardian of the supreme interests of the country in conformity with the Constitution and the laws of the Republic".³⁹ The new paragraph would therefore make possible a retrospective legitimization of the military intrusion into political life that had taken place in 2019 while precluding at the same time any potential disagreement that would oppose it to the President or the Parliament, in the name of the undefined "vital and strategic interests" which could include anything ranging from military affairs to foreign affairs, national politics, economic, social or even cultural matters. In fact, "such broad provisions have the potential to encourage and facilitate the military's intervention in civil and political matters".⁴⁰ True, the new disposition stipulates that military action should be restricted by "constitutional provisions" but without to any provision in particular. If the President of the Republic is the "Commander-In-Chief of the Armed Forces" (art. 91, parag. 1, 1) what would become of him if he infringes a constitutional provision which the army deems part of the "vital and strategic interests of the country"? Which one of those provisions should then prevail? For the Constitutionalist Fatiha Benabbou, "in case the President grows out of control, [...] the army cannot afford not to carry out a coup; [...] only a "pronunciamento" would settle the disagreement",⁴¹ but a "pronunciamento" that is now de jure legitimate.

In Latin America⁴² and in Turkey, the ambiguity of similar provisions did already serve to make Constitutionally legitimate, whether in advance or in retrospect, such "pronunciamentos" against civilian authorities. In order to avoid such ambiguity, it is not only preferable not to proclaim the army guardian of the Constitution so as to

37 "Gaid Salah appelle à l'application 'immédiate' des articles 7, 8 et 102 de la Constitution" ["Gaid Salah calls for the 'immediate' application of articles 7, 8 and 102 of the Constitution"], APS, April 2, 2019.

38 See proposal n. 1317 addressed to the Committee of experts: Committee of Experts in Charge of Redirecting Proposals for the Constitutional Amendment, op. cit. pp. 282-283. Abdelaziz Rahabi, former minister under General Zeroual and former ambassador in Mexico, central America and in Spain, had on his part proposed to make the army the guardian of the "constitutional order" (Proposal n. 1319), in a wording that is similar to that of the Spanish Constitution of 1978 (art. 8, parag. 1): Comité d'experts chargé de rédiger les propositions de révision de la Constitution, op. cit p. 283.

39 "The PNA 'restera toujours le gardien loyal des intérêts suprêmes de la patrie'" ["The PNA 'will always remain loyal to the supreme interests of the motherland'"], APS, March 6, 2019.

40 ICJ, Flawed and Inadequate. Algeria's Constitutional Amendment Process. A Briefing Paper. op. cit. p. 10.

41 Fatiha Benabbou-Kirane, "La nature du régime politique algérien" ["The nature of Algeria's political regime"], RASJEP, vol. 44, n. 1, 2007, p. 60.

42 See Howard J. Wiarda & Hillary Collins, Constitutional Coups? Military Interventions in Latin America, CSIS, June 2011, p. 11.

avoid the risk of thus inviting it to intrude into the political life, but also not to specify the army's missions in detail, so as to make them appear as part of the "classical" missions of the army. This is how, when the 2014 Tunisian Constitution proclaimed the army was "charged with responsibility to defend the nation, its independence and its territorial integrity" (art. 18), the particularly vague character of the concept of "nation" could have justified a military intervention --despite the army's obligation of absolute neutrality -- against civilian authorities whose politics could have been considered detrimental to the interests of the nation.⁴³ Likewise, when the mission of the security forces was defined as "maintaining security and public order, ensuring the protection of individuals, institutions, and property, and ensuring the enforcement of the law" (art. 19), the "protection of institutions" could have suggested an arbitration authority⁴⁴. In the same vein, when the Libyan 2017 Constitution entrusts to the army the duty "to assume the task of defending the country and its independence, unity, and territorial integrity" (178), it opens the door to a possible legitimization of the army's interference against a government or a Parliament that would commit itself to a politics of decentralisation that the army would deem detrimental to the "unity" it --the army-- had to defend. It is significantly on the basis of an apparently classical provision in the 2016 Algerian Constitution, according to which the army had "the permanent mission to safeguard national independence and the defence of national sovereignty" that the then Chief of Staff, General Ahmed Gaid Salah, yoked the "national sovereignty" of article 7, 2, which "belongs exclusively to the People" to the "national sovereignty" in article 28, 2 (in the 2016 codification) which the army had the duty to protect,⁴⁵ in order to justify the army's intervention in Algeria's political life in 2019.⁴⁶

Conversely, by refraining from providing any definition of the missions of the army, the Moroccan Constitutions since 1962 have made it possible to preclude any abusive interpretation of those missions. The Prince Moulay Hassan thus asserted as early as 1957 that "unless we accept to undermine the foundations of all politics and to rush to the abyss, the army can by no means be the political judge or arbiter".⁴⁷ In the meanwhile, other constitutional mechanisms exist that can make possible the army's interference in politics.

43 In Turkey, article 34 of the act on the interior services of the army, according to which the latter's mission was to "safeguard and protect the Turkish nation and the Turkish republic established by the Constitution" served as a justification for a military coup in 1960. See Bernard Lewis, "II. Turquie", in *Dustur. Aperçus sur les Constitutions des Etats arabes et islamiques*. Leiden, E. J. Brill, 1965, p. 20.

44 In Chile, after the military coup of 1973, General Pinochet's 1980 plebiscitary Constitution made the army the guarantor of "the institutional order of the Republic" (art. 90, parag. 2).

45 "Communiqué intégral du Ministère de la Défense Nationale" [" The complete press release of the Ministry of National Defence"; APS, March 30, 2019.

46 Upon reading the 1976 National Charter from which the provision is taken, it becomes clear that the issue concerns in reality the sovereignty of "the country", that is the integrity of borders and not any interference in the political life of the country. See Massensen Cherbi, "L'armée algérienne est-elle un gardien de la Constitution? Du Rôle de bouclier de la Révolution à celui de garant des intérêts vitaux et stratégiques du pays", op. cit. p. 63.

47 Jean-Jacques Régnier et Jean-Claude Santucci, op. cit. p. 169.

B. Through militarised security/military councils and military courts impinging upon civilian courts.

1. Militarised security and defence councils in Algeria and Egypt

Security or military councils also play an important role in the militarisation of political regimes. It is by this means that the Turkish army put all its weight in the 1982 Constitution, drafted in the wake of the 1980 military coup. In Algeria, as a result of the “constitutional vacuum” artificially created by President Chadli Benjedid’s resignation on January 11, 1992 and the dissolution of the parliament a few days before – on January 4 – it is the High Security Council (HSC) that considered itself competent enough to suspend the electoral process on January 12 and to create a High State Committee (HSC) on the 14, in what the publicist Mohamed Boussomah describes as “a real coup d’état against the constitutional order”.⁴⁸ The Algerian Constitution defined the task of the NSC as one that implied no more than “express[ing] views on all the issues related to national security” (1989, art. 162, parag 1 and 2020, art. 208, parag. 2) without detailing either its composition or its precise functions, which is why it referred back to the President of the Republic (2020, art. 208, parag. 3). In a context marked by the repression of the Hirak, the presidential decree 21-539 dated December 2021⁴⁹ markedly increased the military membership in the HCS,⁵⁰ while extending the latter’s missions beyond strict security measures by including in them “consultative referenda on issues of fundamental character” (art. 3, a, 3), which henceforth makes possible a military interference in the most diverse aspects of national politics.

The Egyptian Constitution is even more prolix when it comes to fixing the composition of the National Defence Council (2019; art. 203, parag. 1) as the latter is dominated by the military.⁵¹ It also distinguishes it from the National Council of Security (2019, art. 205) and the Supreme Council of Armed Forces (2019, art. 200, parag. 2). As in 2012, the opinion of the National Defence Council must be sought in issues involving bills related to the armed forces and it is also in charge of discussing their budgets (2012, art. 54; parag. 3). In Morocco, though the Superior Council of Security, introduced for the first time in the 2011 Constitution, comprises in appearance a clear majority of civilians, it also leaves room as well for “those administration officials with competence in security matters, the superior officers of the Royal Armed Forces and any other prominent person whose presence is useful to the work of the said Council”

48 Mohamed Boussomah, *La parenthèse des pouvoirs publics constitutionnels. De 1992 à 1998*. Alger, OPU, 2005, p. 63.

49 Presidential decree 21-539 of December 2021 relative to the composition, organisation and functioning of the High Council of Security, JORA n. 99, December 29, 2021, pp. 9-10.

50 In addition to the President of the Republic, the Prime Minister/Head of the Government, the director of the President’s cabinet (a new member), the Minister of Defence (in practice, the President himself), the Minister of the Interior, the Minister of Foreign Affairs, the Minister of Justice and the Chief-of-Staff, the Council now also includes the Commander of the National Gendarmerie, the Director General of National Security, the Director General of Documentation and External Security, the Director General of Internal Security, the Director General of the Fight against Subversion, and the Director General of Military Security (art. 2). In contrast, the HCS of 1989 had been largely dominated by a civilian majority: presidential decree 89-196 of October 24, 1989, pp. 996-997.

51 It is in fact composed of the President of the Republic, the Prime Minister, the President of the House of Representatives, the Ministers of Defence, Foreign Affairs Finance and the Interior, the head of the secret services, the chief of staff of the armed forces, the commanders of naval, air and air defence forces, the operational chief of staff as well as the director of the departments of military intelligence and reconnaissance.

(art. 54, parag. 3). This Council constitutes “an instance for dialogue concerning the strategies of internal and external security of the country, and of management of crisis situations. It also supervises the institutionalisation of the norms of a good security governance” (art. Parag). As for the Tunisian 2022 Constitution, it barely mentions the Security Council, if not to mention that it is presided par the President of the Republic (art? 91, parag. 1). This Council particularly contributed to the rampant presidentialisation of the Tunisian political system ever since President Beji Caïd Essebsi had reinvigorated the institution in 2017.⁵²

2. Military Courts impinging on the civilian courts in Egypt and Tunisia

Another sensitive issue is that of military courts. Egypt’s constitutional amendment of 2019 allowed an extension of their competences. In fact, if it lays the principle of placing civilians beyond the competence of military courts, it nonetheless makes room for a large number of exceptions for “crimes that constitute an assault against military facilities or camps of the armed forces, or their equivalents, or facilities that are protected by the armed forces, against military zones or border zones determined as military zones, against the armed forces’ equipment, vehicles, weapons, ammunition, documents, military secrets, or its public funds, or against military factories; crimes pertaining to military service; or crimes that constitute a direct assault against the officers or personnel of the armed forces by reason of their performing their duties” (art. 204, parag. 2). This amendment thus makes possible the constitutionalisation of law 136 of October 27, 2014⁵³, by which Marshal al-Sissi had provisionally extended military intervention to include the protection “of public and vital facilities” (art. 1), which had made it possible to expand the competence of military courts to cases of crimes against those facilities (art. 2)⁵⁴.

As for Tunisia, the 2014 Constitution stipulated that “military courts are competent to deal with military crimes” (art. 110) without specifying the nature of those “military infractions” and especially whether civilians could be their perpetrators, which is why referral is solely made to the law.⁵⁵ The creation of a Constitutional court could have clarified the matter, notably in light of the civilian character of the State and of any potential breach of the freedoms guaranteed by the Constitution in accordance with the Civil State (art. 49, parag. 1). This Court, however, has never been put in place and the new 2022 Constitution remains silent on military courts, which may open the door to the use of military justice against civilian opposition by President Kais Saïd.⁵⁶

52 Government decree 2017-70 of January 19, 2017, relative to National Security Council, JORT n° 6 of January 20, 2017, pp. 315-317. See Eric Gobe, “La Tunisie en 2017: Impotence de l’Etat et tentations autoritaires” [“Tunisia in 2017: State Impotence and Authoritarian Temptations”], *L’Année du Maghreb*, 19, 2018, pp. 235-256.

53 Law 136 of 2014 on the protection and the safeguard of public and vital facilities. For a prior rule of law, see Nathalie Bernard-Maurignon, “Les tribunaux militaires et juridictions d’exception en Egypte” [“Military and Special Courts in Egypt”], in *Juridictions militaires et tribunaux d’exception en mutation: perspectives comparées et internationales*, Paris, AUF/Archives Contemporaines, 2007, pp. 191-231.

54 The number of civilians tried in military courts between October 2014 and September 2017 was estimated at 15500, 150 of whom were children: “Egypt: Events of 2017”, Human Rights Watch.

55 “Tunisie: la justice militaire, pour qui et pour quoi?” [“Tunisia: Military Justice, for Whom and for What?”], *Jeune Afrique*, June 29, 2017.

56 “Tunisia: Alarming Increase in Number of Civilians Facing Military Courts”, Amnesty International, November 10, 2021; “Tunisia: Military Court Jails Prominent Lawyer”, Human Rights Watch, March 14, 2022. See also ICJ, *Codifying Autocracy: The Proposed Tunisian Constitution in Light of International Law and Standards*, op. cit. pp. 5-6.

In Algeria, the Constitution has never raised the issue of military courts and neither did Morocco's Constitution. Algeria's Code of Military Justice recognises nonetheless the competence of permanent military courts regarding civilians, notably in cases of "infractions against the security of the State [...] when the penalty incurred is superior to five years of imprisonment" (art. 25, parag. 3). The use of military courts in the context of the repression of the Hirak was especially resorted to in the war between the different factions of the military body.⁵⁷ As to the "opinion prisoners" from among the protesters, they were judged in civilian courts. Even the charge of "demoralising the army" (Penal Code, art. 75), though very frequent at the beginning, was very rapidly abandoned in favour of charges that appeared less military: "undermining national unity" (Penal Code, art 79)⁵⁸ or "offending a public body" (Penal Code art 144 & 146)⁵⁹. Eventually, order 21-08 of June 8, 2021⁶⁰ makes it possible to incriminate under the label of terrorism any action whose object is "to have access to power [...] or to change the governance system by non-constitutional means" (Penal Code, art. 87 bis, 14), thus enabling the sacralisation of the Constitution in which the army is now declared guarantor of "vital and strategic interests" (art. 30, parag. 4) and precluding any demand for a democratic transition beyond what the Constitution provides, which was precisely what the Hirak was demanding starting from April 2019.

Only the Libya 2017 Constitution restrains in clearer terms military jurisdiction to "military infractions" and to "military personnel" (art. 135). However, for the International Commission of Jurists, those military infractions could include violations of human rights and war crimes that should be judged only in civilian courts. The commission also recommended to explicitly state that those courts should intervene only in affairs of military discipline from which civilians are to be exempted.⁶¹

II. The constitutional subordination of armies to civilian authorities

The subordination of the armies to the civilian authorities in both Egypt and Algeria is embodied in the proclamation of the Civil State (A) whereas the formal subordination of the various armies of the region to the Head of State questions the democratic control of the latter through the questioning of their criminal or political liability (B).

57 This is how the secretary general of the Workers' Party (WP), Louisa Hanoune and the younger brother of former president, Said Bouteflika, were sentenced by the Blida military court to fifteen years's imprisonment for conspiracy against the authority of the State (Penal Code, art. 78) and for offence against the military authority (Code of Military Justice, art. 284): "Said Bouteflika, Mediène, Tartag and Hanoune condamnés à 15 ans de réclusion criminelle" ["Said Bouteflika, Mediène, Tartag and Hanoune sentenced to 15 years' imprisonment"], APS, September 25, 2019. They were later acquitted of those charges on appeal by the Blida army court of appeals: "Acquittement pour Bouteflika Said, Mediène, Tartag et Hanoune" ["Acquittal for Said Bouteflika, Mediène, Tartag and Hanoune"], APS, January 2, 2021.

58 The political opponent Karim Tabbou, former first secretary of the FFS and founder of the Democratic and Social Union (DSU) was thus sentenced to one year's imprisonment for offence against the integrity of the national unity, for having opposed the opulence of high-ranking army officers to more modest condition of simple soldiers: C. Alger, Karim Tabbou, March 24, 2020, n. 20/05075.

59 See the Lakhdar Bouregaa affair, *supra*, footnote n. 10.

60 Order 21-08 of June 8, 2021 modifying and completing order 66-156 of June 8, 1966 of the Penal Code, JORA n. 45 of June 9, 2021, pp. 6-7.

61 ICJ, The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws, *op. cit.* p. 72.

A. Through the proclamation of a “civilian, non-military State”

1. An old demand formally or substantially constitutionalised in Egypt (2012), Tunisia (2014) and Libya (2017)

Historically, the polysemic concept of “dawla madaniya”, that is a Civilian State,⁶² took its meaning of a non-military state in face of the dictatorship of the “Free Officers”, in power in Egypt since 1952. The Muslim Brotherhood consider that “the Islamic State is by nature civil(an) state [dawla madaniya], for it is not a military state, ruled by the army, which seizes power through military coups and governs through dictatorial decrees, nor is it a police state ruled by the security apparatus”⁶³. In Algeria, it was in 1956, in the midst of the war for national liberation, that the Soummam Congress laid the foundation of the “primacy of the political over the military” regarding the relations between the the National Liberation Front (NLF) and the National Liberation Army (NLA)⁶⁴. This principle was reiterated just before the independence, in May-June 1962, in the draft Constitution of the France Federation of the NLF, according to which “as all other organs of the State, the army is subordinate to the Government”⁶⁵, “the exercise of military commandment [being] incompatible with political functions”⁶⁶, stating that “the army will be at the service of the people and will be concerned only with the interests of the people”⁶⁷, and that “the Algerian army will be subject to the civilian power designated by the people”⁶⁸. Later, in 1998 and 1999, the former leader of the Special Organisation (SO)⁶⁹ and founder of the Front of Socialist Forces (FSF), Hocine Ait Ahmed, would reclaim the defence of “a civil State that is neither under the tutelage of the army nor in the grip of religion, but which opposes neither the army nor Islam”⁷⁰.

Though an old demand in both Egypt and Algeria, the civilian nature of the State was not consecrated in the 2012 Constitution in Egypt, despite the opportunity offered by the fall of the Moubarak regime. However, it did proclaim the “neutrality” of an army that would “not interfere in political affairs” (preamble, parag. 7, point 8). It is eventually Tunisia which first inscribed the civil nature of the State in its 2014 Constitution, proclaiming Tunisia “a civil state based on citizenship, the will of the people, and the supremacy of law” (art. 2, parag. 1; also “Preamble”, parag. 4 & art.

62 Limor Lavie, “The Idea of the Civil State in Egypt: Its Evolution and Political Impact following the 2011 Revolution”, *The Middle East Journal*, vol. 71, n. 1, 2017, pp. 23-44.

63 Ibid. p. 37.

64 Front de libération nationale, *El-Moudjahid. Organe du Front de Libération Nationale [National Liberation Front, El-Moudjahid. Organ of the National Liberation Front. Special issue]*, p. 10.

65 Front de libération nationale, *Projet de programme présenté par la fédération de France au CNRA [Draft Programme Presented to the CNRA by the France Federation]*, Paris, Imprimerie René-Boulangier, 1962, p. 65.

66 Ibid.

67 Ibid. p. 82.

68 Ibid.

69 Paramilitary branch of the Algerian People’s Party (APP)-A Movement for the Triumph of Democratic Freedoms (MTDF) founded in 1947 and dissolved in 1950, whose members largely participated in the foundation of the NLF in 1954.

70 Boubeker Ait Benali, “Il y a 15 ans, Hocine Ait Ahmed annonce sa candidature à l’élection présidentielle” [“15 years ago, Hocine Ait Ahmed announced his candidacy for the presidential election”], *Algeria Watch*, February 5, 2014

49, parag. 1) implying that the State was both non-religious⁷¹ and non-military. By this token, the Civil State would be embodied in the absolute neutrality the army and the security forces --described as "republican"-- had to observe, a provision which the Venice Commission suggested it should "specify that the army is 'subject and subordinate to the democratically elected civil authorities'"⁷². At an infra-constitutional level, Tunisia's Code for Military Justice of 1957⁷³ had already prohibited military involvement in political parties (art. 128 to 131), which Bourguiba justified in 1965 by asserting that the military are not "free to have political opinions like ordinary citizens. Because they bear weapons the State provided them with, they must use them only to repel an aggression or against a threat to the nation"⁷⁴. In Morocco, this mistrust finds its embodiment in the exclusion from the right to vote of the military and the agents of public forces still in office⁷⁵. In fact, before even accessing the throne, Hassan II had already declared in 1957 that "the democratic royal army must keep itself away from politics"⁷⁶.

When it comes to Libya, the draft Constitution of 2017 went much further, since it declares the military to be "a national armed military force based on discipline and hierarchy" that is "obliged to observe complete neutrality and shall be subject to civilian authority", that it "shall neither interfere in the peaceful rotation of power nor in political life" (art. 177) and that it "may neither undermine the constitutional system and State institutions or obstruct their activity, nor restrict the rights and freedoms of citizens" (art. 178)⁷⁷. To make this possible, the draft prohibits the army members from joining any political party (art. 177) and restrains recourse to military jurisdiction only to military personnel (art. 135). It also makes it illegal for police personnel to "exercise political work" (art. 179). Furthermore, in a context marked since 2011 by the proliferation of militias, the draft Constitution proclaims, in the general interest, the State's monopoly over armed and security forces while prohibiting individuals, political parties and groups from forming military or paramilitary groups (176).

71 See Mounia Kraiem Dridi, "La dimension religieuse dans la Constitution tunisienne du 27 janvier 2014" ["The Religious Dimension in the 2014 Constitution of Tunisia"], RFDC, vol. 127, n. 3, pp. 79-98.

72 European Commission for Democracy through Law, Observations on the Final Draft Constitution of the Republic of Tunisia, Strasbourg, July 17, 2013, p. 8, parag. 26.

73 Decree of January 10, 1957 promulgating the Code of Military Justice, JOT n. 4 of January 11, 1957, pp. 34-45. Conversely, in Algeria, President Boutefflika's death on September 27, 1978, was followed by the army's "dramatic intrusion" into the governing bodies of the NLF: Rachid Benyelles, *Dans les Arcanes du Pouvoir; Mémoires (1962-1999)*, Algiers, Barzakh, 2017, p. 136. However, the military would later leave those bodies after the ratification of the 1989 Constitution: "A.N.P.-F.L.N. Les Représentants de l'ANP au sein du FLN déchargés de leur qualité de membres du Comité Central", Alger, El Moudjahid, according to APS, March 5, 1989.

74 Nicole Grimaud, op. Cit., p. 96.

75 Art. 5, parag 1 of the Royal Decree 1-97-83 of April 2, 1997 promulgating act 9-97 on the electoral code, Bulletin Officiel n. 4470 of April 3, 1997, pp. 306-342.

76 Jean-Jacques Régnier & Jean-Claude Santucci, op. Cit., p. 169.

77 See also the draft Constitution of Yemen, which was not ratified either, because of the civil war the country has been enduring since. The draft recognised more explicitly the civilian character of the State, this time in the opposite sense of a tribal State: "The Federal Republic of Yemen is a federal State, civil, democratic, Arab Islamic, independent and a sovereign country; based on the will of the people, equal citizenship and the rule of law". See Limor Lavie, "The Constitutionalization of the Civil State: The Self-Definition of Egypt, Tunisia and Yemen Following the Arab Uprisings", *Religions*, Vol. 12, 2021, pp. 9-13.

2. Rejection of the Civil State in its non-military meaning in Egypt (2017/2019), Algeria (2020) and Tunisia (2022).

In Algeria, the demand for a “civilian and not a military state” (“dawla madaniya, mâshi ‘askariya”) became, starting from May 10, 2019, one of the most significant slogans of the Hirak⁷⁸. The Chief of Staff remained inflexible in his will to organise presidential elections on the basis of the 2016 Constitution (art. 102, parag. 2), at the risk of electing a president holding the same exorbitant prerogatives which President Bouteflika had enjoyed, thus reproducing the regime and the political system already in place.⁷⁹ The popular demand was, however, demonised, both by General Gaid Salah, for whom it aimed at “undermining the foundations of the national State”⁸⁰ and, after his death, by the journal of the Ministry of Defence, El-Djeich, in which an article described its defenders as “traitors to the motherland”⁸¹.

Yet, such a civil State does not open the door to chaos, as has been demonstrated by the most powerful armies of contemporary times, such as the Soviet army, subordinate to the Party or the American army, subordinate to the President. The American constitutional model represents nonetheless a “solitary success”⁸², hence the danger, in countries lacking a strong democratic tradition, to subordinate the army to a president, especially when the latter is politically reckless (See infra, II. B. 1). It is indeed in this way that in Tunisia, President Kais Saïd suppressed any mention of the civil State in the 2022 Constitution⁸³ after having used the army in his coup against another democratically elected institution, the Assembly of the Representatives of the People. This suppression found expression in the disappearance of all reference to the strict neutrality which the armed and security forces had hitherto the obligation to observe, including the statement of their classical duties, among which the defence of the nation and of institutions respectively, to preclude the risk that the ambiguity marking those notions should justify a new coup, but against the President himself this time⁸⁴.

78 Mustafa Benfodil, “Le 12^e vendredi du hirak s’est formidablement adapté au Ramadhan: ‘Un Etat civil, pas militaire’”, El Watan, May 11, 2019. See also Massensen Cherbi, “L’armée algérienne face au Hirak”, *Movements. Des Idées et des Luites*, Vol. 102, n. 2, 2020, pp. 166-176.

79 See Messensen Cherbi, “Les mécanismes constitutionnels de l’autoritarisme algérien face au Hirak”, *Movements. Des Idées et des Luites*, Vol. 102, n. 2, 2020, 166-176.

80 “Gaid Salah; la position de l’ANP émane de sa conviction de la nécessité de sauvegarder la sécurité et la stabilité de l’Algérie”, APS, November 7, 2019 (“Gaid Salah: The PNA’s position springs from the necessity of safeguarding the security and the stability of Algeria”).

81 Ghedjati, “Malheur au traitres de la patrie” [“Woe to the traitors of the motherland”], El-Djeich, n. 682, May 2020.

82 “Lorsqu’on essaie de transplanter ce régime en dehors de son pays d’origine, l’échec est consommé, à la suite, soit d’un coup d’état, soit de l’abrogation de la constitution. Les précédent latino-américains est français ont discrédité le régime” [“When an attempt is made to transplant this regime outside its country of origin, failure is ensured, either following a coup or through the abrogation of the constitution. The Latin-American and French precedents discredited the system”]: Jean Gicquel & Jean-Eric Jicquel, *Droit constitutionnel et institutions politiques*, Paris, L.G.D.J., 2018, pp. 316-317.

83 The Tunisian President showed hostility towards the notion of the civil State in its strictly religious sense, by declaring that the State was a moral person and could therefore not have a religion, without invoking the absence of such a concept in the West: “Saïd déclare à partir de l’avenue Bourguiba: A ceux qui craignent la dictature...nous ne reviendrons pas en arrière” [“Saïd declares from Bourguiba Avenue: to those afraid of a return to dictatorship...we will not change back”] (Vidéo), in Arabic, Mosaïque FM, July 26, 2022.

84 See Zouhour Ouamara, “Que Signifie la suppression des forces de sécurité dans la Constitution de Saïed?” [What Does the Suppression of Security Forces mean in Saïed’s Constitution?], in Arabic, The Legal Agenda, September 28, 2022.

Paradoxically, it is Egypt which is now the only country of the region that recognises in its positive law the civil character of the state, and this since the 2019 constitutional amendment (art. 200, parag. 1). This civil character must however not be taken in the sense of a “neutral” army, that is of a “civil, non-military State”, since the neutrality which the army had been compelled to observe in the 2012 Constitution disappeared in the new 2014 Constitution to which the 2019 amendment added the provision that the defence of that civil character was the army’s duty. This character must not be either understood as entailing neutrality towards religion, since Islam remains the religion of the State while the principles of Islamic Sharia are still the main source of legislation (art. 2). The president of the House of Representatives, Ali Abdel Aal, had thus taken great care to reassure the Salafist party Ennour that there would be no secular State⁸⁵. This provision must therefore be understood in the sense of a civil State opposed to the Muslim Brotherhood. In fact, “this clause signals that it is the army’s duty to prevent the return to power of Islamist forces, such as the Muslim Brotherhood, who wish to give the state a religious character”⁸⁶.

B. Through the hierarchical relationships and the democratic control

1. Heads of States and heads of military forces in face of their political recklessness (Algeria, Libya, Morocco and Tunisia) and exemption from criminal liability (Algeria, Morocco and Tunisia)

In Morocco, since the 1962 Constitution the King is proclaimed “Supreme Head of the Royal Armed Forces” and is thus entitled to “appoint to the military offices”, with the capacity to “delegate this right” (2011, art. 53). Those nominations require nonetheless the countersignature of the head of government (2011, art. 42, parag. 4) who is accountable to the Parliament. Yet, outside the regulating prerogatives the government is entitled to in virtue of article 90 of the Constitution [...] it has no real control over the RAF⁸⁷. Besides, since the government “disposes of the administration” (2011, 89), “it is clear that [by contrast], it does not dispose of the Armed Forces, this prerogative being the King’s”⁸⁸. Significantly, the King alone has the power to declare the state of emergency (2011, art. 42, parag. 4). The 2011 Constitution provides, nonetheless, that it is “on proposal of the Head of Government” that the King appoints members of the government (art. 47, parag. 2) whose functions he can also terminate (art. 47, parag. 3). However, in practice, in the wake of general Oufkir’s 1972 coup, King Hassan II cancelled the Ministry of Defence in order to have direct control over the army, and the post of a general secretary of the administration of national Defence was created, to be replaced in 1997 by that of Minister Delegate in Charge of the National Defence which has since been held by a civilian who is in charge of “strictly administrative matters”⁸⁹. The King, as Chief of Staff, also presides

85 See Shaimaa Maged, “The Inter-Islamic Competition and the Shift in al-Nur Party Stance towards Civil State in Egypt”, *British Journal of Middle Eastern Studies*, Vol. 49, n. 1, 2022, pp. 121-138.

86 Limor Lavie & Abdallah Shalaby, “The Civil State vs the Secular State in Arab Discourse: Egypt as a Case Study”, *INSS*, vol. 24, n. 1, 2021, p. 90.

87 Brahim Saidy, op. Cit., p.161.

88 Michel Calau, op. Cit., note 80; p. 355. This, while the France Constitution of 1958 explicitly states that the government “disposes of the administration and the armed force” (art. 20, al. 2).

89 Abdallah Saaf, “Une ‘sortie’ du despotisme: l’expérience marocaine de ‘transition’ politique [Leaving Despotism Behind: the Moroccan Experience of Political ‘Transition’]”, *Démocratie, sécurité et développement*, 2009, p. 10.

over the Supreme Council of Security (2011, art. 54, parag 2), a function he can only delegate to the head of government for a single meeting and “on the basis of a specific agenda” (2011, art. 54, parag. 2). Yet, since the 1962 Constitution, the person of the King is “inviolable” (2011, art. 46), that is, entitled to political and penal unaccountability, despite the important prerogatives at his disposal in terms of national defence.

In Tunisia, the 2014 Constitution , following upon a constitutional act of December 16, 2011 (art. 11 parag. 1, point 13) had created an original diarchy by splitting the domains of foreign affairs and national defence between the President of the Republic and the head of government. In fact, it was up to the President, “the Commander-In-Chief of the armed forces” (2014, art.77, parag. 2, point 3) to determine “the general state orientations in the domains of defence, foreign relations and national security in relation to protecting the state and the national territory from all internal and external threats, after consultation with the Head of Government” (2014, art. 77, parag. 1). Hence, “the risk of crises was real in case of a disagreement between the heads of the State, especially when they belonged to different political families”⁹⁰ The new Constitution has thus returned to the 1959 formulation, by making of the President of the Republic the “supreme” chief of the armed forces (1959, art. 46 & 2022, art. 94) presiding over the Security Council (2022, art. 91, parag. 1). True, the regulatory decrees have to be countersigned (2022, art. 105), but this time by a head of government appointed by the President and a minister proposed by him (2022, art. 101) and whom the President can dismiss (2022, art. 102) while the government “shall ensure the implementation of State’s general policies, in compliance with the general orientations” defined by this same President (2022, art. 115) towards whom the government is “held accountable” for its management” (2022; art. 112) whereas his responsibility towards the Parliament is almost inexistent (2022, art. 115). Yet, the 2022 Constitution has established that the President be not only politically unaccountable, as in the 1959 and 2014 Constitutions, but also that he cannot be held responsible before the Parliament and the Constitutional Court in case of “manifest” violation of the Constitution, as it had been provided for in the 2014 Constitution (art. 88).

The Libyan draft Constitution of also provides that the President of the Republic is the Commander-In-Chief of the Armed Forces” (art. 108) with the power to appoint the institutions that are subordinate to him (art. 106, parag. 1, point 1). It is also up to the President to appoint the Prime Minister and the government and to change cabinet members (art. 106, parag. 1, point 1). However, the Libyan President can also be held criminally responsible before the Parliament and then before a special Court (art. 112).

In Egypt, if the President of the Republic is still proclaimed “Supreme Commander of the Armed Forces” (2019, art. 152; parag. 1), the Constitution makes necessary for the nomination of the Minister of defence the approval of the Supreme Council of the Armed Forces (2019, art. 234), a provision that had been only provisional in the 2014 Constitution, which nonetheless had provisioned that the minister be appointed from among the officers of the armed forces (2012, art. 195 & 2014/2019 art. 201), which thus excludes a civilian minister. The said minister is significantly designated as “Commander-In-Chief of the Armed Forces” (2019, art. 201), which barely sets him apart from the “Supreme Commander” that is the President and can thus be a source of ambiguity. The President can be removed not only on the basis of an

⁹⁰ Raffaa Ben Achour, “La Constitution Tunisienne du 27 juillet 2014”, op. Cit. p. 793.

“impeachment” (2014 & 2019, art. 159) but also on the basis of political responsibility following a censure motion voted by the government and put to public referendum (2014 & 2019, art. 161). This mistrust of civilian authorities can be felt even in the oath made by the ministers since decree 562 of August 28, 2013,⁹¹ that is after the coup against President Morsi. Before this decree was issued, the oath to be “a loyal soldier” was addressed to the President of the Republic, a physical person and an identifiable hierarchical superior, whereas since the new decree the oath is addressed to the Republic of Egypt, an abstract legal construction not capable of direct expression, thus making it possible to override the commands of a President who would go against the interests of the Republic as interpreted by the military. This provision has now been reinforced by the role of guardian of the Constitution conferred upon the army by the 2019 amendment (art. 200, parag? 1, see supra I. A. 2).

In Algeria, the President is proclaimed “Supreme Chief of the Armed Forces of the Republic and in charge of National Defence” (2020, art. 91, parag. 1, 1), with the power to appoint to military posts of the State (2020, art. 92, parag. 1, 2), which constitutes an inherent power not subject to countersignature. The President also appoints ministers “upon the recommendation” of the Prime Minister or the head of government (2020, art. 104), the latter being severally liable before the Parliament since 1988. However, since Colonel Boumediene’s 1965 coup, the custom has been to keep the nomination of the Minister of Defence in the hands of the President. This is why the nomination of general Nezzar in 1990⁹² as Minister of Defence was interpreted as a sign of the army’s subordination to the civilian authorities: “from now on, the National Assembly, the legislative body, can call to account a government member in charge of preparations for national defence. This could not be done in the past because, precisely because there was no minister [of defence]”⁹³. However, President Lamine Zeroual, himself a former Defence Minister, restored Colonel Boumediene’s practice in 1994 and President Bouteflika created the post of Delegate Minister to the Defence in 2005,⁹⁴ before replacing it in 2013⁹⁵ with that of a Deputy Minister, all undertaken by military men. The post of Deputy Minister has, however, not been renewed since the death of general Gaid Salah on December 23, 2019. Yet, since the 1976 Constitution it has become no longer possible to hold the President politically responsible for his defence policies, and if the 1996 Constitution introduced criminal liability for “high treason” (2020, art. 183, parag. 1), it is under the condition of an organic law that has never been enacted since its promulgation more than a quarter of a century ago (2020, art. 183, parag. 3). Furthermore, if the President is constitutionally the supreme chief of the armed forces, the 2020 introduction of the defence “of the vital and strategic interests of the country” as one of the army’s missions (art. 30, parag. 4) puts into question the hierarchical relationship between the army and the President in case the former considers the latter has violated constitutional provisions (see supra I. A. 2).

91 “Egypt armed forces no longer swear loyalty to president of republic”, *Ahram Online*, August 28, 2013.

92 Presidential decree 90-224 of July 25, 1990 modifying and completing decree 89-178 of September 16, 1989 relative to the nomination of members of government, *JORA* n. 31 of July 28, 1990, p. 878.

93 Mohamed Touati, “Désignation d’un ministre et prérogatives de défense” [“Designation of a minister and defence prerogatives”], *El Moudjahid*, October 3, 1990.

94 Presidential decree 05-161 of May 1, 2005 relative to the nomination of members of the government, *JORA* n. 32 of May 4, 2005, p. 3.

95 Presidential decree n. 13-312 of September 11, 2013 relative to the nomination of members of the government, *JORA* n. 44, of September 15, 2013, pp. 4-5.

2. Limited parliamentary control in favour of an unfounded “reserved domain”

For the sending of troops abroad, Algerian and Egyptian Constitutions require parliamentary approval. In Algeria, it has to be in order “to participate in peace-keeping and restoration operation” (2020 art. 31, parag. 3) “within the framework of the United Nations, the African Union, and the Arab League, and in full compliance with their principles and goals” (2020, art. 31, parag. 3). The initiative is to be taken by the President who has to get the approval of two-thirds of the members of each house of the Assembly (2020, art. 91, parag. 1, 2). Such approval is however not necessary to declare war, contrarily to Egypt where the President has to obtain, for this as well as for sending troops abroad, the approval of two-thirds of the members of the House of Representatives (2019, art. 152, parag. 1). In Tunisia, of the 2014 Constitution required, for the sending of troops abroad, an agreement between the President of the Republic, the President of the Assembly of the Representatives of the People and the head of the government (art. 77, parag. 2, point 4). The new Constitution of 2022 remains silent on the issue and requires simply, in cases of war declaration and peace agreement, the approval of an absolute majority of the members at the Assembly of the Representatives of the People (art. 98). In Morocco, the Constitution of 2011 does not mention sending troops abroad et requires simply, for a war declaration, a deliberation in the council of ministers (art. 49, parag. 1, point 9), which is presided by the King (art. 48, parag. 1) -- which represents a regression in comparison with the 1962 Constitution which required, for a declaration of war, the Parliament’s approval (art. 51).⁹⁶

As for emergency laws, the Egyptian Constitution makes it mandatory to submit the state of emergency to the House of Representatives within the seven days following the declaration (2019, art. 154, parag. 1) and obtain the approval of the majority of its members (2019, art. 154, parag. 3), whereas the draft Libyan Constitution provides that the state of emergency be submitted to Parliament for approval within a period of three days (2017, art. 186). In contrast, the Moroccan and Tunisian Constitutions do not provide for a parliamentary approval or a particular time limit for the state of emergency (respectively, 2011, art. 59 & 2022, art. 96). The Moroccan Constitution, however, provides, since 1962, for a maximum of thirty days for the state of siege, after which an act becomes mandatory for its prolongation (2011, art. 74). As for Algeria, the 2020 amendment introduced for the first time precise time limits subject to parliamentary approval – of sixty days for the state of exception (art. 98, parag. 1) and of thirty days for the state of emergency and the state of siege (art. 97, parag. 2). Furthermore, concerning the distinction between the domain of the law, which belongs to Parliament and that of regulation which belongs to the executive, the Moroccan Constitution does not include in the field of law the organisation of national defence (2011, art. 71) et requires simply a deliberation in the council of ministers for bills related to the military field (2011, art. 49, parag. 1, point 7). By contrast, the Algerian Constitution includes within the field of law “the general rules relative to national defence and the use of armed forces par civilian authorities” (2020, art. 139, parag. 1, 27) whereas the Tunisian Constitution includes within the field of organic law “the organisation of the national army” (2022, art. 75, parag. 8). As to the strategic issue of the military budget, if it is subject to a parliamentary vote, the Parliament’s control

⁹⁶ The condition was replaced in 1970 by a simple notice made in Parliament (1970, art. 72 and 2011, art. 99).

is restrained by the opacity of military spendings; moreover, the special committees concerned with national defence are of limited importance, which raises the issue of both the competence of parliamentarians and their democratic legitimacy.

Eventually, the *de facto* or *de jure* absence or lack of control of the supreme commanders/chiefs of the armed forces in North Africa --that is the heads of States of the region-- may find its roots in a misinterpretation of the 1958 Constitution of France, a document of significant influence in the Maghreb, a misinterpretation aggravated by the presidentialist drift of the institutions of the 5th Republic. In fact, the “reserved domain” of the French President in matters of foreign policy and national defence is a “pure fable”⁹⁷ invented by Jacques Chaban-Delmas in a 1959 speech⁹⁸, when the 1958 Constitution explicitly subordinates armed forces to the government (art. 20; parag. 2). The presidential title of “head of the army” and the presidency of the superior defence councils and committees (art. 15) are thus merely honorific. They already existed in the 1946 Constitution (art. 33) whereas in the 1958 Constitution it is the Prime Minister who is “in charge of the national defence” (art. 21) and the decisions of the President on the matter, including during the state of exception (art. 16) are not among his inherent prerogatives but are subject to the countersignatures of the Prime Minister and the ministers in charge (art. 19), who are severally accountable for their policies before the Parliament which thus controls military as well as foreign affairs (art. 0, parag. 3: art. 49 & 50) as in the major European parliamentary democracies⁹⁹.

97 Marie-Anne Cohendet, *Droit Constitutionnel*, Paris, Montchrestien, 2011; p. 166.

98 Marie-Anne Cohendet, *Le Président de la République*, Paris, Dalloz, pp. 105-111.

99 As for the disposition according to which the French President is “guarantor of national independence” and of “territorial integrity”, it has to be strictly understood as designating a President-arbitrator, not only on account of the articles 19, 20 and 21, but also on account of the preparatory work for drafting the 1958 Constitution.

Conclusion:

Armies that are sometimes politicised by their role as arbitrators in Algeria and Egypt, and sometimes subordinated to and used by an unrestrained civil authority in Morocco and Tunisia

The place of the army in the Algerian, Egyptian, Moroccan and Tunisian constitutions thus reflects relatively well the power relations between civil and military authorities in the region. Far from the image of a Potemkin Constitution, the studied texts rather reveal their nonconstitutionalist character¹⁰⁰.

The recent constitutional evolutions of 2019 and 2020 in Egypt and in Algeria show a militarisation of the constitutional regimes in both countries meant to preclude, on the one hand, the return to power of the Muslim Brotherhood in Egypt or an uncontrollable President such as Bouteflika in Algeria, and, on the other, calling into question the existing political regime, as the Hirak had tried to do. The consecration of the army's role as arbitrator is therefore not insignificant, in the sense that the military cannot arbitrate between powers as a Constitutional Court or a President of the Republic would do because being armed, they can annihilate all the powers by force. Such a constitutional militarisation thus appears as incompatible with the requirements of the African Charter on Democracy, Democracy, Elections and Governance, which Egypt has nonetheless neither ratified nor signed.

By contrast, since 2011, the Moroccan army has remained under the control of the King, whose person is "inviolable" and whose defence policy remains largely uncontrollable. As to Tunisia, the new 2022 Constitution is marked by the disappearance of dispositions guaranteeing the absolute neutrality of the security and the armed forces inherited from the 2014 Constitution, which raises the issue of the possible use of those forces by a President whose powers have been reinforced. It is therefore the Libyan 2017 Constitution that goes furthest in the subordination of military authorities to civil power, though it has not been implemented to this day. However, it is clear that the constitutional provisions that insist on this subordination were the work of a democratically elected Constituent Assembly and not of a plebiscitary constitution drafted at the initiative of the executive.

It can therefore be recommended to avoid any definition of the classical missions of the army and in particular that of acting as moderator in order to avoid all pronouncement founded on ambiguous constitutional dispositions, while retaining only the principle of hierarchical subordination. In this framework, it could be recommended to place the army not at the disposal of the head of the State, but at that of the head of the government who can be held accountable before Parliament, which could thus reinforce the subordination of the military apparatus to civil power through an increasing control by Parliament. Entrusting the direction of the army to a president or a king, politically unaccountable as in Algeria and Libya or even criminally unaccountable as in Morocco and Tunisia may create the risk of a use of the armed forces in favour of personal interest and at the expense of democracy.

¹⁰⁰ Nathan J. Brown, *Constitutions in a Nonconstitutional World. Arab Basic Laws and the Prospects for Accountable Government*, Albany, State of New York Press, 2002, p. 244.

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