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THE REFORM OF
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INTRODUCTION

THE CONCEPT OF 'DAWLA MADANIYYA' AND ITS IMPLICATIONS FOR THE JUDICIARY

The concept of 'dawla madaniyya' has figured prominently in the debates on constitutional reconstruction following the overthrow of the authoritarian regimes of Zine al-Abdin Ben Ali, Husni Mubarak and Muammar al-Gaddafi. Following the election of the Egyptian Muslim Brotherhood's candidate as new President of Egypt in June 2012, which marked a high point in the political fortunes of moderate Islamists in that country and beyond, the President-elect Mohammed Morsi declared: "Egypt is now a real civil state. It is not theocratic, it is not military. It is democratic, free, constitutional, lawful and modern."¹

The use of the term 'civil state', in Arabic 'dawla madaniyya', by Morsi is representative of the kind of political and constitutional discourse which prevailed not only in Egypt, but also in Tunisia and Libya in the early period following the overthrow of the previous political regimes. But Morsi's downfall only one year after his popular election, which was justified by many of his opponents precisely with his failure to honour his pledge to create truly democratic and inclusive institutions, demonstrates the difficulties associated with the implementation of this complex concept, especially in a political environment which was characterised by mounting polarisation among the political forces supporting the revolution after the Islamists had come to power the first elections following the overthrow of the previous regime.

The embrace of 'dawla madaniyya' allowed the Islamists to discreetly retreat from the objective of establishing an Islamic state. This reflected widespread disillusion with the theocratic form of government which had emerged following the 1979 revolution in Iran but had failed to fulfil the hopes of many Islamists inside and outside the country. By accepting the concept of citizenship, as opposed to the sovereignty of god, as the foundation of legitimate constitutional authority, the Islamists were able to placate the fears of the non-Islamist sectors of society and thus increase their chances of playing a central role in the post-authoritarian constitutional order, without having to use the term 'secular' which is objected to not only by Islamists, but by Arabs in general because of its association with colonialism and Westernisation.²

¹ Quoted after Ashraf Ramelah, *Egypt's Challenge: Writing a New Constitution*, at: **Error! Hyperlink reference not valid.** (last visited January 22, 2014).

² Fawaz A. Gerges, *The New Islamists: Pluralism and Minorities?*, at: <http://blogs.lse.ac.uk/ideas/2012/05/the-new-islamists-pluralism-and-minorities/> (last visited 22 January 2014)

The term 'civil state' as it was used in the early stages of the Arab spring, thus, was an essentially political concept designed to express the basic consensus of the political forces which had promoted the revolution and were united in their desire to replace the old authoritarian political regime with a new constitutional order based on the popular will. In the meantime it has been incorporated as a fundamental principle in the new constitutional documents emerging from the political transformation processes in Egypt³ and Tunisia.⁴ Its essence consists in the rejection of both military and clerical rule in favour of a democratic political order based on the consent of the citizens which respects the rule of law and fundamental rights.⁵

It is quite obvious that the concept of 'dawla madaniyya' with its embrace of a form of political rule that is based on respect for the rule of law and fundamental rights has important implications for the role and the functions of the judiciary in the new constitutional order. Especially in Egypt there had been wide-ranging debates about constitutional reform even before Mubarak's fall.⁶ They resulted in a number of key demands supported by all main political forces outside of the regime which included, among other things, better institutional safeguards for the independence of the judiciary and a central role of judges in the monitoring of elections, as well as an end to the exceptional courts in Egypt which had been a constant feature of the regime since its establishment in the 1950s. Although some progress has been made in the realisation of these goals since the start of the Arab spring, the reform process is far from complete, as a brief survey of its preliminary results shows.

³ Whereas the 2012 Constitution pushed through by the then dominant Muslim Brotherhood and its allies only contained an indirect reference to the concept of civil state (in Article 6), Article 1 of the 2014 Constitution defines the Arab Republic of Egypt as a "democratic republic based on citizenship and the rule of law."

⁴ According to Article 2 of the Tunisian constitution "Tunisia is a state of a civil character based on citizenship, the will of the people and the rule of law."

⁵ See Bruce K. Rutherford, *Egypt after Mubarak*, Princeton 2012, xiv-xxi who concludes that as a result of the events unfolding after January 25 of 2011 the boundary between liberal thought and Islamic Constitutionalism has largely disappeared (xvi).

⁶ Nathan Brown, *Egypt's Constitutional Revolution?*, in: S.A. Arjomand & N. Brown (eds.), *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, New York 2013, 303 (308).

CHAPTER 1

1 EXCEPTIONAL AND MILITARY COURTS IN THE NEW CONSTITUTIONS OF EGYPT AND TUNISIA

1.1 EGYPT

Exceptional courts had been widely used in Egypt prior to the 2011 uprising. The state security court system in particular had proved to be a highly flexible instrument of the executive to maintain the degree of control of internal security which it deemed necessary in the light of the prevailing conditions. State security courts could be established whenever a state of emergency was declared and disappeared when the state of emergency was lifted. The decisions of such could not be appealed. But even during the brief periods when the state of emergency was lifted the executive would not leave the trial of those suspected of subverting internal security to the ordinary court system. Quite on the contrary, when the state of emergency declared in June 1967 was lifted by Sadat in May 1980, he immediately proceeded to create new, permanent security courts whose existence was not linked to the existence of a state of emergency. These permanent security courts functioned until 2003 when they were abolished. However, at that point the state of emergency had long been reinstated, and the emergency State security courts had resumed their work.⁷

The last constitutional amendments seen through by Mubarak in 2007 prepared for another lifting of the state of emergency. They authorized the legislature to adopt a new antiterrorist law and provided that in doing so it would not be bound by the constitutional guarantees protecting against arbitrary arrest, searches of the homes without judicial warrant and state interference with communications. In addition, the constitutional amendment granted the President of the Republic wide powers to determine before which court terrorist suspects should be tried: before an ordinary court, a state security court, a military court or a new special court to be created under the antiterrorist law, provided that the respective court had a basis in the Constitution or in the law.⁸

⁷ N. Maugiron-Bernard, Consolidation of State Authoritarianism under Mubarak, in: S.A. Arjomand & N. Brown (eds.), *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, New York 2013, 197 (185/86).

⁸ Article 179 of the Egyptian Constitution of 1971 as amended in 2007 had the following wording: "(1) The State shall strive to safeguard the general discipline and security in the face of the dangers of terrorism. The law shall regulate the prosecution and investigation procedures required by the fight against these dangers in such a manner that the measures described in the first paragraph of Article 41 and the second paragraph of Articles 44 and 45 do not obstruct this fight, subject to the supervision of the judiciary."

Moreover, the President enjoyed almost unlimited powers with regard to proceedings before the State Security Courts under the relevant legislation. He could suspend a case before it was submitted to the Supreme State Security Emergency Court. Decisions of the of the Emergency State Security Courts became final only once they were approved by the President; thereafter they could not be challenged in any other court in Egypt. However, the President himself was free to commute, change, suspend or cancel such decisions. A few weeks after the overthrow of the Mubarak regime the African Commission on Human and Peoples' Rights issued an important communication in which it denounced the Egyptian State Security Court system as being in violation of several guarantees of the African Charter on Human and Peoples' Rights, especially those relating to the guarantees of an independent and impartial tribunal and the right to a fair trial. In its resolution on the case, the Commission did not only call on the Egyptian government not to implement the death sentences against the applicants in the case and to compensate them. In a most timely call for reform of the Egyptian judiciary, it also urged the new rulers to reform the legislation on the state security courts in order to ensure the independence of these courts and bring the relevant rules in conformity with the Charter.⁹

The constitutional amendments of 2007 had also confirmed the wide jurisdiction of the country's military courts.¹⁰ Since the early 1990s the Egyptian government had increasingly transferred civilians to the military courts with the objective to obtain quick and harsh sentences against its political opponents, especially Islamists, a practice whose constitutionality had been confirmed by the Supreme Constitutional Court.¹¹ The system was reformed in early 2007. However, the amendments enacted to the Military Courts Act left the basic structure of the system intact. While an appeals court was established in order to examine the appeals filed by the prosecution or by an individual sentenced by a military court against the decision of the latter, this court was to be composed exclusively of military judges; the ordinary guarantees of a fair trial did not apply. The amended legislation confirmed the broad discretion of the prosecuting authority to refer civilians to the military courts.¹²

The Constitution which was approved by referendum under Morsi's leadership in December 2012 brought some progress with regard to the elimination of exceptional courts. The reference to the antiterrorist laws disappeared from the Constitution together with the power to create special courts for the trial of suspected terrorists. The President's power to declare a state of emergency was made subject to parliamentary approval and, in the case of an extension of the state of emergency beyond a period of six months, to the approval of the people by referendum (Article 148).

(2) The President of the Republic may refer crimes of terrorism to any judicial body established by the Constitution or the law."

⁹ African Commission on Human and Peoples' Rights, Communication 334/06 of March 2011, Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt.

¹⁰ Article 183 of the Egyptian Constitution of 1971 as amended in 2007 read as follows: " The law shall organise the military courts and determine their competences within the framework of the principles of the Constitution."

¹¹ Rutherford, *Egypt after Mubarak* (note 5 above), 56.

¹² Maugiron-Bernard, *State Authoritarianism* (note 7 above), 186.

The new Egyptian Constitution which entered into force on 18 January 2014 has kept the requirement of parliamentary approval of the declaration of the state of emergency, but reduced the period for which the initial declaration is valid to three months. If it is to be extended beyond that limit for another period of three months, a two-thirds majority in the House of Representatives is needed; its vote replaces the approval by referendum under the 2012 Constitution. There is no absolute limit on how often the emergency period may be extended with the required two-thirds majority (new Article 154). Even more worryingly, the 2014 Constitution gives the public authorities broad powers in their fight against terrorism. The new Article 237 obliges the State “to fight all types and forms of terrorism”. Although the provision indicates that this fight shall be accompanied by “guarantees for public rights and freedoms”, it does not specify the relevant guarantees. Instead the Constitution leaves wide discretion to the legislature in adopting the legislation organising the provisions and procedures of fighting terrorism. This authorisation would also seem to cover the creation of special judicial procedures to deal with suspected terrorists.

Neither the 2012 Constitution nor its successor has touched the system of military courts. The 2012 Constitution made an attempt to strengthen their independence by providing that the members of the military judiciary were autonomous and could not be dismissed. They enjoyed the same immunities, securities, rights and duties as the members of the other judiciaries. But the professional qualifications required to become a military judge were not regulated in the Constitution itself but left to the implementing statute. The jurisdiction of the military courts was limited to all crimes related to the Armed Forces, its officers and personnel, crimes pertaining to military service which occur within military facilities and crimes relating to Armed Forces facilities, equipment or secrets. Civilians, on the other hand, should not stand trial before military courts “except for crimes that harm the Armed Forces” (Article 198). This was a rather vague clause unlikely to substantially limit the wide jurisdiction claimed by military courts over civilians in the past. The definition of such crimes was left to statutory legislation. While Parliament would thus be competent to adopt the relevant provisions, it would have to consult with the representatives of the armed forces before doing so, according to Article 197 which provided that all draft laws related to the Armed Forces had to be submitted for “consultation” to the National Defense Council, a body in which the representatives of the militaries and its allies were in the majority. Not surprisingly, these provisions failed to have a major impact on the widespread practice of putting civilians before military courts which had intensified in the months following Mubarak’s overthrow.¹³ The new Egyptian Constitution which was adopted by referendum in January 2014 leaves the composition and the powers of the National Defense Council virtually unchanged. However, it dispels any doubts which may have lingered under the 2012 Constitution concerning parliamentary oversight by stating that, following discussion in the National Council, the armed forces’ budget is

¹³ The Supreme Council of the Armed Forces (SACF) which exercised supreme authority until President Morsi was sworn in is said to have put some 12,000 civilians on trial in special army courts during the interim period, see Erin Cunningham, Egypt considers expanded powers for military in new constitution, Washington Post of 2 November 2013, at: http://www.washingtonpost.com/world/middle_east/egypt-considers-expanded-powers-for-military (last visited on 22 January 2014).

incorporated as a single figure in the state budget.¹⁴ At the same time the new Constitution makes some effort to define the role and the powers of the military courts more precisely. It contains an express guarantee of the independence of the military judiciary. The principle that civilians shall not stand trial before the military courts is confirmed. While this principle is still subject to exceptions, the exceptions are defined more carefully than in the preceding Constitution. According to the new Article 2014 civilians may only be tried before a military court for crimes that constitute a direct attack against military facilities, military barracks or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties.

1.2 TUNISIA

The role of the military in Tunisia differs considerable from that played by the armed forces in Egypt. After independence Bourguiba sought to confine the military to an apolitical role which did not question the supremacy of the civilian leadership of the country.¹⁵ By and large, the Tunisian armed forces have remained largely removed from political infighting. They managed to keep that low profile during the country's difficult constitutional transition following the ouster of President Ben Ali, although it is widely presumed that the refusal of the military to fire on civilians during the 2011 protests played a crucial rule in his exit.¹⁶

The Tunisian constitution which was finally adopted after two years of deliberation on the 26 of January 2014 and entered into force the following day elevates the apolitical role of the military to the rank of constitutional principle. In line with the civil character of the state laid down in Article 2 it contains a specific provision of the civil-military relationship which the previous Constitution lacked. According to Article 18 Tunisia's armed forces have the mission to defend the nation, its independence and the integrity of its territory. They have a duty of complete neutrality with regard to domestic politics and must support the civil authorities in the conditions defined by law. In a similar vein Article 19 obliges the national security forces to discharge their basic functions – maintenance of public order, protection of the safety of individuals, institutions and property, law enforcement – within the limits established by the fundamental rights in complete neutrality.

Article 110 limits the jurisdiction of the military courts to military crimes. The term "military crimes" is not defined in the constitutional text itself. However, the general structure of the civil-military relationship as fixed by the Constitution, particularly Article 2 and 18, suggests a narrow interpretation which would cover only crimes committed by or committed against military personnel. The same provision allows the creation of

¹⁴ See Article 203 of the Constitution of 18 January 2014.

¹⁵ H.D. Nelson (ed.), *Tunisia – a country study*, 3rd edition 1986, 288.

¹⁶ E. Parker, *Tunisia's Military: Striving to Sidestep Politics as the Challenges Mount*, *tunisialive*, 25 June 2013, at: <http://www.tunisia-live.net/2013/06/25/tunias-military-striving-to-sidestep-politics-as-challenges-mount/> (last visited 22 January 2014).

exceptional courts and procedures only if this has no negative impact on the principles
of a fair trial.

CHAPTER 2

2 PROTECTION OF FUNDAMENTAL RIGHTS BY AN INDEPENDENT JUDICIARY

The implications of the 'civil state' for the judiciary go beyond the elimination or strict regulation of military and exceptional courts. They require a judiciary which is able to effectively protect the constitutional rights of citizens.

2.1 EGYPT

Under Egypt's 1971 Constitution, this function had been discharged in the last instance by the Supreme Constitutional Court. According to Law 48/1971 the party to a court case can question the constitutionality of a law or regulation whose application is central to the adjudication of the case in question. If the party can convince the court of the plausibility of the challenge, the latter has to stay the proceedings for a period of three months and to allow the party to petition the Supreme Constitutional Court for a ruling on the constitutionality of the provision concerned within this delay.¹⁷ The Supreme Constitutional Court had used these powers in order to invalidate a series of laws for infringement on constitutional grounds, including laws which unduly restricted political liberties like freedom of opinion and the press.¹⁸ It had also been prepared to check the worst excesses of electoral fraud by extending the role of judges in the supervision of elections.¹⁹ As a result, opposition parties and human rights organizations had increasingly turned to the Court for relief in situations in which they considered their fundamental rights to be threatened or violated.²⁰

The Egyptian Constitution of 2012 reduced the membership of the Supreme Constitutional Court from 19 to 11,²¹ but left its functions largely unaffected. The Court retained the "exclusive" competence to rule on the constitutionality of laws and regulations.²² However, the constituent assembly dominated by the Muslim Brotherhood and its allies no longer wanted to leave the control of the conformity of the legislation enacted by Congress with the Shari'a exclusively in the hands of the Supreme Constitutional Court, as had been the case under Article 2 of the 1971 Constitution. In the eyes of the drafters of the new Constitution, the Court had proved rather too creative in finding ways to dismiss challenges to the consistency of statutes and

¹⁷ Article 29 of Act No. 48/1979 on the Supreme Constitutional Court.

¹⁸ T. Mustafa, *The Struggle for Constitutional Power – Law, Politics, and Development in Egypt*, 136 ff.; Rutherford, *Egypt after Mubarak* (note 5 above), 64 ff.

¹⁹ Supreme Constitutional Court (SCC), Case No. 11/13, 8 July 2000, *Collection of Decisions of the Court*, vol. 9, 667.

²⁰ T. Mustafa, *Struggle for Constitutional Power* (note 18 above), 145 ff.

²¹ See Article 176 of the 2012 Constitution. The 2014 Constitution leaves the determination of the number of Constitutional Court judges to the implementing legislation. It only requires that their number must be "sufficient", see Article 193.

²² Article 175 of the 2012 Constitution.

regulations with Islamic law by distinguishing between undisputed, universal principles of Shari'a and flexible applications of those principles.²³ The drafters of the Constitution thus included a definition of the principles of the Shari'a in the constitutional text so as to limit the scope of interpretation of the judicial bodies when they have to determine whether a provision complies with these principles. Using technical terms from Islamic legal tradition Article 219 defined what was actually meant by the reference to the principles of Islamic Shari'a in Article 2: these principles had to be understood as including "general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community."

Perhaps even more importantly, the drafters of the 2012 Constitution attempted to involve the country's most important Islamic institution, Al-Azhar, in the implementation of Article 2 of the Constitution. According to new Article 4, Al-Azhar scholars had to be consulted in all matters pertaining to Islamic law. The provision did not specify whether the opinion of the Al-Azhar scholars were to be binding not only for the members of the legislature considering the adoption of the bill, but also on the courts, including the Supreme Constitutional Court, which might subsequently be asked to rule on the conformity of the legislative provision with the principles of Islamic Shari'a under Article 2 of the Constitution. But there can be no doubt that the main purpose of these reforms was a fuller implementation of the principles of Shari'a through ordinary legislation, and a corresponding reduction of the interpretative discretion of the courts.

Not surprisingly, these provisions have been removed from the Constitution in the constitutional revision which took place after Morsi's overthrow in July 2012. The requirement to consult Al-Azhar in all matters pertaining to Islamic law no longer figures in the new Article 7 which defines Al-Azhar's role in Egyptian society as that of an "independent scientific Islamic institution" which is responsible for preaching Islam in Egypt and the world. Article 219 was dropped altogether. Instead the Preamble of the 2014 Constitution affirms unambiguously that the relevant decisions of the Supreme Constitutional Court published in its collected rulings shall be the (only) reference for the interpretation of the Shari'a clause in Article 2.

2.2 TUNISIA

The situation is quite different in Tunisia where the new Constitution, adopted by the nation's constituent Assembly on the 26 January of 2014, provides for the strengthening of the review powers of the judiciary and particularly of the constitutional court. Under the previous Constitution, only the President of the Republic had the right to refer laws before their promulgation to the Constitutional Council for a control of their compatibility with the Constitution. Neither the political opposition nor individual citizens could petition the Council in order to defend their constitutional rights. In addition, its opinions did not have binding character prior to the 1998 reforms.²⁴ The

²³ On this jurisprudence see Adel Omar Sherif, *The Relationship between the Constitution and the Shari'ah in Egypt*, in: R. Grote&T. Röder (eds.), *Constitutionalism in Islamic Countries*, 2012, 121 (128 ff.); R. Hirschl, *Constitutional Courts as Bulwarks of Secularism*, in: D. Kapiszewski&G. Silverstein&R. Kagan (eds.), *Consequential Courts – Judicial Roles in Global Perspective*, 2013, 311 (316).

²⁴ I. Gallala-Arndt, *Constitutional Jurisdiction and its Limits in the Maghreb*, in: Grote&Röder, *Constitutionalism* (see note 23 above), 239, 249 ff.,

Council was thus more of a weapon in the hands of the President to keep Parliament at bay than an effective institution of constitutional review.

The new Tunisian constitution will replace the Constitutional Council with a real constitutional court exercising substantial review powers. The right to submit legislation which has been voted but not yet been promulgated to the Court for review of its constitutionality is extended to members of Parliament.²⁵ Perhaps even more importantly, the new Tunisian constitution allows for the review of laws which have already entered into force upon the initiative of one of the parties to a court case whose outcome depends on the contested provision. While it is the competent court or tribunal which formally submits the matter to the Constitutional Court, it is the party challenging the constitutionality of legislation which initiates the procedure and determines its scope (Article 120). This new power has the potential of turning the Constitutional Court into a genuine guardian of citizens' rights.

2.3 REFORMS IN OTHER ARAB COUNTRIES

A strengthening of constitutional review was also seen as an important part of the constitutional reforms undertaken in other countries which have responded to the public protests triggered by the Arab spring by, among other things, modernizing their constitutional framework. This has been the case especially in Morocco and Jordan.

2.3.1 MOROCCO

The constitutional changes approved by the Moroccan people in the referendum of July 2011 represent a major reorientation of the Moroccan constitutional system. The reforms strengthen the democratic and rule of law components of the constitutional system in several important respects. One such important novelty is the express constitutional recognition of the special status of the parliamentary opposition. The parliamentary opposition has, among other things, the right to present its views in the official media, to have access to public funding, to participate in an effective manner in the law-making procedure and the control of the government and to be represented adequately in the internal activities of Parliament. In another potentially significant departure from previous constitutional practice, the 2011 Constitution contains a fully developed Bill of Rights. In addition to the rights and freedoms set forth in the new Constitution, Moroccans shall also enjoy the human rights guaranteed in the international conventions and covenants to which the Kingdom of Morocco is a party.²⁶ In line with these changes the new Constitution has strengthened the role of constitutional review. The Constitutional Council (*Conseil constitutionnel*) established in 1992 has been elevated to the rank of Constitutional Court (*Cour constitutionnelle*). As its predecessor, the new Constitutional Court is composed of twelve members appointed for a term of nine years; the membership shall be renewed by thirds every three years. Six of its members are appointed by the King; the other six members are elected by Parliament (one half by the House of Representatives, and one half by the House of Counsellors). Of the six members to be appointed by the King, one shall be

²⁵ 30 members of the House of Representatives may petition the Court to rule on the constitutionality of a law voted by the House, see Article 120.

²⁶ Article 19 of the Constitution of 1 July 2011.

proposed by the Secretary General of the High Council of Religious Scholars (see 3. above). Unlike the 1996 Constitution, the new constitutional text leaves no doubt that the members of the new Court have to be drawn from the legal establishment. They shall be chosen from among the personalities who have a good legal education, have demonstrated their competence by practicing a profession in the judicial, academic or administrative field for more than fifteen years, and are known for their impartiality and integrity (Article 130).

The Court continues to discharge the functions which had already been performed by the former Constitutional Council. In this regard, the Court is competent to monitor the proper conduct of parliamentary elections and referendums and to review the constitutionality of parliamentary legislation and of the parliamentary rules of procedure. The power to review ordinary statutes and so-called Institutional Acts (i.e. statutes which are referred to in the Constitution by this name; in substantive terms, these are statutes which fill in the details with regard to the organization, powers and functioning of the main state institutions established by the Constitution) can only be exercised before the statute in question is promulgated. This power has been extended by the reform to international undertakings before their ratification. The review of Institutional Acts and new parliamentary rules of procedure is compulsory, i.e. it does not require a prior application to this end by a state body or an individual. By contrast, ordinary statutes and international undertakings will only be reviewed if they are referred to the Constitutional Court before their promulgation or ratification by one of the applicants mentioned in the third paragraph of Article 132, i.e. by the King, the Head of Government, the President of either of the Houses of Parliament, one fifth of the members of the House of Representatives or one quarter of the House of Counsellors. In the past, the exercise of these review powers by the Constitutional Council has been rather timid, especially with regard to the protection of fundamental rights and freedoms.²⁷ The Council was unable to develop a coherent case-law relating to fundamental rights as the members of the political opposition in Parliament rarely used their right to refer ordinary statutes to the Council in the optional review procedure. This is perhaps not surprising as the Council was originally created with the primary purpose of upholding the dominant position of the monarchy enshrined in the Constitution. It was allowed to venture into other fields, and in particular into the field of fundamental rights, as long as this was not seen as incompatible with its primary role.²⁸ The original narrow view of constitutional review was reflected in the early jurisprudence of the Council which firmly upheld the prerogatives of the Government in its relations with Parliament. The Council did not hesitate to annul provisions in the rules of procedure of both Houses which in its view unduly restricted the powers conferred upon the Government by the Constitution.²⁹ By contrast, a number of statutes which raised fundamental human rights concerns, like the amendments to the laws relating to freedom of the press, of association and of public meetings, the law about the fight

²⁷ For an assessment of the jurisprudence of the Moroccan Constitutional Council see I. Gallala, *Constitutional Jurisdiction in the Maghreb* (note 23 above), 223.

²⁸ O. Bendourou, *Conseils constitutionnels et État de Droit au Maghreb*, in: Ahmed Mahiou (ed.), *L'Etat de droit dans le monde arabe*, 1997, 240.

²⁹ Decisions of January 3, 1995, *Bulletin officiel* of January 25, 1995, 196, and of July 4, 1995, *Bulletin officiel* of July 26, 1995, 2144.

against terrorism and the law relating to the entry and stay of foreigners in the Kingdom of Morocco, emigration and illegal immigration went largely unchecked.

The constitutional reforms of July 2011 have at least given the legal instruments to the new Constitutional Court to act more vigorously in defence of civil rights and liberties. Under the new Article 133 the Court will have jurisdiction to rule on the plea of unconstitutionality brought by one of the parties to a pending court case against a statute allegedly violating the rights and freedoms protected by the Constitution, provided that the outcome of the court case depends on the constitutionality and applicability of the statute. While it is thus still not possible to apply directly to the Court in case of human rights violations, the Court will for the first time have the power to rule on the constitutionality of legislation which is already in force, and will be competent to do so outside a political context in the narrow sense, i.e. upon an application which is not brought by a political body, but by a court or by a private person or entity which is a party to judicial proceedings.

Much will depend on the implementation of this provision, and in particular, on the question whether the power to refer cases to the Constitutional Court for review of the constitutionality of a statute applicable to a case before it is restricted to the highest courts, or whether it is extended to all courts, tribunals and bodies of a judicial character before which the question of unconstitutionality of a statute may arise in the context of concrete litigation. Even more important is the question whether the implementing provisions will allow the party challenging the constitutionality of legislation a substantial role in the shaping of the review procedure while the courts are reduced to filtering out vexatious and manifestly unfounded applications or whether the final decision on the referral and its scope will rest with the ordinary courts. In the second alternative, the freedom of the parties to use the preliminary review of constitutionality as an effective weapon to defend fundamental rights against legislative intrusions would be greatly reduced.

2.3.2 JORDAN

Prior to the constitutional reform of September 2011, Jordan did have neither a French-style Constitutional Council nor an Egyptian-style Constitutional Court. The only provision relating to the enforcement of the Constitution was to be found in Article 122 of the Jordanian Constitution of 1952. This provision assigned to the High Tribunal the right to interpret the provisions of the Constitution. The High Tribunal was the body set up under Article 57 for the trial of ministers for offences which they committed in the performance of their duties. It consisted of nine members, four of whom were drawn from the ranks of the Senate, while the other five members were selected from the ranks of the highest civil court. Its mixed political/judicial character raised doubts whether the constitutional interpretations of the Tribunal under Article 122 could be considered as legally binding. But even if their binding character was admitted, the fact remained that the Tribunal could only exercise its powers at the request of either the Council of Ministers or the House of Parliament. It did not have the power to adjudicate concrete disputes. It was therefore not surprising that its relevance to the development of constitutional law in Jordan remained very limited in practice.

The reforms of September 2011 have brought fundamental change in this area by establishing, for the first time since the country was founded in 1922, a separate constitutional jurisdiction in Jordan. The new Constitutional Court will be composed of nine members. Like the Moroccan Constitution, the amended Constitution of Jordan stresses the need or professional competences of the judges, who must have served either *as* judge in the Court of Cassation or the High Court of Justice; or as law professor (full professor) at a university or as lawyer with no less than 15 years' of professional practice. However, unlike the Moroccan Constitution the revised Jordanian Constitution still leaves the door open to the membership of former politicians by stipulating that also "specialists" who fulfil the conditions for membership in the Senate may join the new review institution (Article 61). According to Article 64, the group of people eligible for membership in the Senate comprises present and past Prime Ministers and Ministers, persons who previously held the office of Ambassador, Minister Plenipotentiary, Speaker of the Chamber of Deputies, President and Judges of the Court of Cessation, and of the Civil and Sharia Courts of Appeal, retired military officers of the rank of Lt. General and above, former Deputies who were elected at least twice as Deputies and "other similar personalities who enjoy the confidence and trust of the people in view of the services they had rendered to the nation and country." It is not clear whether the term "expert" is to be understood as an additional qualification which would allow to whittle down this rather large group of dignitaries to those who either come from the legal profession or at least hold a law degree when it comes to determining their eligibility for membership in the Constitutional Court. The judges will be appointed by the King for a term of six years. Whereas draft versions of the new Article 58 had provided that the term of membership would be subject to renewal, this clause, which constituted a potential threat to the independence of first-term judges, has disappeared from the final version of the Article.

The Constitutional Court shall rule on the constitutionality of laws and regulations and interpret the Constitution upon request of the Council of Ministers or either the House of Parliament (new Article 59). Citizens will not have the right to approach the Court directly. The right to request the review of a statute or regulation for its constitutionality will instead be limited to the highest bodies of the executive and the legislature, i.e. the Council of Ministers and both Houses of Parliament. But the parties to a case pending before the ordinary jurisdiction also have the right to plead the unconstitutionality of law and regulation. If the court of litigation is convinced that the challenged provision is applicable to the case at hand and that the claim of unconstitutionality is serious, it shall suspend the proceedings and refer the matter to the Court of Cassation, the highest civil court in Jordan, for a final decision whether the petition shall be submitted to the Constitutional Court. If the court of litigation refuses to refer the matter to the Court of Cassation, its decision can be appealed. By contrast, the decision of the Court of Cassation not to refer the matter to the Constitutional Court is not subject to appeal by the party whose petition has been rejected. It is thus this Court which will determine whether the avenue to the Constitutional Court for private parties is a broad or a narrow one. Since the independence of civil judges has been strengthened by the 2011 constitutional reforms – they are now appointed by the newly created Judicial Council

(Article 98 (3) of the amended Constitution) – the new constitutional arrangements do not necessarily imply a restrictive court practice in respect of individual petitions. In France where a similar reform was implemented in 2008 to 2010 the highest courts – the Court of Cassation and the Council of State – have proved to be quite liberal in the use of the new procedure.³⁰

³⁰ In the period from May 29, 2010 to June 22, 2012, already 220 decisions of the Council had been issued under the new procedure. A number of important issues, e.g. the constitutionality of the obligation to publish the names of those citizens who propose a candidate in the presidential election, have been scrutinized by the Constitutional Council under the new procedure, see G. Carcassonne&O. Duhamel, QPC, la question prioritaire constitutionnelle, 2011; M. Disant, Droit de la question prioritaire de constitutionnalité, 2011.

CONCLUSION

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The constitutional reforms produced by the Arab spring in the judicial sector have been highly unequal in outlook and effectiveness. While the attempts in Egypt to strengthen the independence of the judiciary and to end the system of exceptional courts, including an excessive role of military courts, have had only limited success; the reforms in Tunisia to implement the concept of 'civil state' in the judicial sector look more promising. Constitutional reform of the judiciary, especially with regard to constitutional review, has also figured prominently in some of the other reform processes triggered by the Arab spring, namely in Morocco and Jordan, where they have been tightly controlled by the reforming monarchies. The professionalization and the independence of the review bodies have been strengthened and they have been given powers which would allow them for the first time to adjudicate on the constitutionality of statutes and other legal provisions in the context of concrete litigation, thus creating a potential opening for individual and civil society organisations to submit their rights claims to them.

However, certain ambiguities continue to exist which might be exploited by the executive in order to check the new-found power of the judges. Where the right to submit questions of unconstitutionality in the context of concrete litigation to the Constitutional Court can only be exercised through the judicial hierarchy, i.e. with the support of the highest ordinary court(s), the latter might use this power not only to prevent the constitutional court from being flooded with frivolous or ill-founded claims, but to exclude politically sensitive issues from its jurisdiction altogether. Much will therefore depend not only on the wording of the implementing legislation, but also on the spirit in which the judges make use of their new faculties.

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