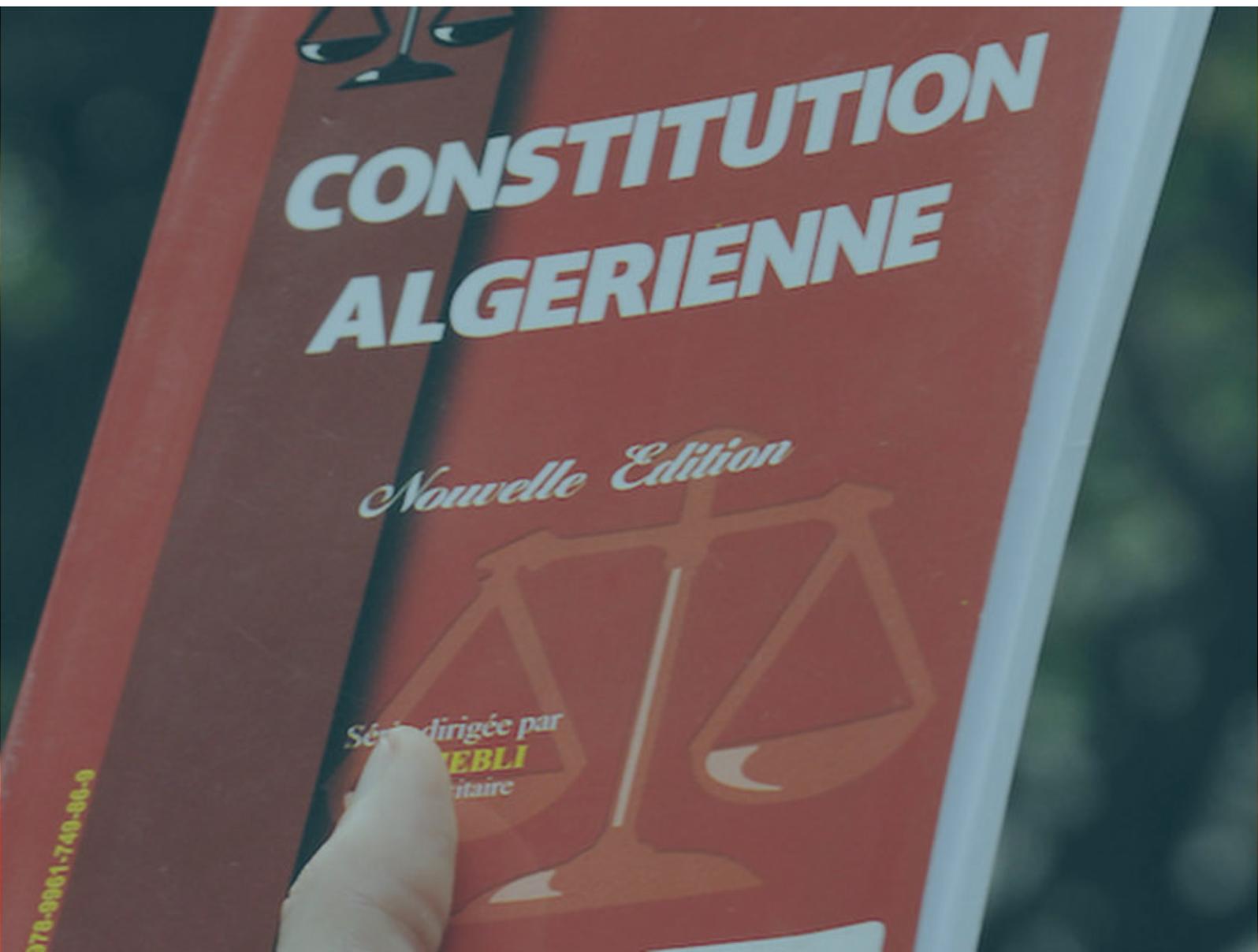


THE 2020 CONSTITUTIONAL AMENDMENT IN ALGERIA : A DE JURE MILITARISED ULTRA-PRESIDENCY

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Introduction

On October 25, 2020, Chileans overwhelmingly voted in a referendum for the abrogation of General Pinochet's 1980 Constitution. No less than 79% of Chileans voted in favor of the new constitution drawn up by an elected constituent assembly. Algerians on the other hand were called upon on November¹, to vote for an umpteenth revision of Colonel Boumediene's Constitution of November 22, 1976. The referendum, organized during the pandemic and in a context of increased repression, resulted in a historically low turnout with no more than 23.84% of Algerians voting with 66.80% approving the amendment¹. These elections confirm the Algerian people's disavowal of the ruling power. This was already signaled during the December 12, 2019, presidential elections which had the lowest official turnout recorded for presidential elections, with just 39.88%. The amended constitution was promulgated on December 30, 2020², after two months of absence by President Tebboune, who was hospitalised in Germany.

In February 2019 the Hirak emerged with its marches against President Abdelaziz Bouteflika's will to cling to power. However, although the Constitution formally proclaims that «national sovereignty belongs exclusively to the people» (Art. 7, para. 2), there was no recall in the texts capable of deposing him. Nor was there any constitutional counter-power capable of triggering an impeachment procedure against him, making the president a true material sovereign. It was finally the intervention of the country's true sovereign, the army, that compelled President Bouteflika to resign on April 2, 2019, after only a few hours the Chief of Staff, General Ahmed Gaïd Salah, called for the immediate application of Article 102³.

Article 102 provided 90 days to organize new presidential elections, while placing the National Council's president, Abdelkader Bensalah, as interim president. During this period the government appointed by the former president was to be maintained. In April, the Hirak continued its mobilisation against the application of Article 102 by refusing the organization of presidential elections without prior institutional change. In effect, the elections amounted to electing a president with the same exorbitant powers as those held by Abdelaziz Bouteflika, with the same risks of deadlock. This high concentration of power in favor of the president derives from the Constitution of Colonel Boumediene of November 22, 1976 and was later reinforced by the Constitution of General Liamine Zeroual of December 7, 1996.

Confronted with the Chief of Staff's desire to abide by the Constitution that was in place, the slogan *Dawla madaniya, mâshî 'askariya*, «Civilian state, not a military one» appeared on the streets. However, unable to organise presidential elections within the constitutional deadline of 90 days, General Ahmed Gaïd Salah issued a warning on 18 June against any alternative political process, emphasising the potential danger of a «constitutional void»⁴. He thus refused any Tunisian-style solution, which involved dissolving the Parliament and the Constitutional Council formed under the former president, or by dissolving political parties booed on the streets such as The FLN (Front de Libération Nationale) and the RND (Rassemblement National Démocratique). An alternative political path could have entailed the promulgation of a «small transitional constitution» which would have organized public life while electing a Constituent Assembly, a historic demand of the Algerian national movement⁵. Taking advantage of a decline in the Hirak's mobilisation during

1. Proclamation n° 01 / P.CC / 20 of November 12, 2020, stating the results of the referendum of November 1, 2020, on the constitutional amendment, JORA n° 72 of December 3, 2020, pp. 4-5.

2. Presidential Decree n° 20-442 of December 30, 2020, relating to the promulgation in the Official Journal of the People's Democratic Republic of Algeria of the constitutional revision, adopted by referendum of November 1, 2020, JORA n° 82 of December 30, 2020, pp. 2-49.

3. « Gaïd Salah appelle à l'application «immédiate» des articles 7, 8 et 102 de la Constitution », APS, 2 April 2019.

4. « Gaïd Salah met en garde contre les objectifs «ambigus» de ceux qui veulent geler la Constitution », APS, 18 June 2019.

5. Jacques Simon, *L'Assemblée constituante dans le mouvement national algérien*, Paris, L'Harmattan, 2012, 208 p.

the month of Ramadan, on June 19 the Chief of Staff launched a policy of *divide ut imperes* by stigmatising holders of the Amazigh flag⁶. Judicial repression against the Hirak then took the form of an attack against national unity, the army's morale, and national interests.

It is in this repressive context that the 2019's presidential elections were organized, making Abdelmadjid Tebboune, former prime minister and minister of Abdelaziz Bouteflika, the new President of the Republic. While he was still a candidate, Tebboune had already committed himself to a revision of the Constitution, an initiative monopolised by the president since 1976. To this end, he formed a committee of experts by decree No. 20-03 of January 11, 2020, composed of eighteen jurists chosen by him and chaired by Ahmed Laraba, to apply his specifications (art. 1). Although the decree provided that the committee was responsible for 'formulating any recommendations, it deems useful' (art. 2, para. 1), its conservatism quickly became apparent, as one of its members, Fatsah Ougergouz⁷, denounced the impossibility of addressing the sensitive subject of the army's role⁸.

Delayed by the COVID-19 pandemic, the committee produced a preliminary draft that was distributed on May 7, 2020. It resulted in 5,018 proposals, mainly from state institutions, micro-political parties, associations, or personalities unknown to the public. As for the civil society and opposition parties, they largely boycotted this constituent process coming from above. The proposals submitted to the committee resulted in a new draft on September 5, 2020. It was adopted by the Ministerial Council on 6 September, then unanimously by the National People's Assembly (APN) on 10 September, and by the Council of the Nation on 12 September, two chambers composed of parliamentarians «elected» or appointed under President Bouteflika. The amended constitution was then submitted to a referendum on 1 November, the symbolic date of the outbreak of the war of national liberation⁹.

According to Montesquieu, «every man with power is prone to abuse it; he continues until he finds limits.» These limits were absent in 2019 since there was no constitutional mechanism to stop President Bouteflika's hubris¹⁰. Thus, has this most recent constitutional amendment, initiated by a president lacking democratic legitimacy while enjoying exorbitant powers, allowed the introduction of constitutional checks and balances ?

This paper argues that by proclaiming the Algerian army as the guardian of the country's vital and strategic interests, the constitution of December 30, 2020, constitutionalised *de jure* the army's political role exercised until then *de facto*. The army is the only real counter-power to the President of the Republic, who retains most of the exorbitant powers inherited from the 1976 and 1996 Constitutions.

6. « Gaid Salah met en garde contre ceux brandissant des drapeaux autres que l'emblème national », APS, 19 June 2019.

7. Imène Amokrane, M. Mehenni, « Le dr Ougergouz émet de sérieuses réserves sur la mouture remise à Tebboune. Révision de la Constitution : démission au comité d'experts (document) », Liberté, 14 April 2019.

8. Tahar Houchi, « Fatsah Ougergouz, ex-membre du comité pour la révision de la Constitution. «Le projet ne contient pas de véritables marqueurs de changement» », Liberté, 10 June 2020.

9. Presidential Decree n° 20-251 of September 15, 2020, convening the electorate for the referendum on the draft revision of the Constitution, JORA n° 54 of September 16, 2020, pp. 3-48.

10. Massensen Cherbi, « Les mécanismes constitutionnels de l'autoritarisme algérien face au Hirak », Mouvements, n°102, 2020, pp. 166-176.

Constitutionalising of the army's political role: The guardians of the country's vital and strategic interests

Constitutionalising the political role of the military dates back to the September 2020 draft of the amended constitution. It came to replace the controversial suggestion to include an unelected vice-president in the May 2020 draft.

The removal of the post of vice-president, a dolphin designated by the president

The fundamental reform in the May 2020 draft was the introduction of an optional post of Vice President of the Republic. Already present between 1976 and 1989, this role was nevertheless symbolic, as the Vice-President was not even considered to be a «dolphin¹¹» to the president and had no power of his own.

The main novelty suggested in the May 2020 draft was that the vice-president would succeed to the presidency in case of death or resignation. However, unlike in the US, the Algerian vice-president would not have been elected together with the president. He would have been appointed on an optional basis by the incumbent president, just as in 1976. This optional appointment was particularly authoritarian since it allowed an unelected person to become head of state to complete the term of a deceased or resigning president. Such an innovation would have made it possible to circumvent the limit of two presidential terms, reintroduced by the constitutional revision of March 6, 2016, and consolidated by the new revision (Art. 88, para. 2), by allowing the incumbent president to place a dolphin as the head of state.

The post of vice-president would also have obviated the application of Article 102. Indeed, although during the 2016 revision, the interim period was extended from 45 to 90 days, it was not sufficient in 2019 to organize elections in the context of widespread contestation. This deadlock required the intervention of the Constitutional Council in its decision N° 20 /D.CC/19 of June 1, 2019,¹² to maintain the interim president beyond 90-days, using a broad understanding of the «spirit» of the constitution.

In the end, the Ministry of National Defense criticised this suggested post by stating that the vice president «would have to guide the country for a certain period of time», without having «the legitimacy of the ballot box» (Proposition No. 2865). With this amendment removed from the September 2020 draft, in case presidential elections cannot be organized within the 90-day interim period, the Constitutional Court can extend this period to a maximum of 180 days (Art. 94, para. 5).

The consecration of the army as the new guardian of the constitution

The significant novelty of the latest constitutional amendment is that it introduces a new paragraph in the article dedicated to the role of the army. It proclaims that «the National Army of the People shall defend the country's vital and strategic interests under the provisions of the Constitution» (Art. 30, para. 4). The list of proposals for revision sent to the Committee of Experts shows that the Ministry of National Defense created this formulation using these words: «The National Popular Army defends the vital and strategic interests of the country in all circumstances. The situations and modalities for the application of this paragraph shall be determined by law» (Proposition 1317). This is a radical legal change that consecrates de jure the political role exercised de facto by the army since 1962. Indeed, no Algerian constitution had previously explicitly enshrined the army's political role, notwithstanding its role as guardian of the Socialist Revolution between 1976 and

11. Khalifa Mameri, *Réflexions sur la constitution algérienne*, Alger, OPU, 1983 [1979], p.94.

12. Decision n° 20 /D.CC/19 of June 1, 2019, JORA n° 38 of June 12, 2019, p. 11.

1989. Until then, the army maintained an ultra-presidential constitutional regime inherited from the 1976 Constitution, written for Colonel Boumediene, who was then the army's leader and the president of the republic.

Therefore, since December 2020, the army has become the guardian of the Constitution. The notions developed in the new paragraph are particularly unclear and lack precision. Decisions on what constitutes a threat to the «vital and strategic interests of the country» are left to the subjective judgment of the army. This allows the army to override or even oppose the people's representatives and the judiciary, both in resolving institutional disputes and in intervening in foreign policy economic and societal issues. Although the president of the Republic is proclaimed to be the Supreme Commander of the Armed Forces (Art. 91, para. 1, 1), if the Parliament violates other «constitutional provisions» (deemed vital or strategic by the Army), Article 30, para. 4 may allow him to override or even overthrow elected bodies through constitutional pronouncements.

This new provision makes it possible above all to legitimise *posteriori* the *contra constitutionem* intervention of the army in Algerian political life in 2019. Since the end of socialism in 1989, the army had lost all political roles in the Algerian Fundamental Law¹³. Following the halt of the electoral process in 1992, committees of constitutional experts in 1993 and 1996, aimed to make the army the guardian of the Constitution but failed to institutionalise this change at the time¹⁴. Notwithstanding, on a March 30, 2019 communiqué, the National Ministry of Defense linked territorial sovereignty described in Article 28, paragraph 2 to the national sovereignty that belongs exclusively to the people in Article 7, paragraph 2 to justify the military's intervention in political life¹⁵. Such an interpretation was abusive since Article 28 was derived from the 1976 National Charter, which referred to the country's sovereignty¹⁶. The defense of national sovereignty was understood as synonymous with the defense of borders. This is confirmed by Khalfa Mameri, a commentator on the 1976 Constitution, who in the late 1970s classified the defense of national sovereignty among «the basic missions of any army...¹⁷».

The Algerian army thus becomes a new guardian of the Constitution, following the Latin American model¹⁸, in addition to the President of the Republic (art. 84, para 2), inspired by the Schmittian model, and the Constitutional Court (art. 185), inspired by the Kelsenian model. Such a provision runs counter to one of the major demands of the Hirak: that is the move to a «civilian, non-military state.» The new Article 30(4) also counteracts the 2007 African Charter on Democracy, Elections, and Governance, ratified by Algeria on 27 September 2016¹⁹. It provides that «State Parties shall strengthen and institutionalise the control of civil, constitutional power over the armed and security forces to consolidate democracy and constitutional order» (Article 14(1)).

Moreover, the 2020 constitutional amendment now allows the army to intervene abroad: to «participate in the maintenance of peace (...) within the framework of respect for the principles and objectives of the United Nations, the African Union and the League of Arab States» (Art. 31, para. 3) after the approval of each chamber of Parliament by a two-thirds majority (Art. 91, para. 1, 2). This provision, introduced in the preliminary draft of May 2020, has the advantage of legitimising the Algerian regime on the international scene by relieving certain foreign powers of the financial and human burden of military interventions in the Maghreb and the Sahel²⁰.

13. Myriam Aït-Aoudia, *L'expérience démocratique en Algérie (1988-1992). Apprentissages politiques et changement de régime*, Paris, Les presses de Sciences Po, 2015, pp. 111-114.

14. Mohamed Boussoumah, *L'opération constituante de 1996*, OPU, Alger, 2012, p. 104.

15. « Communiqué intégral du Ministère de la Défense Nationale », APS, 30 March 2019.

16. Ordinance n° 76-57 of July 5, 1976, publishing the national charter, JORA n° 61 of July 30, 1976, p. 742

17. Khalfa Mameri, *Réflexions sur la constitution algérienne*, op. cit., p. 62.

18. Howard J. Wiarda, Hilary Collins, *Constitutional Coups? Military interventions in Latin America*, CSIS, June 2011, 11 p.

19. Presidential Decree No. 16-255 of September 27, 2016, ratifying the African Charter on 'Democracy, Elections and Governance' adopted by the Heads of State and Government of the African Union, in Addis Ababa (Ethiopia) on January 30, 2007, JORA n° 59 of October 9, 2016, pp. 4-12.

20. On this subject, see the interview in which the French President, Emmanuel Macron, expressed his support for his Algerian counterpart, qualifying him as «brave» and assuring that he would do everything possible to help him: Benjamin Roger and Marwane Ben Yahmed, «Exclusive - Emmanuel Macron: «Between France and Africa, it must be a love story», *Jeune Afrique*, November 20, 2020. Macro's statement came a few days before the almost unanimous resolution of the European Parliament condemning the violation of human rights in Algeria: «European Parliament resolution of November 26, 2020, on the deterioration of the human rights situation in Algeria, in particular the case of journalist Khaled Drareni» (2020/2880 RSP).

Preservation of the exorbitant powers of the President of the Republic inherited from the 1976 and 1996 Constitutions

The new distinction between a head of government and a prime minister does not change the constitutional ultra-presidency inherited from the 1976 and 1996 Constitutions, which only constitutionalises the army moderates' political role.

The chimerical distinction between the head of government and the prime minister

The May 2020 draft proposed reintroducing a head of government instead of the prime minister. The September 2020 draft now distinguishes between a prime minister (appointed in the event of a «presidential majority» within parliament) and a head of government, appointed in the event of a «parliamentary majority» within the lower house, i.e., a cohabitation majority distinct from that of the president of the Republic. This is a partial reversal of the constitutional revision of November 15, 2008, which had symbolically reduced the «head» of government to a *primus inter pares*.

The 1976 Constitution did not initially confer any powers on the prime minister²¹. Following October 1988, the constitutional amendment of 5 November 1988, introduced the post of head of government with certain powers of its own, starting with legislative initiative. He was also responsible for Parliament. The first person to hold this position was the former Military Chief of Security, Kasdi Merbah. However, while he was in conflict with President Chadli Benjedid, he claimed legitimacy from the Parliament that had adopted his program²². Merbah was, however, forced to step down in September 1989. The constitutional amendment of 1988 and the Constitution of 1989 preserved the President of the Republic's power to dismiss him *ad nutum*, in an unequal dualism in favor of the president, who remained the true head of the executive.

As for the conditions of appointment, the President of the Republic is required to appoint a head of government from the parliamentary majority (Art. 110, para. 1), while in the event of a presidential majority, the president remains free to appoint the prime minister of his choice (Art. 105). Even in the event of a parliamentary majority, the president remains free to choose the candidate of his choice among the different parties of the parliamentary majority. In the event of a coalition, within this majority, the president can choose another leader to maintain his hold on the government. The 2014 Tunisian Constitution is more precise in this regard as it requires the president to appoint «the candidate of the political party or electoral coalition that has obtained the largest number of seats in the Assembly of People's Representatives to form the Government» (Art. 89(2)).

In any case, both the prime minister and head of government would only have subsidiary powers compared to the president's exorbitant powers. The Constitution now provides that either the prime minister or head of government «appoints civilian representatives in the State that do not fall within the power of appointment of the President of the Republic or those delegated to him» (Art. 112, paras. 1, 6). However, strategic appointments still fall within the president's powers. As the prime minister or head of government, the President of the Republic retains the power to dismiss him *ad nutum*, including when he is removed from office by an opposing parliamentary majority (Art. 91, paras. 1, 5).

21. Khalfa Mameri, *Le Premier ministre en Algérie*, Alger, ENAL-OPU, 1984, 159 p.

22. Myriam Ait-Aoudia, *op. cit.*, pp. 139-140.

The government's accountability to Parliament, which has historically been very limited, was extended through a motion of censure in case of an interpellation (Art. 161, para. 1) which could overthrow the government. Nonetheless, this motion would still leave the president in place, despite being the true head of the executive under his exorbitant powers. There is no legal mechanism for removing the president from office, whether that is for political reasons or criminal charges. In this context, General Rachid Benyelles' assessment of the 1988 constitutional amendment remains relevant today:

«For the «reformers» who initiated this constitutional revision, the goal was to preserve the President's leonine powers, while relieving him of the daily worries that the Executive would have to face on the front lines, in a very difficult political and socio-economic context»²³

The army as the only real counter-power against the president in the new constitution

The constitutional amendment retains most of the president's exorbitant powers. As in 1976, he alone initiates the constitutional amendments (Art. 219, para. 1). This monopoly over drafting the fundamental text alone is sufficient to depict the authoritarian nature of the Algerian Constitution and characterise it as the most authoritarian constitution in the Mediterranean. Whereas everywhere else in the region, constitutional changes are under the prerogative of both the Parliament and the presidency like in Tunisia, or the Parliament alone as in Turkey, or is even shared directly with the people as is the case in Croatia. Similarly to 1976, the Algerian president initiated the referendum alone (art. 8, para. 4 and 91, para. 1, 9), which could be described as a Caesarist plebiscite. The lack of popular sovereignty proclaimed in the Algerian Constitution and demanded by the Hirak (articles 7 and 8, para. 1) is evident since the people cannot directly initiate a revision of the Constitution or a referendum.

As in 1976, the President of the Republic may legislate by ordinance during the parliamentary recess, without prior authorisation from Parliament (Art. 142). Similarly, he may veto laws adopted by Parliament (Art. 149). The president may also dissolve the lower house of Parliament at any time (Sec. 151). As in 1976, the president has autonomous regulatory power (Art. 91 (1), (6) and Art. 141 (1)). As in 1963 and 1976, the president is responsible for national defense and foreign affairs (Art. 91, paras. 1, 1, and 3). Similarly, the president appoints walis and generals (Art. 92 (1), (2), and (10)) and since 2020, the president appoints all the members of the National Independent Electoral Commission, including its president (Art. 201 (1)). Similarly to the 1996 Constitution, the president appoints one-third of the upper house of Parliament, the National Council (Art. 121, para. 3). All of this power comes without any mechanisms to remove the president from office based on political or criminal responsibility, a fortiori a recall. The only potential root for impeaching the president would be a charge for High Treason (art. 183) introduced in 1996. However, this is inapplicable in the absence of an organic law. Moreover, the Constitution does not provide for the removal of the president found guilty of this crime.

Although the amended constitution provides a framework for the proclamation of a state of siege, a state of emergency, and a state of exception, within specific time limits (Articles 97 and 98), it does not punish the president for abusing such proclamations. The Constitutional Council, now named the Constitutional Court, facilitates the modalities of referral to control the constitutionality of the president's acts (Art. 190, para. 3, 193, para. 2 and 195, para. 1) unless the president puts the blame on the government as recognized by the Supreme Court (Art. 190, para. 3, 193, para. 2 and 195, para. 1)²⁴.

23. Rachid Benyelles, Dans les arcanes du pouvoir. Mémoires (1962-1999), Alger, Barzakh, 2017, p. 229.

24. Supreme Court, Administrative Chamber and Private Law Chamber combined, January 20, 1967, RASJEP, 1972, n ° 2, pp. 507-514.

Indeed, one-third of the Constitutional Court members are still appointed by the President of the Republic, including its head (Art. 186, para. 1, indent 1). At the same time, the Supreme Court and the State Council each elect one member among their members (Art. 186, para. 1, indent 2), even though it is the President of the Republic who appoints the presidents of these two courts (Art. 92, para. 1, 4 and 5). This being said, the recognition of the state of impediment due to serious illness of the president no longer requires unanimity of the members of the Court, but a vote of three-quarters of its members (Art. 94, para. 1). One-third of its members appointed by the president constitute a blocking minority. This is sufficient to prevent the initiation of such proceedings. As for the judiciary, if the president is no longer the protector of its independence, he still presides over the Supreme Council of the Judiciary (Art. 180, para. 2) and may optionally entrust his presidency to the first president of the Supreme Court, whom he appoints.

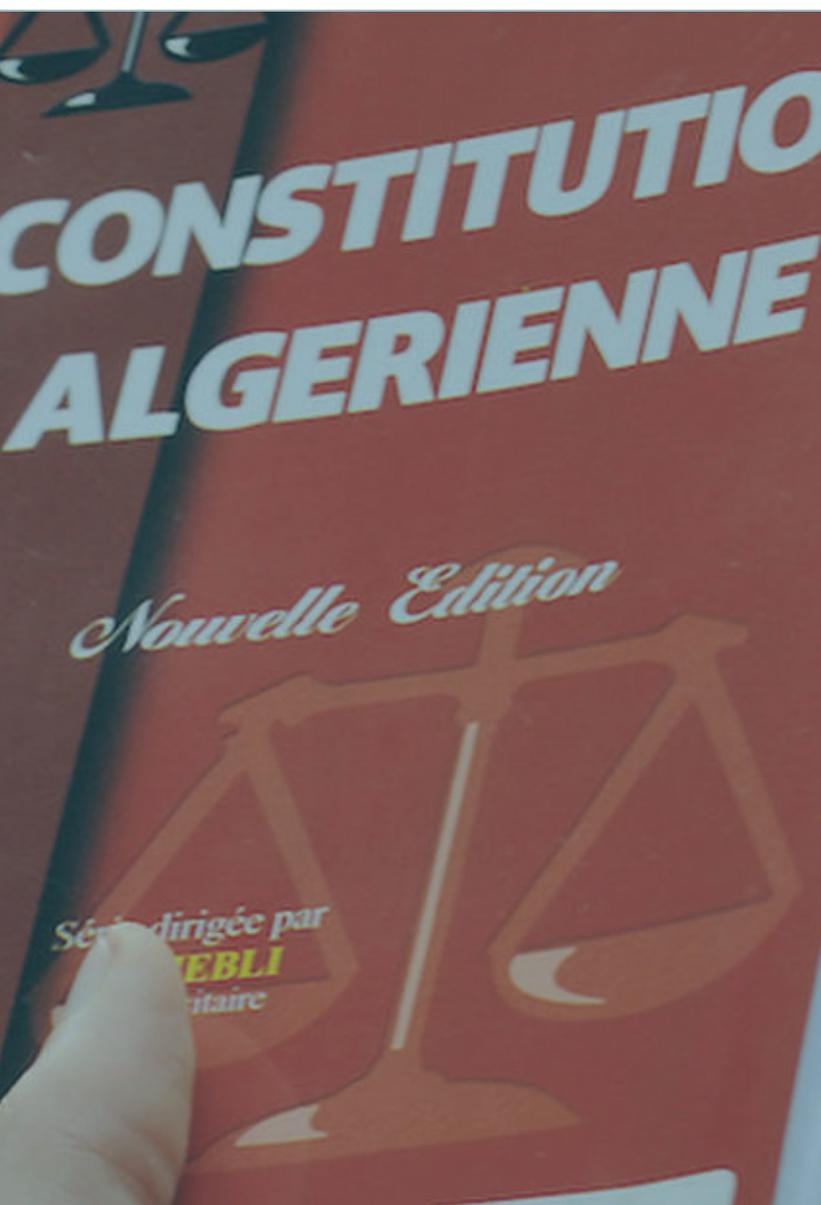
Conclusion

The Algerian Constitution, as revised in 2020, therefore, does not constitute a parliamentary system. Since the Head of the Executive, who is the President of the Republic in Algeria and not the prime minister or the head of government, is not accountable to Parliament and his actions are not subject to ministerial countersignature. It does not either make up a presidential political regime (referred to by President Wilson as a congressional regime). Since in the United States, only Congress and the state legislatures initiate the revision of the Constitution. The U.S. president cannot dissolve any chamber of Congress or appoint one-third of the Senate members. The Senate oversees the appointments of the U.S. president, while Congress can dismiss him by impeachment procedure. The Algerian constitution makes up an ultra-presidential, «unconstitutional²⁵» regime, marked by a concentration of powers in favor of the President of the Republic inherited from the 1976 constitution.

Nevertheless, while in 1976, the formal state president was also the real head of the army. The events that took place in 2019 have shown that a civilian president (despite being initially chosen by the army) could later escape the army's control using the exorbitant powers granted to him by the constitution. The constitutional amendment of 2020, while confirming Algeria's ultra-presidency, nevertheless introduced a counter-power to the president by constitutionalising the political role of the army. The new text entrusts the army with the mission of defending «the vital and strategic interests of the country following the constitutional provisions» (art. 30, para. 4).

The authoritarian process used for the constitutional amendment of December 30, 2020 - a process that came from the top, i.e., a presidential initiative, and not from the bottom, i.e., a Constituent Assembly - thus largely predetermined the authoritarian content of this revision. During the parliamentary debates of the National Constituent Assembly of 1962-1963, the deputy, Arezki Bouzida, stated, «this Constitution [that of the Majestic Cinema of 1963] does not create a strong power; it creates an exorbitant power». He added that «an Executive possessing these qualities does not exist in any Arab or African Constitution [1].» This quote still applies today.

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



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