

## *Constitutions of the Countries of the World*

### MOROCCO

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#### **I. Origins and Historical Development of the Constitution**

Since its independence in 1956, Morocco has had six constitutions, promulgated in 1962, 1970, 1972, 1992, 1996, and 2011. It also has seen constitutional amendments and revisions, in 1972, 1992 and 1996, which accompanied political and social change. Even though Morocco evolved progressively from an authoritarian to a more democratic state, its constitutional history has not always been of a progressive nature. To the contrary, it has experienced some regressions and contradictions, due to the style of the monarch in power, on the one hand, and the domestic and international political context, on the other. This historical overview will focus on the evolution of Moroccan constitutions in relation to the domestic and international political interests in which they have emerged, in order to better understand the issues at stake in the present 2011 Constitution.

##### **A. A brief constitutional history**

Following independence, after the short period of the reign of Mohamed V, King Hassan II enacted the first Moroccan constitution in 1962,<sup>1</sup> which laid the ground for the foundation of the independent state. His reign is known for the building of a ‘constitutional monarchy of divine right’; a reign during which, as pointed out by one historian, the terms ‘constitution’ and Islam became interchangeable,<sup>2</sup> and a reign which was defined by the centrality of monarchical power. The first Constitution of 1962

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<sup>1</sup> We are talking here about the post-colonial state. Historical studies of Morocco demonstrated that a draft constitution was submitted by Ulamas (a body of Muslim scholars) to the Sultan Abdel Hazif in 1908. See Idriss Lakrini, ‘Incremental Constitutional Reform in Morocco : An Approach to The 2011 Constitution’, (IeMED, 2012), available at <http://www.iemed.org/publicacions/historic-de-publicacions/monografies/sumaris-fotos-monografies/constitutional-reform-morocco-lakrini-idriss.pdf>

<sup>2</sup> Daniel Rivet, *Histoire du Maroc* (Fayard, Paris, 2012), p. 362.

established the creation of a government and a parliament. It affirmed Morocco as an African sovereign Islamic state, and a social and democratic constitutional monarchy with Arabic as its official language. It also declared Morocco to be part of the Greater Maghreb and that its objective was to realize African unity (which objective was later negated after Morocco left the Organization of African Unity (OAU) in 1984). The document essentially made the King the guarantor of the Constitution and of Islam, the guarantor of national independence and territorial sovereignty, the commander of the believers (a religious status over Muslims that is currently used only in Morocco), the supreme chief of the armed forces, and the president of the Council of Ministers (with the right to appoint the Prime Minister): all these functions are still relevant today, except the last one. This same Constitution introduced the principle of the sacredness of the King, on the one hand, and gave the right of initiative to the Prime Minister and Parliament, on the other<sup>3</sup>: in other words, both a symbolic and a political power.

The first legislative elections were organized in 1963. The campaign featured a strong contest between the conservative right-wing independence party and the progressive left-wing socialist party, among others. Two years later, no robust majority had arisen and the government was not constituted, which led to many chaotic situations such as the violent protest seen in several cities on 23 March 1965.<sup>4</sup> Subsequently, Hassan II proclaimed a state of exception and assumed full legislative and executive power. After several years of crisis, a new constitution was approved in 1970, but it only restored a limited parliamentary K2government by removing the bicameral system in favor of a single chamber and by granting the King the right of initiative with regard to constitutional amendments.

From the 1970s through the early 1990s, Morocco experienced an authoritarian regime challenged both by parties on the left and by Islamist movements. The monarchy was also threatened by the military which attempted two *coups d'Etat* in 1971 and 1972. The

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<sup>3</sup> See the full Constitution (in French) at <http://mjp.univ-perp.fr/constit/ma1962.htm>.

<sup>4</sup> Mohammed Kharchich, « *L'expérience parlementaire (1963-1965) et la transition politique au Maroc* » Revista de Historia Actual, Vol. 2, Núm. 2 (2004), pp. 93-99, available at <http://historia-actual.org/Publicaciones/index.php/rha/article/viewFile/349/743>.

causes of disagreement included the King's harsh style of rule as well as the economic model of the state (capitalist versus socialist), among other things. Morocco was at that time a country characterized by poverty, lack of education, human rights abuses, a corrupt political system, and ineffective political parties. Building a modern post-colonial nation-state in the context of the Cold War, while assuring the continuity of the *Makhzen* (the governing monarchical institution: the King and his inner circle)<sup>5</sup>, was a complicated process that led King Hassan II to adopt constitutional measures to ensure protection of the regime and the state's security. The measures did not necessarily keep the democratic system from developing and the political parties from participating in decisions. For example, the 1972 constitutional amendments had already begun to give a more prominent democratic character to the Constitution by placing further powers within the Council of Ministers, such as the declaration of war, the determination of the state of siege, or the ability to seek votes of confidence from the House of Representatives. Moreover, the Green March<sup>6</sup> toward the Spanish Sahara organized by the King in 1975 brought about a consensus between the political parties around the cause of territorial integrity, which helped to pacify the relations between them and the monarchy and led them to pursue participation rather than systematic opposition.

The early 1990s saw many changes in the global system that led to domestic reforms. Indeed, the end of the Cold War and the spread of the liberal democracy model and its promotion by international donors were two of the most critical determinants. Within Morocco, there was a growing demand for human rights protection and political participation. These new pressures were the origin of two significant constitutional amendments in 1992 and 1996 that introduced new principles and rules, such as an

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<sup>5</sup> To learn more about this, see Mohammed Daadaoui, 'The Makhzen and State Formation in Morocco', in: *Moroccan Monarchy and the Islamist Challenge* (Palgrave Macmillan, New York, 2011), pp 41-70, available at [https://link.springer.com/chapter/10.1057%2F9780230120068\\_3#citeas](https://link.springer.com/chapter/10.1057%2F9780230120068_3#citeas).

<sup>6</sup> The Green March was a peaceful march organized on the initiative of the late King Hassan II on 6 November 1975, at the time of the decolonization of the Spanish Sahara. Morocco has claimed sovereignty over this territory since its independence in 1956. The Green March gathered 350,000 civilians surrounded by 20,000 soldiers, all heading towards the Spanish Sahara with a flag and each with a Koran in their hand. Faced with this massive mobilization, Spain ratified, with Morocco and Mauritania, the 'Madrid Agreements', which provided for the transfer of the colony's sovereignty to the two independent states. At the same time, the Polisario Front movement claimed the independence of this territory, which led to the opening of a United Nations mediation, which is still ongoing.

increase in the government's power along with the ability of Parliament to challenge the government's decisions. Moreover, this era saw the consolidation of the liberal dimension of the economic model. These post-Cold War amendments also enhanced administrative decentralization through the 'policy of regionalization', which gave the regions more power to manage local issues. Regionalization naturally led to more division in power-sharing and propagated problems between the center and the periphery that are ongoing to this day. More generally, the 1992 and 1996 amendments introduced an increase in democratic principles and affirmed respect for human rights. However, these amendments did not lead to significant changes in the system and nor did they reduce the *Makhzen's* importance. To the contrary, the King's powers were extended through the right to determine the constitutionality of laws. Until 2011, there were no further amendments to the Constitution.

When the new monarch, Mohammed VI, came to power in 1999, he initiated a new open policy dedicated to ensuring democratic transition. One of his first acts was to release or reduce the sentences of thousands of political prisoners and establish a truth commission called the 'Equity and Reconciliation Commission', which recognized and sought to repair the human rights abuses that occurred during the 'years of lead'<sup>7</sup> of Hassan II. Mohammed VI assumed a unique ruling style as he sought to maintain the legitimacy of his throne and to differentiate himself from his predecessor. Described (in the local press) as the King of the poor, the defender of women's rights, the protector of the Moroccan community abroad as well as the guarantor of a moderate Islam, among other roles, Mohammed VI has been particularly dynamic in the socio-economic field. He introduced several changes without resorting to constitutional amendments, such as the revision made to the religious Family Code aimed at increasing gender equality and recognition of the Berber language as an official language alongside Arabic. Despite these reforms, many observers among Morocco's civil society considered these changes

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<sup>7</sup> The 'lead years' correspond to part of Hassan II's reign, from 1975 to 1999, during which the authoritarian dimension of power reached its peak, expressed through strong repression against political opponents and democratic left-wing movements.

to be a political rather than a democratic transition,<sup>8</sup> meaning that the landscape that encompasses the elite and other dynamic governmental structures has changed within a strengthened regime that consolidates more power.

## B. The new Moroccan constitution making-process

The context of regional revolutionary upheavals in 2011 was an opportunity for Moroccan protesters representing a myriad of political affiliations (Islamists, secularists, populists, liberals, and so on) to claim their demands through a movement called the February 20 Movement. They demanded greater social justice, increased power for the government and elected parliamentary representatives, more human rights protection, economic equality, and less corruption. Thanks to the influence of social media, the February 20 Movement developed an extensive network of supporters around the world.<sup>9</sup> Its actions played a crucial role in bringing about a constitutional amendment that would finally increase the power of the government, the Parliament, and the judiciary.

For several months, protestors challenged the dominant institutions by using various means (newspapers, social media, sittings, boycotts, artistic and cultural actions, and so on) to voice their demands for democracy and economic development, while the state tried clumsily to limit the use of violent repression. There were several prosecutions and arrests, such as the arrest of one of the spokesmen of the February 20 Movement, the rapper Mouad Belghouat, aka El Haqed,<sup>10</sup> and many activists and protestors were wounded during altercations with the police. However, with a view to the regional context, the monarchy chose to anticipate the possible violent consequences of the upheaval by putting a project for a new constitution to a referendum, paving the way

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<sup>8</sup> Abdalla Saaf, « *L'expérience marocaine de transition politique* », IEMed Institut Européen de la Méditerranée, 2009; Mohamed Tozy, *Monarchie et islam politique au Maroc* (Presses de Sciences Po, Paris, 1999); Jean-Noël Ferrie et Baudouin Dupret, « *La nouvelle architecture constitutionnelle et les trois désamorçages de la vie politique marocaine* », Confluences Méditerranée, 2011, vol. 78, n° 3, p. 25.

<sup>9</sup> Lennie Brouwer, Edien Bartels, 'Arab Spring in Morocco: Social media and the 20 February Movement', Afrika Focus, Vol. 27, n°2, 2014.

<sup>10</sup> 'El Haqed, rappeur 20 févrieriste « arrêté pour ses idées politiques »', Yabiladi.com, 14/09/2011, available at <https://www.yabiladi.com/articles/details/6892/haged-rappeur-fevrieriste-arrete-pour.html>.

towards a new identity and political change. Indeed, the general response to the protest was also far less repressive than those experienced during the ‘years of lead’ under the reign of Hassan II.

The drafting of the new constitutional text was entrusted to an advisory committee composed of seventeen members. The date of the referendum was set for 1 July 2011. Most political parties close to the *Makhzen* campaigned for a ‘yes’ vote, as well as the Islamist opposition through the Justice and Development Party. However the leftist parties, grouped in a broad coalition called the ‘Democratic Left Alliance’, called for a boycott of the referendum: a strategy that was less useful than a negative vote. The main reason for this opposition was that this constitution was discussed behind closed doors over a period of a few weeks, whereas in other countries like Tunisia, the referendum project was publicly debated for several months. Also, the outcomes of this discussion did not satisfy the demands of a parliamentary monarchy. So, even though the opposition parties had access to the official media (which was new), they were not able to raise those issues and call for a boycott. As for the *Makhzen*, they resorted to religious leverage to campaign for a favorable vote by mobilizing imams from mosques.<sup>11</sup> Thus the Constitution was adopted with 97.5 percent of the vote, with a participation rate of 75 percent of citizens able to vote.

The new Constitution was presented by the state as unique for being a ‘suitable tool initiating the Moroccan alternative toward democracy’ and for being a ‘constitution made by the Moroccans’.<sup>12</sup> This statement is not entirely wrong but has to be nuanced by further contextualizing the way in which this constitution came into being. As shown above, constitutional change is not novel for Morocco. However, for the first time in modern Moroccan history this constitutional amendment came from a robust, popular, and transnational demand during the Arab Spring. Before that, the monarchy had always maintained the initiative of constitutional reforms, following a top-down approach.

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<sup>11</sup> Bendourou Omar, « *La nouvelle Constitution marocaine du 29 juillet 2011* », *Revue française de droit constitutionnel*, 2012/3 (n° 91), pp. 511-535.

<sup>12</sup> « Constitution », Maroc.ma <http://www.maroc.ma/en/content/constitution>.

The Moroccan protests that led to constitutional change were not only a consequence of the Tunisian ‘Jasmine Revolution’, but also a result of the historical confrontation between the people and the state over the democratic transition of the country, and also as a logical continuation of the two ‘political defuses’ engaged under the reign of Hassan II,<sup>13</sup> as well as Mohammed VI’s ‘open up’ policy. Although the protesters came from different backgrounds and held different grievances, that is why they stood together as a whole civil society with a common goal: to gain more political power-sharing with the people to allow them to participate in social and economic developments. Even though there were many socialists, secularists, and progressives among the movement, when the Islamist party won the first post-protest election democratically, there was no violent protest against this outcome, which lends a certain legitimacy to the democratic process.

Many observers (scholars, policymakers, and others) consider the 2011 Constitution to be proof of Moroccan exceptionality and even uniqueness, especially in comparison to the security situation experienced by the other North African countries, due to the fact that the state has managed to avoid the violent outcomes that have characterized the rest of the region. Morocco has even been presented as a model that other Islamic monarchical regimes could follow or a model of democratic transition for the entire region. However, other observers consider this Constitution to be one of smoke and mirrors, hiding more change in the continuity than continuity in the change. Driss Maghraoui, for example, points out that ‘the official Moroccan response to the demands of the Arab Spring merely highlighted once again the Royal Palace’s hegemonic control of the political process’<sup>14</sup>: while civil society was consulted over the development of the first draft, the proposal itself and the final version came from the *Makhzen*. In a more nuanced way, Omar Bendourou considers that ‘while the King has responded to several

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<sup>13</sup> The first was the alternation policy in 1991 and the second was the social reforms in 1999. See Ferrie and Dupret (n 8).

<sup>14</sup> Driss Maghraoui, ‘Constitutional reforms in Morocco: between consensus and subaltern politics’, *Journal of North African Studies*, 2011, 16:4, pp. 679-699.

demands from human rights associations and opposition parties by proclaiming an important list of rights and freedoms, questions remain as to their effectiveness'.<sup>15</sup>

Throughout this report, I will argue that Morocco is neither an exception nor a stagnating state. The 2011 Constitution has indeed strengthened the executive power of the monarchy, drawing all the attention to this dimension, but other fundamental changes, such as the redefinition of national identity, as well as the reconstruction of the state's role in the international system, are worthy of analysis because they are indirectly and positively influencing the process towards democratic change. Nevertheless, many of the principles laid down are not sufficiently detailed to ensure the effective application of democratic standards and the protection of human rights and individual freedoms as universally recognized.

## **II. Fundamental Principles of the Constitution**

The new Constitution resulting from the 2011 referendum contains 180 articles compared to the 108 found in the previous 1996 text.<sup>16</sup> The preamble has also been integrated as a full component of this text and sets out the three fundamental objectives for Morocco. The first concerns the nature of the state; this is the consolidation of the construction of a democratic rule of law. The second involves the nature of national identity; this is about preserving territorial integrity, state religion, and cultural and linguistic diversity. The third relates to foreign policy; this is about strengthening Morocco's place within the international system as well as its relations with the Maghreb and the rest of Africa. This section will deal with the first two aspects, while the third, Morocco's international relations, will be the subject of a dedicated section at the end of this study.

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<sup>15</sup> Bendourou (n 11).

<sup>16</sup> According to Bendourou, [t]he length of the text is to be attributed to an abundance of details unusual to modern constitutional texts and sometimes detrimental to the coherence and relevance of the formulations, which hinders the comprehension of certain principles'. Bendourou (n 11). .



## A. The monarch's role and centrality

First, in regard to the nature of the state, Morocco presents itself in the 2011 Constitution, for the first time in its history, as a parliamentary monarchy, thus expressing a significant ambition. Article 1 of Title I reveals that 'Morocco shall be a constitutional, democratic, parliamentary and social Monarchy'. Morocco aims to tend towards a state of law, marked by normativism and constitutionalism.<sup>17</sup> Since the 1992 Constitution, the Kingdom has had the features of a parliamentary system. As will be demonstrated in the section devoted to the separation of powers, the 2011 Constitution reinforces the organic specialization of the executive, the legislative, and the judicial branches. It also introduces a monist transition from a parliamentary system and breaks with the principle of the unity of power. However, Morocco is undoubtedly not a parliamentary monarchy such as those in Europe, insofar as the King, as the Articles devoted to him demonstrate, remains at the top of the executive, legislative, and judicial apparatus and above all, beyond the laws.

The centrality of the monarch's power remains unchanged, since he remains constitutionally and symbolically the head of state. Although the person of the King is no longer 'sacred', as in previous constitutions, the monarchy is a potent political force that seeks to maintain its symbolic legitimacy as well as its decision-making authority. Driss Maghraoui has called this process 'the Makhzenian evolutionary logic', with a communication strategy that rests on 'non-debatable and unchallenged rhetoric of maintenance and the maintenance of political interest rather than by more openness to constructive criticism, freedom of thought and actual consensus-seeking'.<sup>18</sup> This statement is not entirely wrong, but it has to be nuanced and made more precise. The fundamental features of the new constitutional text remain the same as in the last Constitution: the monarchical regime, the principle of separation of power, Islam as the

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<sup>17</sup> David Melloni, « La Constitution marocaine de 2011 : une mutation des ordres politique et juridique marocains », *Pouvoirs* n°145 - Le Maroc - avril 2013, pp. 5-15.

<sup>18</sup> Maghraoui (n 14), pp. 681-682.

official religion, and the strengthening of the democratic path form the main principles, with some moderate modifications that will be discussed in this section.

#### B. A 'Golden Mean' Islam as a religious identity

First, the preamble to the Constitution announces that Morocco will give primacy to international law while respecting its unchanging national identity, which is primarily characterized by the Muslim religion. According to the Constitution, 'Islam shall be the religion of the State which guarantees to all the freedom of worship'; '[t]he preeminence assigned to the Muslim religion within the national reference framework goes hand in hand in with the commitment of the Moroccan people to the values of openness, moderation, tolerance and dialogue for the mutual comprehension among all cultures and civilizations of the world.' Since the early 2000s, however, Morocco's official Islam has been redefined by the monarchy and clergy as a 'golden mean Islam' (*Islam du juste milieu*; *Al Wasatiya*). Once defined through the *Malekite* rite and *Ash'arite* doctrine, today it also includes the Sufi dimension. Sufis have been present in Morocco through transnational brotherhood networks since the middle of the 19th century. With the rise of security threats linked to religious extremism in the region, the monarchy decided to make Sufism a lever for the 'dissemination of national and regional spiritual security'. At the symbolic level, Sufism allows the official Moroccan Islam better to claim its tolerant and open dimension because it is perceived as being peaceful and tolerant. However, while Morocco can be considered one of the most open and tolerant Muslim countries in the region, freedom of belief is not allowed. Indeed, an attack on the Muslim identity as defined by the state can be considered as an offense punishable by imprisonment. Thus the Constitution provides that 'the provisions relating to the Muslim religion, the monarchic form of the State, the democratic choice of the Nation and the advances achieved in the field of fundamental freedoms and rights which are enshrined in this Constitution shall not be the object of any constitutional amendment.' The choice to give primacy to the Constitution and international law while underlining the Kingdom's attachment to the Muslim religion constitutes a contradiction, particularly concerning freedom of belief, as we shall see in the section dedicated to the protection of

fundamental freedoms. It is the judges who are responsible for ensuring compliance of domestic law with the Constitution and international treaties ratified by Morocco while specifying the place of Islam in this legal framework.

There has been a significant shift concerning another dimension of the state's identity, now defined as culturally pluralist, with various influences that will be placed in context further below. First, while Arabic remains the official language of the state, the Constitution now concedes that 'Amazigh shall also be an official language of the State, as a common heritage of all Moroccans without exception' (Article 3). Moreover, while the Moroccan state used to recognize Arab-Muslim culture only, the 2011 Constitution provides that '[i]ts unity, forged by the confluence of its Arab-Islamic, Amazigh, and Saharo-Hassanian components, has been nourished and enriched by its African, Andalusian, Hebrew and Mediterranean elements.' The recognition of the pluralistic nature of national identity constitutes a significant change, due to the activism of Berber civil society and to the new Moroccan diplomacy strongly oriented towards Africa and the consolidation of the role of identity as a geo-civilizational bridge.

### **III. Fundamental Rights Protection**

#### **A. Fundamental rights improvements**

The 2011 Constitution devotes twenty-two Articles to human rights and fundamental freedoms (Articles 19-40), which is far more than in the earlier Constitutions. It also devotes several passages to the project of strengthening good democratic governance. The Constitution seeks to align itself with the international conventions signed by Morocco in this area, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. It also claims many values that are part of Morocco's identity or aspirations as a state. These are equal opportunities, solidarity, freedom, social justice, dignity, and security. There is also more determination in this new constitutional text to combat discrimination in all its forms: racial, religious, social,

gender, and disability discrimination. Judges are responsible for ensuring that the principles enshrined in the international conventions signed by the state conform to the Moroccan legal corpus. The desire to upgrade to international standards has become all the more critical as the Kingdom has included in the preamble to the 2011 Constitution a commitment to

accord to the duly ratified international conventions within the framework of the provisions of the Constitution and the laws of the Kingdom and in respect of the unalterable national identity the primacy over the domestic law of the country once they have been published, and to harmonize the relevant provisions of the national legislation accordingly.

This is how this Constitution expands the number of rights and freedoms. Some were already in the earlier constitutions: '[t]he freedom of thought, opinion and expression' (Article 25), '[t]he freedom of creation, publication and exhibition in the literary and artistic fields and in scientific and technological research' (Article 25), and '[t]he freedom of the press' (Article 28). Other rights are new. These are the right to life (Article 20), the right to security and protection of property (Article 21), and the right to privacy and inviolability of the home (Article 24). There are also economic rights that have been consolidated, such as the right to property, the freedom of enterprise, and free competition (Article 35). Moreover, some human rights violations have been more severely criminalized: for example, torture now 'constitutes a crime punishable by statute' (Article 22). At last, other rights have been clarified or strengthened. For example, the state is henceforth responsible for gender equity since it 'shall strive to realize the parity between men and women' (Article 19).

Generally, regarding the defense of these rights and the fight against discrimination, the 2011 Constitution seems to be more decisive, without however leading to significant changes in the law. Article 23, for example, provides that '[a]ny incitement to racism, hatred, and violence shall be prohibited.' More generally, fundamental freedoms are supported by the state's responsibility '[t]o ban and combat any discrimination against anybody, on the grounds of sex, color, beliefs, culture, social or regional origin, language, handicap or any personal condition whatsoever' (in the preamble). However, to date, no

corpus of anti-racist laws has been adopted, despite the draft laws tabled by political parties. Similarly, Article 22 condemns torture, which ‘shall constitute a crime punishable by statute’. At the economic level, the Constitution ‘guarantee[s] equality of opportunity for all and a special protection for the disadvantaged social groups’ (Article 35). At the social level, the Constitution provides for ‘the prevention of the vulnerability of certain groups of women, mothers, children and old people’ (Article 34), and provides ‘assistance to [young people] who have difficulties with coping in school or in social or professional life’ (Article 33).

#### B. Limits and challenges in interpretation, translation, and application

All of these rights and freedoms do not necessarily translate into substantial laws and obligations. For example, the right to health, enshrined in Article 31, gives rise to social insurance for all citizens, but the conditions of access to care and reimbursement remain unequal. For example, while the Constitution recognizes the three fundamental principles of criminal procedure, namely security (Article 117), the presumption of innocence (Article 119), and the right to a fair trial (Article 120), not all citizens are treated fairly before the courts or are genuinely protected by the police.

Moreover, there are sometimes contradictions between domestic values and international norms that limit improvement. For example, expressing an ‘attachment to human rights as they are universally recognized’ (preamble) and defending the integrity of national identity do not always go hand in hand, especially regarding freedom of belief. The Consultative Commission for the revision of the Constitution in 2011 initially proposed freedom of conscience and religion, but this was not included in the final version. The only religious freedom granted is freedom of worship within the framework of the Muslim religion (Article 3). The ‘preeminence assigned to the Muslim religion’ (preamble) and the denial of religious freedom constitute an essential limitation to liberty and also impose many barriers to the application of human rights in Morocco. For example, how can the inviolability of the home be combined with the prohibition of

unmarried intercourse? How can the pursuit of gender equality be compatible with the Islamic rule of inheritance that favors men?

The issue of gender equality is one of the topical issues that best illustrate this contradiction. The 2011 Constitution enshrines a more significant political and social role for women through the announcement of gender equality, but also through inclusive writing. The term 'female citizen' (*citoyenne, Mouwatina*) is used nineteen times (especially in Title II on Fundamental Rights and Freedoms), whereas it was absent from earlier constitutions. Article 6 states that '[t]he public authorities shall strive to create conditions which foster the general effectiveness of the liberty and equality of citizens, as well as their participation in the political, economic, cultural and social life.' Article 19 more precisely reiterates the Kingdom's commitment to equality since it provides that '[m]an and woman shall enjoy, in equal terms and conditions, the civil, political, economic, social, cultural and environmental rights and freedoms', thus broadening, in comparison with earlier constitutions, the fields of this equality.

On the one hand, these new distinctions in the 2011 Constitution are part of a context of a gradual integration of gender equality into Moroccan laws and political identity that began in the aftermath of the Cold War. When Mohammed VI came to power in 1999, for the first time in the history of this dynasty the King has married only one wife. She is shown in public, bears the title of Royal Highness, and embodies the role of First Lady, as well as an image of a modern and unveiled woman. Morocco has also signed numerous international conventions and treaties on this subject, such as the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW). To introduce more gender equality into the Islamic clergy, in 2003 the King introduced the brand new function of '*Mourchidates*', or female imams, a function that does not exist in any other Muslim country. In 2004, the status of women also underwent a significant change in the laws, thanks to the reform of the *Moudawana* (the Family Code, inspired by the Malekite religious texts). This reform was the result of feminist associative activism coupled with the reformist tendency of the monarch. As the King stated in his 2001 speech when he announced the establishment of the advisory

committee to review the *Moudawana*, the goal is to free women ‘from all forms of injustice they suffer’. For the first time, a religious code had been ‘de-sacralized’ by its revision, in the name of equality, paving the way for a series of promising reforms. The new code also introduced a series of adjustments offering more freedoms and protections to women.

Nonetheless, the laws that must follow from the 2011 Constitution do not allow a real application of the principles enacted. The new 2004 *Moudawana*, which already was not satisfying all the demands of the activists, either in its content or in the way it was applied, has not been amended post-2011. Single mothers, abused wives, rape victims, lesbians, and many others women have been harassed or under-protected by the law. Some rape victims have killed themselves because otherwise they would have been forced to marry their attacker. After many years of feminist activism, the first-ever Anti-Violence Against Women Bill was adopted in 2018, without however satisfying the demands of the protestors, who consider that its text is imprecise and does not meet international standards, and that it does not enjoy strong state support in its implementation.<sup>19</sup> This shows that society—including the policymakers, the lawmakers, the *Ulemas*, and the judges—is not yet ready to embrace this equality.

The rights of Moroccans resident abroad also illustrate this legal gap between the Constitution and the laws. The 2011 Constitution allows Moroccans residing abroad to enjoy the full rights of citizenship, including the right to vote and to stand for election. They may ‘appear as election candidates in local, regional, and national election lists and constituencies’ (Article 17). The *Dahir* (royal decree) of 14 October 2011 provides in its Article 72 that the right to vote granted to Moroccans residing abroad can only be exercised by delegation, whereas direct voting should, in principle, constitute the rule.

Another example of a gap relates to freedom of association. Article 29 guarantees ‘the freedom of reunion, assembly, peaceful manifestation, association and membership

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<sup>19</sup> See the comments of Saïda Drissi, President of the Democratic Association of Women of Morocco, and Fouzia Assouli, Honorary President of the Federation of Women’s Rights League, in ‘*Le Maroc adopte une loi contre les violences faites aux femmes*’, La Croix, 15 February 2018.

in a trade union or political party'. In practice, however, the constitution of an association can be prevented. As one professor has pointed out,

the problem in Morocco is that the administration sometimes refuses to give the declaration receipt to the association's officials or even to receive the declaration. Sometimes, the administration imposes conditions not provided for by law to discourage those responsible from creating it or at least delay its constitution. The authorities act in this way in the case of Islamist or leftist associations or associations whose leaders are regarded by the authorities as politically suspect persons.<sup>20</sup>

The law allows denial of the right to associations that discriminate, or that undermine territorial integrity, the monarchical regime, or the Islamic religion. These restrictions on freedom of association, based on the authorities' interpretation of the law, also apply to political parties. In the same way that a radical Islamist party cannot see the light of day (as is the case of *Al Adl Wal Ihsane*, for example), a secular political party could also face the same prohibition. Article 7 provides that political parties 'may not seek to undermine the Muslim religion, the monarchy, constitutional principles, democratic foundations or the national unity and territorial integrity of the Kingdom'. All of these principles, which are subject to interpretation, are also regularly convened to limit freedom of the press.

To ensure the defense of human rights in this context, a National Human Rights Council has been created. Today, this institution constitutes a recognized and credible mediator between citizens who are victims of violations of rights and freedoms and the monarchy. Its work is all the more difficult as society is limited in its ability to claim its rights and participate in change. While the freedoms of assembly and demonstration are guaranteed by Article 7 of the 2011 Constitution, the authorities still have broad discretion to prohibit such gatherings.

#### **IV. Separation of Powers**

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<sup>20</sup> Omar Bendourou, « *Les droits de l'homme dans la constitution marocaine de 2011: débats autour de certains droits et libertés* », La Revue des droits de l'homme 6 | 2014.



## **A. The King's executive and symbolic powers**

The King is at the heart of the executive apparatus as the head of state, to the point that the local media designated Mohammed VI's regime as an 'executive monarchy'. He is simultaneously referee, sovereign, and actor. The King has strong normative power and at the same time has a form of jurisdictional immunity that places him above the law. Moreover, Article 42 of the Constitution states in regard to the King

Symbol of the unity of the Nation, Guarantor of the permanence and continuity of the State and Supreme Arbiter of its institutions, shall ensure the observance of the Constitution, the smooth functioning of its constitutional institutions, the protection of the democratic choice and the rights and freedoms of the citizen and of the communities, and the observance of the international obligations of the Kingdom.

In this capacity he chairs the Council of Ministers and exercises extensive prerogatives in strategic areas, such as foreign and religious affairs. In addition '[t]he King may, on His initiative and after consultation with the Head of Government, terminate the functions of one or several members of the Government' (Article 47). This strongly differentiates his powers from those of European parliamentary monarchies. This power was exercised, for example, following the Al Hoceima demonstrations in 2017. After expressing his dissatisfaction with the slow implementation of socio-economic projects in the Al Hoceima region, Mohammed VI abolished the annual leave of the ministers concerned, before dismissing a number of them. Although a large part of public opinion reacted positively to this decision, it nonetheless illustrates the supremacy of the monarch within the executive apparatus and confirms the notion that the governmental dualism asserted in the 2011 Constitution is not yet applied in practice.

The monarch also has a religious function as the 'Commander of Believers'. According to Article 41 '[t]he King shall exercise the religious prerogatives inherent in the institution of Commander of the Faithful which are conferred upon Him in an exclusive manner by the present Article by way of royal decrees'. This historical status gives the King a primarily symbolic hold which, in the Moroccan context, is more important than the territorial hold of politics. The King therefore also has legislative

power that could potentially compete with Parliament, insofar as Morocco is a Muslim state and the law derives in part from the Shari'a. Although this symbolic function is historical and was institutionalized in the first Constitution of 1962, it is for the first time the subject of a separate and specific Article. The political objective of consolidating the monarch's religious role is to combat religious extremism and to promote a 'moderate Islam', known as 'Moroccan Islam of the Golden Mean' (see Section II.B). The King is strengthened in his power over the *Ulemas* (religious legislators) and can, with even greater legitimacy, take measures to regulate Moroccan religious teaching and practices.

The principle of the sacredness of the King is no longer enshrined in the 2011 Constitution. However, this principle is replaced by the notion of inviolability and respect due to the King. Thus, for example, Article 64 states that

[n]o Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the performance of his official duties, except in cases where the opinions expressed call into question the monarchical system of the State, the Muslim religion or betray a lack of respect due to the King.

These red lines inherent in parliamentary immunity are important limits and may relate to different subjects, especially when it comes to the question of 'respect due to the King'. The King maintains a dominant position, all the more so as he 'may, after consulting the President of the Constitutional Court and after informing the Head of Government, the President of the House of Representatives and the President of the House of Counselors, dissolve both Houses of Parliament or either of them by royal decree'. Thus, even though the 2011 Constitution abolished some of the King's direct legislative powers, such as the possibility of resorting to legislative referendum, his political and symbolic powers over the legislature have been strengthened. If we adhere to the text and look beyond the religious functions, the status of the monarch in the Constitution is similar to that of some European monarchs and, as one scholar has pointed out, must be 'defined more in terms of authority than absolute power'.<sup>21</sup>

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<sup>21</sup> Melloni (n 17).

At the same time, the 2011 Constitution tends to make the law more sacred, to the detriment of the *Dahirs*. Thus, for the first time, Article 118 provides that '[e]very legal act of a regulatory or individual character which is taken in administrative matters shall be subject to review before the competent administrative courts', putting an end to the principle of jurisdictional immunity of the *Dahirs*, which had been the subject of a 1960 judgment of the Supreme Court (the *Ronda* judgment). Moreover, '[t]he King shall fulfill these missions through royal decrees by the powers which are expressly assigned to him by the present Constitution': these royal decrees, except for those related to his power, shall be countersigned by the Head of Government (Article 42). It should be noted, however, that in reality neither the Prime Minister nor a judge would dare question the legality of a *Dahir*, or even its usefulness. This change, therefore, remains symbolic at this stage, and legally initiates the prospect of future change.

#### B. The promising status of the Prime Minister

The 2011 Constitution establishes a prime ministerial system: 'The constitutional regime of Morocco shall be based on the separation, balance, and cooperation of powers, on citizens' democracy and participatory democracy, the principles of good governance and the correlation between responsibility and accountability' (Article 1). For the first time in Moroccan history the Prime Minister is not appointed by the King, but from the party that won the parliamentary elections, held every four years:

The King shall appoint the Head of Government from among the members of the political party which has come out on top in the elections to the House of Representatives and in light of the election results. On the proposal of the Head of Government, He shall appoint the members of the Government (Article 47).

Invested by the lower House of Parliament (Article 88), the Prime Minister now takes the title of Head of Government (Article 87), and has the unprecedented power to dissolve the House of Representatives (Article 104) (after, however, consulting the King, the President of the House, and the President of the Constitutional Court). The Prime Minister also chairs the Council of Government, a body that previously had no particular consistency, but which today has its own powers. Unlike the Council of Ministers

(Article 48), this Council meets without the presence of the monarch. For some observers, it even escapes any royal hold.<sup>22</sup> More generally, the power of the Prime Minister has increased.

### C. The growing prerogatives of Parliament

Parliament is responsible for exercising legislative power as well as ‘enact[ing] the statutes, control[ling] the action of the Government and evaluat[ing] the public policies’ (Article 70). While the status of parliamentarians has evolved, the 2011 Constitution allows Parliament to benefit from a significant strengthening of its powers through the extension of the field of law and international treaties that are subject to prior ratification by Parliament. This includes, for example, the area of foreign policy: if Parliament cannot decide on the ratification of an international treaty, it signs the authorization to grant budgetary appropriations and has a right of scrutiny and control over their use. Thus Article 55 provides that the King ‘shall sign and ratify treaties’, but that he ‘can submit any other treaty to Parliament before its ratification’. This new competence strengthens the power of Parliament, all the more so as the possibility for the executive to use the legislative referendum to circumvent Parliament has been removed in the 2011 Constitution.

More importantly, the Moroccan Constitution expressly ‘grants the parliamentary opposition a status which confers upon it the rights allowing the opposition to fulfill without difficulties its missions associated with parliamentary work and political life’ (Article 10), which is very unusual in light of Moroccan constitutional history but also in comparison with its neighboring countries. Article 10 strengthens the democratic system and has also had a positive impact on the monarchy’s power. The *Makhzen* protects a loyal parliamentary opposition (leftists, liberals, seculars, and so on) that could be helpful for fighting the Islamist opposition groups that emerged from the 2011 elections. Thus this parliamentary opposition, with the rest of Parliament, can monitor governmental work, through oral and written questions (Article 100) as well as through commissions of

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<sup>22</sup> Centre d’Etudes Internationales (dir.), *La constitution marocaine de 2011: analyses et commentaires*, (LGDJ, Paris, 2012).

inquiry (Article 67), and it also has the capacity to overthrow the government through the mechanism of motions of censure (Article 105).<sup>23</sup>

On the other hand, the House of Councilors, which represents trade unions and local authorities, has lost part of its capacity to participate in the legislative power by giving up the possibility of engaging the government's responsibility. Only the House of Representatives can adopt the legislative proposals submitted to it. For some observers, this reorganization weakens Moroccan bicameralism but facilitates the work of Parliament and makes it more useful, especially since many working methods have been rationalized. For example, Article 61 puts an end to the possibility for parliamentarians to change parties or groups during their term of office. Parliamentarians are also protected in their rights, within the limits of the red lines defined by the *Makhzen*. Thus Article 64 provides that

[n]o Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the performance of his official duties, except in cases where the opinions expressed call into question the monarchical system of the State, the Muslim religion or betray a lack of respect due to the King.

The Constitution thus ensures a slow but real transition to a parliamentary system. However, while the party that won the election is supposed to represent the majority and by extension popular opinion, the Constitution does not provide much detail on the electoral system, particularly concerning the voting system. Since 2002, the voting system has been one of proportional representation, while Morocco's partisan structure (multiple parties and the risk of disintegration) does not allow a stable majority to emerge. According to one scholar, 'by abandoning the most tried and tested techniques of rationalization of parliamentarism, the new Constitution further compromises the stability potential of the regime.'<sup>24</sup> Indeed, because of the plurality of political parties and the difficulty with forming coherent coalitions, no government could be established for nearly five months after the 2016 elections, leading to a political crisis bogged down by

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<sup>23</sup> See Abdelhamid Benkhatab, *Le parlement marocain: Régulation politique et incertitude transitionnelle* Revue Marocaine d'Administration Locale et de Développement, 2012, pp. 29-52, available at <halshs-00872965>.

<sup>24</sup> Melloni (n 17).

the fact that the Prime Minister had to come from the majority party and not from the majority coalition that won the elections. Furthermore, the King retains an absolute power over parliamentary activity, insofar as he can dissolve the two Houses of Parliament (Article 51) and has more critical normative prerogatives.

#### D. The semi-independence of the judiciary

The judiciary is independent of the legislative and executive powers. However, the monarch retains primacy over this power as the ‘guarantor’ of justice. He ‘chairs the High Council of the Judiciary’ (Article 56), ‘approves by royal decree the nominations for judges and prosecutors by the High Council of the Judiciary’ (Article 57) without the need for counter-signature, and ‘exercises the power to grant pardons’ (Article 57).

### V. Federalism/Decentralization

#### A. The regionalization process

The different regions that comprise Morocco are historically very different, both culturally and linguistically, and with regard to regional management by the *Makhzen*. The colonial experience, however, played a fundamental role in the institutionalization of regionalization as well as in the administration of the territories to give them a certain autonomy while ensuring their control by the central state. The General Resident of France in Morocco, Hubert Lyautey, created ‘political and administrative units’ from the cultural and geographical divisions of Morocco. He considered that these units responded ‘to the very structure of the Cherifian State, of such a complex nature, comprising populations of statutes, customs and even of such different races, to whom it would be a big mistake to impose a uniform and rigid regime’.<sup>25</sup> During this colonial period, regional councils were created. After independence, regional organization responded to the state’s need to ensure the efficiency of the *Makhzenian* power throughout the territory. The

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<sup>25</sup> Arthur Girault, Louis Milliot, *Principes de colonisation et de législation coloniale* (Librairie du Recueil Sirey, société anonyme, Paris, 1936), p. 281.

regions disappeared from the vocabulary and were replaced by provinces and prefectures, which gained the status of administrative, legal persons. Morocco was then divided into sixty-two provinces and thirteen prefectures.

The notion of the region reappeared in 1971 with the aim of developing the territories economically. A 'region' is defined as 'a set of provinces which, both geographically and economically and socially, maintain or are likely to maintain relations of such a nature as to stimulate their development and thereby justify overall development'.<sup>26</sup> Seven regions were thus created, six of which had access to the sea or ocean, to stimulate their development. However, this experience failed due to the lack of coherence between the different regions, which widened the gap between rich and poor areas. In 1997 a new division into sixteen regions was made, taking into account both cultural specificities and the objective of economic development. Some parts have therefore been named after the main tribal groups that lived there. Despite these efforts, this policy has not been able to respond to the socio-economic challenges faced by Morocco and to adapt to the changes that have affected the country (rural exodus, uneven growth, urbanization, and population growth).

In 2015 a new division, proposed by a Consultative Commission for Regionalization ('CCR') set up for this purpose, created twelve regions. This was the culmination of five years of work on a project launched in 2010 and described as 'advanced regionalization'. The objective of this project, launched by the King, was to introduce a new political culture based on consensus in the planning and management of territories. In his speech of 3 January 2010, the King declared that the CCR should 'strive to develop a Moroccan model of regionalization'. It had to 'preserve the unity of the State, the nation and the territory ... without falling into mimicry or the literal reproduction of foreign experiences'. This division would, therefore, take into account the existing administrative network, and the notion of 'proximity', defined by the CCR as 'a relational distance, the region being a place of identification and a framework for the

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<sup>26</sup> *Dahir* of 16 June 1971.

involvement of local actors where citizens share a minimum of common reference points and perceive, overall, such a regional space as relevant'.<sup>27</sup>

#### B. The 2011 Constitution and the 'Advanced Regionalization Project'

The 2011 Constitution, drawn up barely one year after the launch of the Advanced Regionalization Project, therefore reinforces this process. It stresses from the outset that '[t]he territorial organization of the Kingdom shall be decentralized, based on an advanced regionalization' (Article 1). It recognizes the regions, the prefectures, the provinces, and the municipalities as territorial communities of the Kingdom (Article 135), but confers on the region 'a preeminent role concerning the other territorial communities' (Article 143). It also consolidates the democratic and inclusive dimension of the Advanced Regionalization Project by conferring on the regions the status of 'legal entities under public law which manage their affairs democratically' (Article 135) which have 'their own competences, competences they share with the State and competences which may be delegated to them by the latter' (Article 140).

Among the measures taken to ensure the autonomy and democratic management of the regions are the creation of regional councils and the post of presidents of the regional councils, who are responsible for ordering expenditure and adopting decisions of the council. The role assigned to the presidents of the regional councils stems directly from a directive of the King, for whom it was necessary to 'confer on the presidents of the regional councils the power of execution and deliberation in place of the governors and the *walis*' (speech to the nation in 2011). Unlike the latter, the presidents of the regional councils will be elected and must represent the interests of citizens. The Constitution also reflects this change in Article 135, which provides that '[t]he Councils of the Regions and the Courts shall be elected by direct universal suffrage'.

Regarding citizen participation, the Constitution also provides in Article 139 that

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<sup>27</sup> See the CCR Website : <http://www.regionalisationavancee.ma/>. See also Abdeljalil Lokrif and Jean-Yves Moissoner, « *La politique de régionalisation avancée au Maroc : enjeux et état des lieux* », Maghreb - Machrek, 2014/3 (N° 221), pp. 111-126.



[p]articipatory mechanisms of dialogue and coordination shall be established by the Councils of the regions and the Councils of the other territorial communities to favor the involvement of citizens and of associations in the drafting and implementation of development programs. The citizens and associations may use the right of petition in order to request the inclusion of a matter falling within its competence in the agenda of the Council.

This provision responds to the CCR's recommendations to introduce a form of participatory democracy in the management of territories. The Constitution also acknowledges the concern to strengthen gender equity in representation and participation in regional development. The objective, also formulated by the monarch in 2011, will be to 'strengthen women's participation in the management of regional affairs and, more generally, in the exercise of political rights'. Thus the Constitution states in Article 30 that '[t]he statute shall make provision to favor the equal access of women and men to elected offices', a principle intended to be pursued by a law which must specify the quotas reserved for women in this field, among other things.

Until 2011, the legal framework governing the functioning of the regions was based on the 1997 *Dahir*. The 2011 Constitution introduced Article 146, which provides that

[a]n organic law shall determine in particular: the conditions of democratic management of their affairs by the regions and other territorial communities, the number of members of their councils, the rules relating to eligibility, incompatibilities and prohibitions of accumulation of elective functions, as well as the electoral regime and the provisions designed to ensure a better participation of women in the councils; the conditions for the execution of the resolutions and decisions of the Regional Councils and the other territorial communities, in accordance with the provisions of Article 138.

In 2015, three organic laws on advanced regionalization were effectively adopted, leading to the activation of the Social Qualification Fund and the Solidarity Fund between regions, which are intended to reduce regional disparities.

#### C. The status of the Sahara within the regionalization process

There is, however, one region with a unique political status: the Western Sahara. While this territory is historically claimed by Morocco, the independence movement the Polisario Front, supported in particular by Algeria, claims the establishment of an autonomous Sahrawi Arab Republic. The Sahara is not the only region with linguistic and societal particularities. Morocco as a whole constitutes an ethnic-cultural mosaic. Seen from the perspective of the Kingdom, the Sahara represents its southern provinces. They organically and effectively form the continuity of the territory towards the south, since only a small part located to the east, on the Algerian border, is occupied by the independence fighters and their refugees. For the Kingdom, the recognition of the 'Moroccanity' of the southern provinces is an issue of post-colonial territorial integrity, diverted by ideological cleavages during the Cold War. For Polisario Front supporters, this is a question of the right of self-determination. Because of the difficulties encountered by Morocco in persuading United Nations members to adhere to its cause, the King proposed an intermediate solution for the decentralization of power: the Moroccan Autonomy Project (PMA), submitted in 2007 following consultations with local populations. This status derogates from ordinary law since it proposes a redefinition of the territory. According to the draft text, it enables

the people of the Sahara to manage their affairs themselves and democratically through legislative, executive and judicial bodies with exclusive powers. They will have the financial resources necessary for the development of the region in all fields and will participate actively in the economic, social and cultural life of the Kingdom,

while the central state will retain the classic attributes of sovereignty. The PMA, inspired by European experiences (Catalonia, the German Federal State), must be proposed to the people of the Sahara by a referendum vote. If the Sahrawis agree, it is planned to provide the region with its parliament, an economic and social council, and a regional head of government elected by the parliament and invested by the King. France, the United Kingdom, and the United States supported the proposal in principle as a basis for negotiations. The United States considered the Moroccan proposal 'serious' and 'credible'. Similarly, Russia has recognized Morocco's 'willingness to explore mutually acceptable ways out' of the conflict. If Morocco succeeds in getting its proposal accepted

by the international community, it is very likely that the Constitution will have to be amended to clarify the specificity of this region.

## **VI. Constitutional Adjudication**

The 2011 Constitution devotes more importance to the law and is itself a dominant normative framework. Article 55 provides that

[i]f the Constitutional Court, on a referral from the King, the President of the House of Representatives or the President of the House of Counselors or a sixth of the membership of the first House or a quarter of the membership of the second House, declares that an international undertaking contains a clause contrary to the Constitution, its ratification may only take place after amending the Constitution.

In this context, the conditions for revision of the Constitution are strategic. These rules are specified in Title XIII, which contains four Articles and is specifically dedicated to the conditions for ‘Revision of the Constitution’.

### **A. The pre-eminence of the King**

The King is at the center of the constituent procedure. First, he has absolute power to review the Constitution since he may, after consultation with the President of the Constitutional Court, submit to Parliament by royal decree a bill amending specific provisions of the Constitution (Article 174). Even if the King is not of age to exercise his powers, he gains that power. Article 44 provides that ‘[d]uring the minority of the King, all powers and constitutional rights of the Throne shall be exercised by a Regency Council, save those concerning the revision of the Constitution.’ This is an exceptional prerogative that was already enshrined in previous constitutions and is reiterated in the 2011 one. This power derives from the monarch’s status as ‘Supreme Representative, Symbol of the unity of the Nation, Guarantor of the permanence and continuity of the State and Supreme Arbiter of its institutions’ (Article 42). As such, he is responsible for ‘ensuring the observance of the Constitution, the smooth functioning of its constitutional

institutions, the protection of the democratic choice and the rights and freedoms of the citizen and of the communities, and the observance of the international obligations of the Kingdom' (Article 42). Moreover, he is the only person who may submit a draft constitutional revision to a referendum without a government proposal or parliamentary scrutiny (Article 172). The referendum results are then irreversible since '[t]he amendment of the Constitution shall take effect after adoption by way of referendum' (Article 174). On the other hand, the King may also decide to dispense with the referendum by merely submitting the draft revision to a vote in Parliament (Article 174). The possibility of such a choice increases the likelihood of a favorable outcome for the royal proposal.

#### B. Other actors in constitutional amendments

Nevertheless, the Head of Government, the House of Representatives, and the House of Counselors also have the right to initiate constitutional amendments (Article 172). Parliament retains a restrictive power of initiative, which was already present in previous constitutions. However, the 2011 Constitution introduces a method of parliamentary revision provided for in Article 174. Although the initiative remains in the King's hands, Parliament is convened to vote on draft revisions and may adopt them by a two-thirds majority. This process represents a significant improvement in the revision rules. In the same spirit, the Head of Government also has the right to initiate revision, a power he had in the 1962 Constitution and which he had since lost. Unlike the 1962 Constitution, the 2011 Constitution does not make the Prime Minister's initiative conditional on deliberation by the Houses of Parliament, which is favorable to him. Moreover, as we have seen in the drafting of the 2011 Constitution, Morocco confirmed the liberal turning point it took in the 1990s with the establishment of a Consultative Commission for the revision of the Constitution, which was invited by the monarch to 'consult with political parties, trade unions, youth organizations and associative actors' in order to reflect the aspirations of the nation as a whole. The King also created a body responsible for 'follow-up, consultation, and exchange of views on the draft revision of the Constitution', bringing together political and trade union organizations (speech of 11 March 2011). While the final result was not considered completely satisfactory by the opposition

movements, for mostly justifiable reasons, the process by which the Constitution was drafted illustrates a serious democratic evolution that denotes the full powers of the King.

### C. The Constitutional Court's role in application control

The application of the 2011 Constitution is directly supervised by the King, who has the power to appoint the President of the Constitutional Court (Article 130). Currently, he has designated a constitutionalist known for his attachment to the centrality of the monarch, Abdelatif Menouni, who wrote in one of his first publications that 'the uniqueness of power' was

one of the fundamental realities, the keystone and cement of the Moroccan constitutional system which means ... the existence of a single political power in the strong sense of the term, of a single will, of a single master of the political game, and whose role naturally belongs to the institution which enjoys plural, religious, historical and legal-rational legitimacy; the King.<sup>28</sup>

However, the Court is also composed of elected members. Article 130 provides that

[t]he Constitutional Court shall be composed of twelve members appointed for a non-renewable term of nine years. Six members shall be appointed by the King, one of whom shall be proposed by the Secretary-General of the High Council of the Religious Scholars, and six members shall be elected, one half by the House of Representatives, the other half by the House of Counselors, from among the candidates presented by the Bureau of either House, in a secret vote with a two-thirds majority of the members of the respective House.

This new institution, which replaces the Constitutional Council, has also expanded prerogatives: 'the Constitutional Court shall have jurisdiction to rule on an objection of unconstitutionality raised in the course of court proceedings when it is alleged by one of the parties that the statute on which the outcome of the case depends infringes the rights and freedoms guaranteed by the Constitution' (Article 133), which constitutes a novelty. This Article allows citizens to challenge the constitutionality of a law through the newly

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<sup>28</sup> Abdelatif Memouni (dir.), *Constitution et séparation des pouvoirs, in trente années de vie constitutionnelle au Maroc* (LGDG, collection Edification d'un Etat moderne, 1993).

established Constitutional Court, or to bring an action before the Court during a trial. Thus the independence and weight of constitutional judges have been strengthened. Their term of office is nine years and is non-renewable, while one-third of their terms are renewed every three years. This provision is supposed to guarantee their autonomy vis-à-vis the authorities which appointed them, at least in principle. However, as Jean-Noël Ferrié and Baudouin Dupret point out, because the Constitutional Court can play a decisive role, the meaning given to constitutional principles will depend greatly on the Court's composition.<sup>29</sup>

Ultimately, regarding the application of the Constitution, the judge's impartiality also depends on the judge himself. Judges have several prerogatives. They must ensure compliance with the Constitution and the confirmation of organic laws with it, monitor the rules of both Houses of Parliament before they are implemented, and observe the conduct of parliamentary elections. The constitutional judge is also an electoral judge. According to Article 132, the Constitutional Court 'rule[s] on the regularity of the election of members of Parliament within one year, starting with the date on which the legal time limit for the appeal expires.' In 2017, some thirty appeals handled by the Court resulted in the cancellation of eleven seats for electoral fraud.<sup>30</sup> The remaining challenges concerned the Court's ruling on the exceptions of unconstitutionality. In principle, under the new regime a citizen can appeal to the Court and challenge the application of the unequal law of inheritance between men and women in the name of gender equality enshrined in the Constitution, or the non-application of the death penalty (still in force in Morocco) in the name of the right to life, also enshrined in the 2011 Constitution. However, the implementation of the unconstitutionality exception depends on a court that is not truly politically independent and is not composed of progressive judges. This is still a visible limit to the application of the Constitution. In response, the National Council for Human Rights proposes to assist the Constitutional Court in fulfilling its role, in a

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<sup>29</sup> Ferrié et Dupret (n 8). .

<sup>30</sup> Amine Derkaoui, '*A quoi sert la Cour Constitutionnelle*', La Dépêche, 18 September 2017, available at <https://ladepeche.ma/a-quoi-sert-cour-constitutionnelle/>.

detailed and promising memorandum.<sup>31</sup> All this shows that Morocco has a hybrid and ambivalent regime. For Melloni, the 2011 Constitution ‘follows in the footsteps of a reinvented dualist parliamentarianism. It succeeds, at the end of the work remarkably carried out by the Menouni commission, without ever imitating—as in the past—the models coming from Europe, and especially from France’.<sup>32</sup>

## **VII. International Law and Regional Integration**

The 2011 Constitution enshrines, more than previous ones, the importance of international law and of taking into account the agreements and treaties signed by Morocco, the resolutions it has accepted, and the international conventions to which it has acceded, in the drafting of national laws. It undertakes, from the preamble,

[t]o accord to the duly ratified international conventions within the framework of the provisions of the Constitution and the laws of the Kingdom and in respect of the unalterable national identity the primacy over the domestic law of the country once they have been published, and to harmonize the relevant provisions of the national legislation accordingly.

The 2011 Constitution extends Morocco’s commitment to several sources of international law and its various branches. These include, for example, humanitarian law and the law of armed conflict. The importance attached to international law is such that, as stressed in the previous section, if a treaty appears to be contrary to the Constitution, then the latter must be amended before the treaty is signed (Article 55). This is the first time that an Article has established the constitutionality of treaties.

### **A. The intertwining of international law and domestic law**

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<sup>31</sup> La loi organique relative à la Cour Constitutionnelle, Memorandum, Conseil National des Droits de l’Homme, Mars 2013, available at [https://www.cndh.org.ma/sites/default/files/documents/Memorandum\\_COUR\\_CONSTITUTIONNELE.pdf](https://www.cndh.org.ma/sites/default/files/documents/Memorandum_COUR_CONSTITUTIONNELE.pdf)

<sup>32</sup> Melloni (n 17).

The King maintains his power to ratify treaties. However, Morocco's particularity lies in the fact that the Head of State does not negotiate treaties. His role is to take note of the negotiators' comments or reservations and then sign and ratify the treaties. In addition, a number of treaties, which are defined in the Constitution, require prior ratification by Parliament. These are 'peace or union treaties, or those relating to the delimitation of borders, commerce treaties, treaties affecting the State finances, treaties whose application requires legislative measures as well as those relating to the individual and collective rights and freedoms of the citizens' that must not be ratified without prior approval by statute (Article 55). These are the most critical treaties since they concern territorial integrity, human rights, and economic security.

The King is also responsible for the implementation of international agreements signed by Morocco: according to Article 42, he shall ensure 'the observance of the international obligations of the Kingdom'. In other words he is responsible for ensuring that the state's commitments are respected by the institutions responsible for implementing them, primarily Parliament. However, the Constitution does not specify the forms and conditions of parliamentary involvement.

More generally, the 2011 Constitution does not clarify, any more than the previous ones, the identity and role of the institutions responsible for determining relations and for bringing international law and domestic law into line. The King's supremacy in this area is apparent, but his role is no more specified than that of the Constitutional Court or Parliament.

This contradiction is particularly visible in the field of human rights. It should be recalled that from the preamble, Morocco undertakes to 'protect and promote human rights and humanitarian international law standards and to contribute to their development in their indivisibility and universality'. However the death penalty, the



marriage of minors, and male polygamy (to cite just a few examples) are still allowed in Morocco, although several associations are calling for their prohibition.<sup>33</sup>

In other areas Morocco seems to be pursuing international standards and applying them. Thus international law is cited in Article 16, relating to Morocco's policy towards the diaspora: 'The Kingdom of Morocco shall strive to protect the rights and the legitimate interests of the Moroccans residing abroad, in accordance with international law and the legislation in force in the host country'. For the past fifteen years or so, the diaspora has been receiving increasing attention from the monarchy, particularly because of the role it plays in financial inflows. Consular services have been improved and modernized to better meet the needs of Moroccans living abroad. At times, the King has undertaken mass dismissals of consuls and ambassadors who were deemed incompetent with regard to the new objectives of protecting the diaspora. This was the case in 2013, 2015, and 2017.

#### B. Regional and international integration

Regarding regional and international integration, Morocco has committed itself in the 2011 Constitution '[t]o work for the construction of the Union of the Maghreb, as a strategic option' and '[t]o consolidate the relations of cooperation and solidarity with the peoples and countries of Africa, in particular the countries of Sahel and of the Sahara'. While the last fifteen years have been characterized by the development of a new African policy (Morocco became the second African investor on the continent, after South Africa, just as it rejoined the African Union in 2016), Morocco's commitments towards the Arab Maghreb Union have not continued. On the contrary, given the evolution of regional security after the Arab Spring, its tense relations with Algeria, and its new ambitions for continental integration, Morocco has moved away from North Africa in favor of West Africa. Indeed, the King declared at the Fifth African Union - European Union Summit in 2018 that '[u]nfortunately, the Arab Maghreb Union does not exist', even though the Constitution places unity of the Maghreb as a strategic goal.

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<sup>33</sup> « *L'harmonisation de la législation marocaine avec le droit international des droits de l'homme* », Fondation Ebert Stiftung, Novembre 2013, available at [https://www.fes.org.ma/common/pdf/publications\\_pdf/publicationAA2013/9.pdf](https://www.fes.org.ma/common/pdf/publications_pdf/publicationAA2013/9.pdf)

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