



The 2011 Moroccan Constitution: A Critical Analysis

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Foreword

In the context of the popular uprisings that swept across North Africa starting in Tunisia in December 2010, the Kingdom of Morocco responded by rapidly drafting and adopting a new constitution in July 2011. Although Morocco took the lead in that regard, Jordan reformed its existing constitution in September 2011 while Egypt adopted a new permanent constitution in December 2012. Tunisia, Libya, Algeria and Yemen are all currently engaged in constitution revision processes of one type or another and are likely to be followed by other countries in the future as the process of change continues.

Within a dynamic of change, one of the questions that must be answered is whether new constitutions respond to popular aspirations and to the specific demands expressed by the people during the course of the uprisings. Although the protests have clearly been motivated by a desire for greater transparency and accountability in governance, for the most part these demands have not been translated into detailed demands for change at the level of the constitution. Mohamed Madani, Driss Maghraoui and Saloua Zerhouni, the authors of this critical analysis of the 2011 Moroccan Constitution, offer significant insights in this regard. They provide a strong overview of Morocco's historical, political and legal context, and scrutinize each section of the constitution in the light of the demands for change that were expressed in the historic demonstrations that took place in 2011.

International IDEA is proud to publish this excellent study as part of a series that will be published on constitutional processes in the region. We are confident that the study will contribute to a better understanding of developments in the West Asia and North Africa region since December 2010 and that it will inform the continued debate on constitutional reform in Morocco and beyond.

Ayman Ayoub
Regional Director
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Executive summary

The Moroccan political and constitutional context represents an interesting situation in the Middle East: a reigning monarchy that, despite having been in power for more than three centuries, has nevertheless evolved in recent years. In the context of highly discredited and politically weak Moroccan political parties and labour unions, on 20 February 2011 approximately 150,000–200,000 Moroccans in 53 cities and towns across the country marched in a call for greater democracy and change. This movement was joined by a range of political groups, comprising a mishmash of different ideological positions united only by their opposition to authoritarian rule in all its manifestations. While the king acknowledged the need for a social charter, and later constitutional reform, the entire constitutional reform process was driven by the king's agenda. The royal commission for constitutional reforms met representatives from different political parties and civil society organizations, but the majority of political parties failed to engage generally in any significant debates about key articles of the constitutional text. In the end, the constitution was 'validated' by the royal cabinet before the referendum, and most political parties, despite their lack of substantive input, supported the text when it was put to referendum and called on their members to vote 'yes'. Under such political conditions, the referendum on 1 July 2011 was akin to a renewal of the traditional act of allegiance between the sultan and his subjects. The new constitutional text was enacted on 29 July 2011.

The new Moroccan constitution includes many human rights that were not previously recognized in the country. Although this is a step forward, several rights are without precise normative content; for example, the rights to life and physical integrity are not accompanied by a clear abolition of the death penalty. Also, the constitution provides that certain rights are to be defined and regulated by ordinary or organic laws, many of which remain to be enacted and could be restrictive; for example, freedom of press is guaranteed but legislation will set the rules of organization and control of public means of communication. Other rights and freedoms are contradictory. Article 19 establishes equality between women and men, but adds that this must be in accordance with the 'permanent characteristics of the kingdom'. Moreover, the constitution does not set out the conditions and procedures that can be used to challenge legislation before the Constitutional Court. Finally, the role of international treaties remains ambiguous in the constitution.

On the issue of governance, the king remains at the centre of political and constitutional life under the new constitution. He alone can revise the constitution, and the powers of the head of government and the parliament are in this regard only formal. Significantly, the king appoints the head of government and other cabinet members on a proposal by the head of government. In contrast, in Spain, the king

proposes a candidate for the presidency of the government in consultation with representatives designated by political groups with parliamentary representation.

The king also maintains significant power over the government's decision-making process. The constitution draws an important distinction between the Council of Ministers and the Council of Government. When the government meets under the chairmanship of the head of the government, it is referred to as the Council of Government, but it is the king who chairs the Council of Ministers. The Council of Ministers has veto power over all decisions made by the Council of Government, leading to a relationship of control by the first and submission of the second. No vote is taken in the Council of Ministers, because the monarch is the head of the council and no votes can be imposed upon him. The fact that the Moroccan Constitution does not impose any meeting requirements of the Council of Ministers, in contrast to the councils of ministers in France and Spain which are required to have weekly meetings, accentuates the subordination of the Moroccan government to the king.

The constitution also imposes significant limitations on the legislative process. Civil society does not have sufficient access to parliament, committee meetings remain generally secret, and parliament is subordinate to the government and by extension to the monarchy. Additionally, the king retains wide-ranging and vague emergency powers that require no legislative approval. The 2011 constitution ensures the independence of justice through the principle that judges are irremovable; however, this principle is limited to the *magistrat de siège*.

On a vertical level, the new constitution does not establish a truly decentralized form of government. Morocco is defined as a 'united state' and lays out the framework for decentralization and advanced regionalization. At the institutional level, Morocco is divided today into three levels: (a) regions headed by a *wali* (regional governor) and a regional representative council; (b) prefectures and provinces; and (c) rural urban communes. However, the prefectural and provincial level is tightly controlled by the state. These levels are extensions of central administration and a means of territorial control of the population, as opposed to being a vehicle through which communities can govern the delivery of services at a local level.

With the help of rejuvenated and independent political parties, Moroccans should write a new social contract that puts allegiance to the monarchy aside if real democracy is to be established. Any renewed effort to engage in constitutional reform should be based on the following recommendations:

- The reforms should be prepared by an elected constituent assembly.
- Constitutional provisions on fundamental rights and freedoms recognized by the constitution should be interpreted in accordance with the Universal



Declaration of Human Rights and in accordance with international conventions related to civil, political, social and economic rights.

- The powers of the head of government should be strengthened, and the Council of Government should be defined as being the true centre of executive power.
- The independence of parliament and of the judiciary vis-à-vis the executive should be strengthened.
- The right to life and physical integrity should be accompanied by an explicit abolition of the death penalty.
- Gender equality should be recognized without restrictions.
- The Moroccan state should recognize the supremacy of international treaties ratified by Morocco over domestic law.

Introduction¹

This paper reviews and analyses some of the main changes that have come about as a result of the 2011 Moroccan Constitution, and considers some of the potential and long-term implications for the Moroccan political system. We start from an understanding that the Moroccan political and constitutional context represents an interesting situation in the Middle East: a reigning monarchy that has been in power for more than three centuries and that has evolved over the years—especially over the last two decades and, in a more pronounced way, within the past few months as it engaged in constitutional reforms. We also proceed with caution, in the sense that constitutional reforms ultimately have to be put to the test in terms of their effective implementation and institutionalization, and are in effect also open to unexpected political consequences. The Moroccan constitutional reforms did not take place in a vacuum; therefore they have to be assessed both from an internal political perspective and within the broader context of what has come to be called the 'Arab Spring'. While it is possible to make predictions about what the consequences of the Moroccan constitutional reforms will be, there is no way we can anticipate exactly what might follow. There are a multitude of perspectives from which any given constitution can be analysed. We need to clarify from the outset that this analysis is by no means exhaustive; there are other aspects of the 2011 Moroccan Constitution that can be further analysed and developed.

Our analysis focuses on what we judged to be the most important changes to and positive characteristics of the new constitution, and on some of the most salient contradictions that clearly reflect the persistently illiberal nature of the Moroccan political system. We also address the historical and political contexts, as well as the procedures that ultimately gave birth to the new constitution. This critical analysis of the 2011 Moroccan Constitution involves three main steps. First, we describe the general political context in which these reforms took place, in order to explain the political environment that produced them as well as the procedural problems that relate to the development of this constitution. Second, after some preliminary remarks about the constitution, we discuss its basic values, the organization of power at the national and local levels, the parliament, the executive power of the government, the judiciary and the process of revising the constitution. Whenever appropriate, we have attempted to compare the Moroccan Constitution with those of other countries, both within the Middle East and outside the region. Finally, we suggest ways in which future improvements can be made and propose recommendations for improving Morocco's political environment in the future.



The general political context

In order to have a full grasp of the new Moroccan Constitution and its potential consequences, we need to understand the historical context in which the constitutional reforms evolved and the more recent social movements that have triggered the reforms. In the context of highly discredited and politically weak Moroccan political parties and labour unions, on 20 February 2011 approximately 150,000–200,000 Moroccans in 53 cities and towns across the country marched on the streets and called for democracy and change, symbolized by the popular Arabic call of *al-shai'burid udustur anjadid* ('the people want a new constitution'). It has since become known as the February 20 movement. Inspired by the revolts in Tunisia and Egypt and aided by Internet connections and technology such as Facebook, thousands of young Moroccans joined the movement and became active in the protests. However, the February 20 movement cannot be interpreted as simply part of the Arab Spring, since in the Moroccan context a dynamic civil society has been active over the more recent past (Maghraoui 2008). The Arab Spring has clearly given more stamina to the movement, which itself has energized a Moroccan political field that has literally become depoliticized over the past decade (Maghraoui 2002).

The movement was joined by one of the largest informal and powerful Islamic opposition groups, known as Justice and Charity, and by a number of smaller left-wing parties.² The influential Moroccan Human Rights Association and the Moroccan Organization for Human Rights have also offered their support. In addition, the movement was able to gain the solidarity of small segments of left-wing political parties and labour unions such as the Unified Socialist party, *annahj addimocrati* (The Democratic Path) and the Party of the Democratic and Socialist Vanguard. In some cases, even the members of the parties of the 'political consensus', such as the 'February 20 *ittihadis*' (the youth of the Socialist Union of Popular Forces, USFP) have joined the movement. These members represent youth groups that are disillusioned with the political choices and orientations of their own parties. Finally, a number of Amazigh associations have found new opportunities in the movement to press for cultural issues that are central to identity politics.

Like most of the social movements that have swept across different countries in the Middle East/North Africa region, the February 20 movement is a mishmash of different ideological positions that are united only by their opposition to authoritarian rule in all its manifestations. While the protesters called for greater social equality and access to social welfare services in the fields of health, education and housing, their demands were more generally focused on political issues. What united the movement was a set of grievances that speak clearly to some of the major problems that have plagued the Moroccan political system since its inception. Their demands included the establishment of a more democratic constitution based on the principle of

popular sovereignty, an independent judiciary and the separation of powers.³ Popular notions regarding the power of the king were captured by the slogan 'the king who reigns but should not rule'. The protesters have also called for the freedom of the press and independent media as well as the end of corruption, more transparency and a clear separation between business and politics.


While the slogans of the February 20 movement reveal the heterogeneous ideological orientations of its activists, where the proposed changes are concerned they do share some important common ground. Concerning the constitution, many slogans called for the end of article 19, which stated that

'the king, *Amir al-Muminin* (commander of the faithful), shall be the supreme representative of the nation and the symbol of the unity thereof. He shall be the guarantor of the perpetuation and the continuity of the state. As Defender of the Faith, he shall ensure respect for the constitution. He shall be the protector of the rights and liberties of citizens, social groups and organizations.'

Article 19, along with articles 23,⁴ 24,⁵ 27⁶ and 30,⁷ gives the king unlimited powers, and the basic principle of the separation of powers has not been respected in any version of the Moroccan Constitution. In reaction to what has become known as *al hirak al-Ijtimai'* (social movement), the monarchy decided to move ahead with constitutional reforms that were to be voted on by the Moroccan people in a referendum.

By the time of the 2011 referendum, Morocco had 35 political parties and a multiparty system that has led in contradictory ways to a kind of 'excessive consensus' under the tutelage of the *makhzen*.⁸ Overall, the majority of political parties strongly supported the referendum and called upon their members to vote 'yes'. The parties did not generally engage in any significant debates about key articles regarding the powers of the king (i.e., articles 19, 23 or 29 of the 1996 constitution). The new constitution was strongly supported by the most important political parties, trade unions and the media. Most of the parties' newspapers called upon Moroccans to vote 'yes'. The popular nationalist party, Istiqlal, called upon the Moroccan people, in its newspaper *L'Opinion*, to 'participate and vote for the new constitution', and in a similar vein the leftist USFP's newspaper, *Libération*, stated on its front page 'Yes to the Constitution'. The newly created Party of Authenticity and Modernity was naturally very supportive of the constitution, while the Party of Justice and Development (PJD), which represented the opposition to the government, adhered enthusiastically to the plans and outcomes proposed by the king in his speeches.

The parties' positions during the 2011 constitutional reforms gave the most tangible example of their 'domestication' by the monarchy and demonstrated their *makhzenization*. The Moroccan parties seem more comfortable with not taking the



initiative and leaving the palace in full control of the political game. This was clear from the vague and politically limited propositions that most parties addressed to the Commission Consultative pour la Révision Constitutionnelle (Consultative Commission for Constitutional Reforms, (CCRC)) in response to the king's request (*Telquel* 2011).⁹ Overall, the parties' propositions were superficial rather than substantive, and did not seriously address the issue of the concentration of power in the hands of the monarch. The parties were content with supporting the king's proposed constitutional changes, which included making Amazigh an official language (proposed by a member of parliament, MP), reinforcing the role of the prime minister (mentioned by the Party of Progress and Socialism), insisting on the Muslim character of the state (proposed by the PJD), and full support of the constitutional status quo (as presented by the Istiqlal Party) (*Adala* 2011).¹⁰

The reform process is also outside the politics of consensus, as the proposals are associated with crony political parties; the February 20 movement does not view the royal plans and approach to constitutional reform as real and structural democratic change. The members of the Constitutional Reform Advisory Commission, which was established by the monarchy to work on constitutional reform, were appointed by the king and ultimately worked within structurally established constraints. These include, for example, the unbalanced political relationships between the palace, political parties and the legislature, and the weakness and quiescence of the political parties. In addition, the entire constitutional reform process was driven by the king's agenda. In this sense, the king's speeches become the only term of reference available. While the royal commission for constitutional reforms has met representatives from different political parties and civil society organizations, there were no clear-cut rules that could guarantee respect for the propositions of these political forces. The end result is that the constitution was 'reworked' and 'validated' by the royal cabinet before the referendum. The final constitutional text was, therefore, promoted by the state-run media rather than effectively debated.

It is within this context and with these constraints that the February 20 movement considered the *makhzen* approach, which resulted in what the movement has called '*al-destour al-mamnuh*' (the given constitution), as structurally and essentially flawed. It is not by coincidence that the movement declined the advisory commission's invitation to come up with propositions; many activists concluded that the commission lacks legitimacy and does not respect the principle of popular sovereignty. The movement condemned the process that produced the reforms and called for a boycott of the vote, the outcome of which was predetermined. Protestors believed that the new constitutional reforms were only cosmetic and did not challenge the political system, which remains structurally authoritarian. In a number of statements on Facebook and other websites, the movement clearly rejected what it calls a 'political game' that is constantly controlled by the monarchy.


The historical constitutional context

Of independent Morocco's eight constitutional reforms,¹¹ seven were made during the reign of Hassan II. Independent Morocco's first constitutional document was passed on 14 December 1962. The 1962 constitution established the political supremacy of the palace and set up a 'constitutional monarchy' in which the king reigns and governs. This constitution was not put into effect until 18 November 1963 with the opening of the first session of a parliament that was elected that year. The new parliament was soon paralysed by conflictual relationships and the inability of the two major parties at the time, Istiqlal and the National Union of Popular Forces (Union Nationale des Forces Populaires, (UNFP)), to win a majority. Faced with the impossibility of establishing a national unity government and reaching a clear parliamentary majority, the king broke the deadlock by using article 35 of the constitution, which gave him the right to declare a state of emergency. For five years, the king—assisted by his civilian and military advisors and supported by a vast network of local elites—governed without the parties. The state of emergency officially ended on 31 July 1970 with the promulgation of a new constitution. The regime of 'emergency powers' would nevertheless be extended in different forms and on various grounds beyond that date.

The 1970 constitution contributed to the weakness of political parties and gave a parliamentary façade to what was essentially absolutist rule. In 1970 the power of the monarchy was at its peak, and opposition parties could no longer curb its political supremacy. Thus the palace seemed to have succeeded in indefinitely neutralizing opposition parties, which appeared to be cut off from the masses and deprived of many of their supporters as a result of repressive measures. However, the effects of the political abuse of power would soon be felt. The sidelining of political parties led to an extension of the army's role, which would ultimately result in an attempted coup d'état in July 1971 that forced the king to reach out to the opposition parties (the UNFP and Istiqlal).

The 10 March 1972 constitution revealed the true extent of the new political opening towards the opposition. The new constitution returned to the provisions of the 1962 text, but it did not truly come into effect until October 1977. Even though the parties of the so-called *koutlah* (opposition) called for a boycott of the referendum, they maintained contact with the king, believing that the second coup d'état in August 1972 would give them an opportunity to reach an agreement on a programme of reforms and establish a coalition government.

The unity of the *koutlah* was shattered by the divisions that emerged within the UNFP by the end of 1972. The palace, meanwhile, took control by calling for national unity around the throne and by playing the nationalist card to claim sovereignty over the



southern provinces, which were under Spanish occupation. But the political field would not experience a relative decompression until the June 1977 elections. Despite the reintegration of the parties into the political game between 1972 and 1977, thanks to article 102 of the 1972 constitution relating to transitional provisions, Hassan II continued to concentrate executive and legislative powers in his own hands.

Under pressure from the democratic *koutlah* in the 1990s, and in an unprecedented international environment resulting from the fall of the Berlin Wall, the king presented a new project for revising the constitution on 20 August 1992. The 1992 constitution responded in part to the claims contained in a memorandum presented by the *koutlah*. It should be noted that the amendments that were made to the constitutional text in 1970, 1972, 1980, 1995 and 1996 strategically enabled the king to simultaneously engage with the opposition and decongest the political space.

The revised constitution of 1996 was the product of a consensus between the opposition elites (well-established parties) and the monarchy. It was made possible by the so-called consensual *alternance*, which meant the establishment of a coalition government led by the influential opposition party at that time (the USFP). After coming to power in 1999, King Mohammed VI reaffirmed his intention to rule and rejected any allusion to similarities between the Moroccan and Spanish monarchies. He often defined the Moroccan regime as an 'executive monarchy'¹² and made regular use of article 19 of the 1996 constitution, which states that the king shall be the guarantor of the independence of the nation and the territorial integrity of the kingdom within all its rightful boundaries. (See also quote on page from Article 19). When faced with calls for constitutional reforms, the new king instead insisted on the need to reform political parties and to 'upgrade'.


From his accession to power in 1999 until his 9 March 2011 speech, Mohammed VI made no explicit references to constitutional reforms. For ten years, his speeches avoided directly addressing the issue of constitutional reforms. Even his speech introducing the proposed autonomy of the Sahara as part of a 'negotiated political solution' avoided talking about constitutional reform, even though it was implicitly part of a package deal.¹³ Instead, the language made reference to other concepts and expressions such as 'institutional governance' or 'institutional reform' as a way of responding to pressing issues.¹⁴ In the opening speech to parliament in October 2009, the king highlighted the three pillars of a 'deep institutional reform', meaning 'a substantial reform of justice, an advanced regionalization and a wide devolution'.¹⁵ It was only after 20 February 2011 that constitutional reforms became part of the royal political agenda.

The procedural context of the 2011 constitution

The monarchy's first reaction to the February 20 movement came in a 21 February speech that announced the creation of the Economic and Social Council with the appointment of the ex-minister of the interior, Chakib Benmoussa, as chairman. According to the speech, 'The council will act in an advisory capacity and will submit studies to the government and parliament.' The speech had as a priority 'developing a new social charter based on major contractual agreements that create the right environment to meet the challenge of revamping the economy, boosting competitiveness, promoting productive investment and encouraging public involvement to achieve development at a faster pace'. The creation of the Economic and Social Council was followed by the king's announcement on 3 March of the creation of the National Human Rights Council (NHRC), which replaced the Consultative Council on Human Rights (CCHR) that was established in 1990. In contrast to the CCHR, the new NHRC was not supposed to have members of the government, but 16 out of 27 members were to be appointed by either the king or parliament. The *dahir*⁶ establishing the council states that it will 'monitor and assess the human rights situation, blow the whistle and enrich rights related-debate ... it will examine any violations or alleged violations of human rights and conduct appropriate inquiries'.

The most publicized reaction of the monarchy to the February 20 movement was associated with the very important 9 March speech, as it is called: the king announced what seemed to be important democratic constitutional reforms. His speech implicitly recognized the legitimacy of the February 20 movement's demands. The monarchy set up a plan, agenda and rules for drafting a new constitution by appointing the CCRC, which was entrusted to work on the reform of the constitution in less than four months and to present the proposed constitutional reforms in a referendum on 1 July.

The CCRC was supposed to coordinate with political parties, unions and other political actors to propose constitutional reforms to the palace. What seemed like a positive step towards reacting to popular pressure for change was paradoxically hampered by at least three realities. First, the constitutional reforms happened very rapidly. For such important and decisive constitutional changes, which have been urgent for decades in Morocco's political history, it is clear that the time limit imposed in which to develop a new constitution was unreasonable and strategically motivated. This timeline made it impossible for various political actors to criticize the draft effectively or delay its presentation in the referendum. Second, the 'Arab Spring', a kind of a chain reaction that began in Tunisia and then moved in more violent ways to other countries, made Morocco look like a very positive example of change: an international reality that also served the regime well. Third, the CCRC was, after



all, appointed by the king and served only as a proposing committee. While it was chaired by Abdelatif Menouni, a well-respected jurist who consulted with different political parties, labour unions, business associations and other political forces, it was in reality Mohammed Moatassim, the king's close advisor, who was the major force behind and architect of the final draft of the constitution.

Preliminary remarks on the constitution

In the eyes of overtly optimistic Moroccan commentators, the draft was surprising in the breadth and depth of its proposed reforms. The political elite of many of the major political parties and factions therefore expressed their strong support. But it is clear that, while the monarchy was explicitly responding to more recent social and political pressures, the drafters of the new constitution were directly responding to the will of the traditional *makhzen* and essentially working in the shadow of a long and well-established authoritarian rule. The new constitution was approved in the referendum on 1 July 2011.

Under such political conditions, the referendum appeared more like a renewal of the traditional act of allegiance (*bay'a*) between the sultan and his subjects than anything else. From this perspective, the 'yes' vote seemed to reflect the oath of allegiance that binds the Moroccan people steadfast to their king, a reality that places the monarch beyond any divisions and above the constitution. Voting 'yes' for the constitution was like acting as a 'legal witness' and carrying out a 'national duty'. In this sense, to object to the king's project would have been interpreted as a legal trespass and outside the norms set up by the 'community'. It would have been like violating a 'divine duty' and a sacrilege.

The new constitutional text, which repealed the 7 October 1996 text, was enacted on 29 July 2011. It contains a preamble, which is an integral part of the text, and has 180 articles (the 1996 text contained only 108 articles). Many articles are written very vaguely, and a title is devoted to the generalities of 'good governance' (title 12). The content of the new constitutional text incorporates the claims of key social groups such as Amazigh activists (the recognition of Tamazight as an official language in article 5), women's organizations (parity in article 19), Moroccans living abroad (recognizing the rights of full citizenship in article 17), the labour unions (the maintenance of the Chamber of Advisers in article 63), the young elites (creation of an advisory board of youth and community action in article 170) and electorally dominant parties such the PJD (an increased Islamic element) or the USFP.

The compromise, which was the basis of the constitutional text, has generated a number of ambiguities and uncertainties. The French version differs slightly from the Arabic text, and the original text is open to several interpretations depending on whether one looks at it from the perspective of a liberal democracy or from the prism

of an 'unchallengeable national identity'. For example, article 2 of the constitution refers in French or English to the fact that 'sovereignty' belongs to the 'nation'; the equivalent word in Arabic becomes *'ummah'*, which has a religious connotation. Another interesting aspect of the new constitution is that it totally ignores the notion of 'the people' as sovereign, which is generally referred to as 'popular sovereignty'. Instead, it insists on the notion of 'national sovereignty'.

Such discrepancies clearly leave room for conflicting interpretations, but this conflict is an integral part of the constitutional process, and is common in other countries. However, in Morocco the process of interpreting and reaching decisions is conducted not by a neutral arbiter (such as a judge) but by the king. So if we can say that the constitution in the United States is 'what the Supreme Court says it is', in Morocco it is fair to say that the constitution is, given the weakness of the judiciary, 'what the king says it is'.

As far as the content is concerned, a quick analysis shows that on a number of points the new text has gone through important changes compared to the 1996 text: recognition of new rights, recognition of the Amazigh language as an official language, capacity building for the parliament and government, the constitutionalization of regulatory bodies as well as the promotion of human rights. However, the constitution has not established a true parliamentary monarchy. The king remains at the centre of political and constitutional life, and he continues to concentrate all powers.



The constitution's principles and basic values

The 2011 constitutional text refers, on the one hand, to human rights as they are universally recognized and to identity, Islam and the 'permanent character of the kingdom' (*constantes du royaume* in French and *thawabit al mamlakah* in Arabic) on the other. This dual reference makes it difficult to understand and interpret a text that aspires to appeal both to the principles of a liberal democracy and to those that claim to rely on a particular interpretation of 'tradition'.

The political system and its foundations

The first article of the constitution defines the system as 'a constitutional monarchy, democratic, parliamentary and social'. The political regime is supposed to be based on the separation, balance and cooperation of powers, as well as on a citizen and participatory democracy. However, it should be emphasized that the concept of constitutional monarchy in Morocco is quite different from the English monarchy, and that the notion of parliamentary monarchy clearly has nothing to do with parliamentary monarchy as defined by the Spanish Constitution of 1978. In the Moroccan Constitution, the king reigns and governs, and his powers are not just symbolic. Even if article 6 of the constitution speaks of 'the law as the supreme expression of the will of the nation' and declares that 'all physical or moral persons, and including the public powers, are equal before it and held to submit themselves to it', it does not necessarily put the king under any legal constraints, because in reality the whole architecture of the constitution gives the monarch a supreme position without accountability. Meanwhile, the notion of a 'social monarchy' in this context refers to social rights and the role of the monarchy in protecting these rights. It is probably closer to the concept of a 'welfare state' as it exists in other constitutions.

The identity of the kingdom

Compared to earlier constitutional texts, which promoted a selective identity (Arabic and Islamic), the new constitution is clearly more open. The preamble states that national unity was forged by the convergence of Arab-Islamic, Amazigh and Saharan-Hassani components and enriched by 'African, Andalusian, Mediterranean and Hebrew' heritage. The Arabic language is no longer the only official language of the state, while the Amazigh language has also become an official state language and part of a common heritage of all Moroccans, without exception (article 5).

The state also intends to work to preserve the Hassani culture as part of Morocco's cultural identity. A national council of languages is therefore responsible for the protection and development of languages and diverse cultural expressions. However,

within the provisions relating to the plural identity of Morocco, Islam occupies a prominent place.


The Islamic provisions

The preamble describes the kingdom as a sovereign Muslim state (*al-dawla al-islamiyya* in Arabic). It emphasizes the importance attached to the Muslim religion in the multicultural character of the nation. The body of the constitution specifies the content of this notion: Morocco is conceived as a Muslim state in the sense that the vast majority of its nationals are Muslim, and article 3 states that 'Islam is the religion of the state, which guarantees all the free exercise of beliefs'. This specific formulation differs from that found in other constitutions, which make Islam 'the source of legislation', 'sole source of legislation' or 'foundation source of legislation' (see for example Egypt and Iraq). We can find similar provisions in other Arab and European constitutions. For example, article 2 of the constitution of the Kingdom of Jordan states that 'Islam is the religion of the state'. Other democratic European constitutions provide for the existence of a state church (article 4 of the 1953 Danish Constitution) or an official or dominant religion (article 2, paragraph two of the 1814 Norwegian Constitution and article 3 of the 1975 Greek Constitution). Liechtenstein's constitution 'recognizes the importance of the Roman Catholic Church' by declaring it the 'national church' in article 37, paragraph 2.

The concept of 'religion of the state' in article 3 appears to be less politically and legally loaded than that of the 'official state religion' (article 4 of the Moroccan 1961 *loi fondamentale*). Islam as a 'religion of the state' may imply that the contours of the Moroccan people overlap with those of the Muslim community established on the territory. Within this Arab and Muslim nation live non-Muslims: as individuals, Jews are invested with the same political rights as their Muslim compatriots, but as a community, they benefit only from the freedom of worship. Moreover, the existence of a 'state religion' entitles the state to intervene to protect this community. This is precisely one of the king's fundamental tasks as a protector.

The state guarantees the free exercise of 'religious practices' (*liberté des cultes*) to all citizens, but it does not recognize freedom of conscience and religion. Regardless of the nature of the relationship that exists between the state and church (strict separation or amicable coexistence, accommodation, cooperation, or a model of an assisted church or favourable church/state church, such as the Scandinavian example), all European democracies, in comparison, have adopted the freedom of thought, conscience and religion of the person as defined by section 9 of the European Convention on Human Rights.

Morocco is also a Muslim state because it is headed by a monarch whose status is consistent with a politically strategic interpretation of tradition. Article 41 states



that the king, as *amir al mouminin* (commander of the faithful), ensures compliance with Islam. He guarantees the free exercise of religion and chairs the Council of the Ulama, a body empowered to issue fatwas, or religious views, on the issues that are presented to it. In this sense the Council of the Ulama is a kind of constitutional body that is mandated to monitor the Islamic identity of the laws and acts. In a synergetic way, the head of state and spiritual leader of the community are one. This reference to the 'commander of the believers' is not without its problems for understanding a text that otherwise claims that human rights are universally recognized.

Human rights

The 2011 constitution sets out a list of new rights that were not included in the 1996 constitutional text. These include:


- the right to life;
- the right to security of the person;
- the right to physical or moral integrity;
- the right to protection of privacy;
- the presumption of innocence and the right to a fair trial;
- the right of access to justice;
- the right of access to information;
- the right to health care;
- the right to social welfare;
- the right to decent housing; and
- the right to present petitions, among other rights.

However, several items are simple statements without precise normative content and refer to ordinary or organic laws. The rights to life and physical integrity have not been accompanied by a clear abolition of the death penalty.

Other rights and freedoms are written in a contradictory way. For example, article 19 establishes equality between women and men, but it adds in the context of compliance with the 'permanent characteristics of the kingdom' (*constantes du royaume* in French). One of the most important questions is how to guarantee the rights that are proclaimed above. For example, the right to health care, social welfare, modern education, vocational training, work, decent housing, access to public service based on merit and access to water and sustainable development all seem to depend more on an individual's means and ability to achieve them rather than on outcomes that will be at the expense of the state, public institutions and local authorities (article 31).

In most cases, legislators are entitled to limit the exercise of other rights. The involvement of legislators in democratic states is common, but in the Moroccan context it becomes more problematic because the parliament is practically under the oversight of the monarch. As a result, a number of rights run the risk of being diluted by either ordinary or organic laws. As in other countries influenced by the French judicial tradition (Algeria, Tunisia and Francophone Africa, for example), Moroccan 'organic laws' are supposed to complement the constitution. These laws are adopted according to a procedure that distinguishes them from 'ordinary laws'. For example, the text of the law is presented for vote only after a specified deadline. Article 85 states that 'the bills and proposals of organic law are only submitted to deliberation by the Chamber of Representatives at the end of a period of ten days after their deposit with the Bureau of the Chamber'. The accord of the Chamber of Councilors is necessary for the adoption of organic laws. In addition, the Constitutional Court must ensure that organic laws conform with the constitution. It is important to keep in mind that an organic law is situated between constitutional (supreme) law and ordinary law. Organic laws are prescribed by the constitution in specific fields and must be validated by the Constitutional Court before being implemented. Theoretically, organic laws are meant to complement the constitution by defending more rights; however, they can, with quite the opposite effect, limit those rights.

In its current form, the constitution has anticipated the enactment of 20 organic laws. In Moroccan constitutional practice, organic laws are not necessarily promulgated, as is the case for the right to go on strike, which has been waiting for an organic law since 1962. This reality makes room for restrictive interpretations that may go so far as to criminalize the right to strike. A slight change has been introduced with article 86, which states that: 'The bills of organic laws provided for by this constitution must have been submitted for approval to the parliament within a time not exceeding the duration of the first legislature following the promulgation of said constitution.' Other organic laws, such as the one related to the election to the Chamber of Representatives, limit the rights of Moroccans living abroad by imposing the practice of proxy vote. Another example of organic laws is provided by article 49, which relates to the power of appointments by the king and the head of government to 'strategic positions' in state institutions. The recent organic law that was adopted by the parliament is very specific about the fact that 20 public institutions and 70 public enterprises are defined as 'strategic', which automatically entitles only the king to appoint their high officials. Two important points need to be raised here. First, there is no clear definition of 'strategic institution', which makes the notion of 'strategic' highly ambiguous. The second point is related to the lack of transparency associated with the exact criteria and qualifications for selecting individuals for these positions.



For other rights, the legislator is, in most cases, entitled to limit their exercise. The right to freedom of assembly and peaceful demonstration, the right of free association and the right to trade union or political membership are all guaranteed by the constitution, but it is up to the law to set the conditions for the exercise of these freedoms (article 29). The law that regulates civil society associations and the organic law on political parties strictly control the freedom of association and the freedom of belonging to political parties. It is clear that the right to strike is guaranteed in the constitution, but an organic law needs to determine the conditions and modalities of its exercise (article 29, paragraph 2). A draft law was not passed in 2009 due to the opposition of the unions. In practice, article 288 of the Penal Code is used to punish some cases of 'concerted work stoppage'. The right to property is guaranteed, but the law may limit its scope and its exercise if economic constraints and the social development of the country require it (article 35). The state also guarantees freedom of enterprise and free competition (article 35 paragraph 3). The home is inviolable, but searches may occur under conditions and procedures prescribed by law (article 24). The right to information is guaranteed but may be restricted by law 'in order to protect all aspects of national defence, internal security and external state and privacy of people, to prevent the infringement of fundamental rights and freedoms' and protect 'sources and areas specifically identified by law' (article 27). The right to information is clearly emptied of its substance as a result of these limits, which are established by an organic law.

There is a consistent pattern whereby the principles of rights that are set up in the constitution can potentially be useless due to restrictive laws. The freedom of the press is guaranteed, but the law sets the rules of organization and control of public means of communication (article 28). The right to submit motions on legislation is granted to citizens, but an organic law determines the conditions and modalities under which that right can be exercised (article 14). The right to submit petitions to the government is recognized, but an organic law determines the conditions and manner of the exercise of this right (article 15). Moroccans living abroad enjoy full citizenship rights, but the law sets specific criteria for eligibility and incompatibility (article 17).

The right to petition the Constitutional Court is guaranteed when either party to a lawsuit claims that the law upon which the outcome of the dispute rests affects the rights and freedoms guaranteed by the constitution. Article 133 states that 'the Constitutional Court is competent to take cognizance of a pleading of unconstitutionality raised in the course of a process, when it is maintained by one of the parties that the law on which the issue of the litigation depends infringes the rights and freedoms guaranteed by the constitution'. However, an organic law determines the conditions and procedures for the exercise of this right.

Despite the establishment of a Constitutional Court (article 129), the protection of freedoms is not institutionally guaranteed. Two-thirds of the members of this court are appointed by authorities, and its membership is not decided by direct universal suffrage. Six members of this court are appointed by the king, and six are elected by both the House of Representatives and the House of Councilors, which is elected by indirect suffrage. In addition, the president of the Constitutional Court is chosen from its members and is appointed by the king. This body is only called upon to assess the constitutionality of a number of laws and acts, but it does not function to protect the constitution.

Moreover, we are confronted with a constitutional reality in which there are laws that limit the exercise of freedoms that would be consistent with the constitution, in addition to the incompatibility of the principle of legality with that of the status assigned to the king, which might pose threats to citizens' rights. It is true that the king, under section 42, is the protector 'of democratic choice and the rights and freedoms of citizens and communities', but section 41 entrusts the 'commander of the faithful' with the power to ensure respect for Islam. Using article 41, would not the king be able to restrict rights and freedoms?

Although the constitution states that 'the judge is in charge of protecting the rights and freedoms' and that the judiciary is independent of the legislative and executive powers (article 107, paragraph 1), it is the king who is the guarantor of the independence of the judiciary (article 107, paragraph 2), who chairs the Higher Judicial Council and who is also the real head of the executive.

As a final point, the status of international conventions in the constitution remains ambiguous. The language in the constitution's preamble is ambiguous and its content presents a number of problems. The new principles that are introduced include the protection and promotion of measures for human rights and international humanitarian law 'in their indivisibility and universality'. But the reference to the supremacy of international treaties over domestic legislation is replete with obscure jargon that deprives it of any legal efficiency. So the kingdom, through article 19, has committed itself to 'international conventions and pacts duly ratified by Morocco and this, with respect for the provisions of the constitution, of the permanent characteristics [*constantes* in French] and of the laws of the kingdom'. It is fair to conclude that the new constitution does not clearly establish the supremacy of international treaties over domestic law. This confusion does not facilitate the work of the judiciary, as there is no clear obligation for judges to uphold international law, including the protection of human rights.



The organization of power at the national level

The executive branch

Unlike the Jordanian Constitution, which deals with the powers of the king as part of the executive branch, the Moroccan Constitution recognizes the royal power as a separate power. But a careful reading of the constitution reveals that the king is the real chief executive.

Royal powers

The first form of power that is defined by the constitution is that of the 'commander of the faithful'. Article 41 is the first article that defines royalty (title 3 of the constitution). The king is first a 'commander of the faithful' before being 'head of state'. Sections 41 and 42 define the multiple functions of the king as 'commander of the faithful' and 'head of state'. He ensures respect for Islam, the constitution, the good functioning of the institutions and respect for Morocco's international commitments. The king is the protector of democratic choice as well as the rights and freedoms of citizens and communities. Finally, he guarantees the independence of the nation and its territorial integrity. Each of these functions is echoed and manifested in other provisions of the constitution. The king has a civil list. Article 46 states that 'the person of the king is inviolable, and respect is due him'. The acts of the king enjoy also complete immunity.


Constitutionally, the king is not accountable to any other institution; he remains above the law. While under the new constitution the king is no longer 'sacred', article 46 states that 'the integrity of the person of the king shall not be violated'. The king has the power to appoint the head of government (article 47) and government ministers, while symbolically he is supposed to do so after a proposition from the head of government. After 'consultation' with the head of government, the king can dismiss government ministers (article 47). Article 48 stipulates that the king presides over cabinet meetings, and, using the *dahir* system, he has the power to dissolve parliament (article 51). The king is the 'commander-in-chief' of the armed forces' (article 53), appoints ambassadors (article 55) and through article 41 is *amir al mouminin* (commander of the faithful), the most powerful religious authority of the country. In general the king has not relinquished any of his prerogatives, and will continue to have veto power over all major decisions.

Immunity of dahirs

The king exercised his powers under the first constitution (1962) by decree. From 1 January 1969 and in the context of a state of exception, royal acts are given a new name: *dahirs* (royal decrees). This return to traditional use is no mere formality. *Dahirs* are part of the king's discretionary acts in a variety of fields that are related to administration, legislation and other regulatory mechanisms. The ability to promulgate a *dahir* is historically one of the best examples of the unchecked constitutional powers of the Moroccan king. In a historical political context that has essentially not been characterized by democratic practices, the practice of issuing *dahirs* is so much a part of the political culture that it is not even raised by mainstream political parties. *Dahirs* have persisted as one of the main features of Morocco's political system. The use of *dahirs* in Morocco differs from other forms of discretionary powers that might exist in extra-presidential systems because it is closely attached to the king's religious authority, and a *dahir* is thus considered almost as a sacred text that has never been challenged.

The royal discretionary power of *dahirs* therefore constitutes one of the most important sources of legislation. It is important to note that important royal decisions are automatically formulated as *dahirs*, a legal reality that puts them above the law and the constitutional text. *Dahirs* are signed by the commander of the faithful and are subsequently enforced as laws. The invocation of the religious nature of *dahirs* makes them sacrosanct and therefore not subject to invalidation. *Dahirs* are regularly invoked in most royal appointments, and they continue to remain immune to any judicial control.

In the current constitution, the king continues to exercise his powers by *dahir*. There are two types of *dahirs*: those that allow the king to exercise his religious prerogatives (article 41) and those related to his status as head of state. This distinction does not signify a difference in nature. The constitution also distinguishes between *dahirs* that are countersigned by the head of government and those that are signed only by the king. The jurisprudence by the Ronda case presented by the Administrative Chamber of the Supreme Court on 18 June 1960 (RACS adm. 157-60, p. 136) established the principle of the immunity of royal acts. These acts are 'incontestable and irreproachable'. In the Ronda case, the Administrative Chamber of the Supreme Court was confronted with an appeal against the abuse of power in a *dahir* that led to the applicant's suspension from the office of judge. The chamber concluded that the appeal must be dismissed on the following grounds: 'under the terms of article 1 of the *dahir* of 27 September 1975 establishing the Supreme Court, it shall have jurisdiction ... over actions for annulment of abuse of power against decisions by administrative authorities. It is anticipated that the action brought by Mr. Ronda is not directed against a decision of an administrative authority, but against an act



emanating from a sovereign, and having taken the form of a *dahir*; as a result, the Supreme Court has no jurisdiction to entertain the action aforesaid’.

The incapacity of the Supreme Court to rule on the legality of an individual administrative act taken by the king as a *dahir* was reaffirmed by this court in the Bensouda (15 July 1963, RACS adm. 1961-1965, p. 173) and Rezk iTijani cases (15 July 1963, *ibid.*, p. 177). Both substitute judges were removed from their judiciary functions. In these three cases the Supreme Court was merely limited to a restrictive interpretation of the *dahir* of 27 September 1957, which established a precedent for the high court to decline jurisdiction. In another case known as ‘agricultural property of Abdelaziz company’, which took place in the context of the state of exception, the court referred to the *dahir* of 1957 and based its juridical incompetence on articles 19 and 83, which stated that ‘the judgements are delivered and executed on behalf of the king’ and the constitution. In this particular judgement, the Supreme Court developed the doctrine of the *imamate*, which would result in the court being forbidden to rule on royal acts, adding that such rulings can only be part of an informal appeal.

The king’s speeches

The king addresses speeches to the nation and parliament. The messages are read in both houses and cannot be subject to any debate (article 52). The king may also send a message to the nation when he wants to apply provisions related to a state of emergency (article 59), dissolve parliament or either house (article 96) or declare war after parliament is informed. As part of the legislative procedure, the king may send a message to both houses in order to carry out a new reading of any bill or proposed law (article 95). The constitution does not indicate that the king must make a royal speech to revise the constitution or to submit a proposed revision to referendum, but it is an accepted practice that this should be done.

The king’s speeches have become, over the years, the prime reference for the political parties. They are very often used as guidelines for the government and political parties. The speeches are the dynamic of every change, the blueprint for various actions and the centre around which the politics of consensus is constructed. Most political leaders refer to them, and no one can disagree with their substantive content. The constitutional basis for this was formulated in article 28 of the 1996 constitution, which stated that: ‘The king shall have the right to deliver addresses to the nation and to the parliament. The messages shall be read out before both houses and shall not be subject to any debate.’ The same constitutional basis that forbids debating the king’s speeches is now part of article 52 of the 2011 constitution.

Powers of the king with regard to the government

Appointment of the head of government

The king appoints the head of government and other cabinet members on a proposal from the latter. The appointment of the head of government is a significant power of the king, to the extent that it should be a matter of a personal choice of the party that won the elections and is at the head of the legislature. This explanation implies that the head of state is forced to choose the leader of the party that won the elections. However, it should be mentioned that in the latest parliamentary elections, King Mohammed VI appointed as head of government Abdelillah Benkirane, the leader of the PJD, which won a majority in the elections on 25 November 2011. The king appoints the head of government by *dahir*, which he signs alone (article 47, first paragraph, states that it is not to be countersigned by any authority). By comparison, in Spain the appointment of the head of the government by the king is countersigned by the president of the Congress. Article 47 does not impose any deadline. It is up to the king to decide on what he considers most appropriate. Normally he acts without a deadline. After being appointed, the head of government takes an oath before the king. This procedure is not provided for by the constitution. Appointment by the king is sufficient to give the head of government full responsibility for the function. The latter is not explicitly subject to a parliamentary vote.

In Spain, the king, in consultation with representatives designated by political groups with parliamentary representation, proposes (through the president of Congress) a candidate for the presidency of the government. The proposed candidate presents to the Congress the political programme of the government he intends to form and requests the confidence of the house. If the Congress of Deputies gives its accord to the candidate by an absolute majority of its members, the king can then appoint him president of the government. If this majority is not obtained, the same proposal will be subject to a new vote 48 hours later, and it will be considered that confidence has been secured if it is granted by a simple majority. If, after this vote, confidence is not granted for the investiture, successive proposals will be presented. If no candidate has obtained the confidence of the Congress within two months from the first vote for investiture, the king (countersigned by the president of Congress) dissolves both houses and calls for new elections. But in Morocco, as the government must be 'invested' by the parliament from which it emanates, it is necessary for the head of government to be accepted by parliamentary majority. After the appointment of other members of government, the head of government must appear before both houses of parliament in order to have his programme approved by the House of Representatives. The confidence of the chamber is expressed by an absolute majority



vote of its members for the government programme, and can only be withdrawn if the programme does not receive a vote of confidence (article 88).

Resignation of the head of government

The resignation of the head of government is applicable in the case of disapproval of a programme (article 88) or policy statement, during the vote on a text (article 103) or in the event of a motion of censure being adopted (article 105). The resignation may also be voluntary, but it does not mean that it is spontaneous. Only the resignation of a government gives rise to a new government (sometimes with the same head of government). Regardless of their importance, the changes or replacements that occur without the resignation of the head of government are simply part of a rearrangement. Even when the resignation is forced, only the king (based on article 47.6) shall terminate the services of government. As long as he does not do so (by *dahir*, without countersignature), the government remains in office. If the head of government presents his resignation, the function of government is limited to the management of the usual state affairs. The new constitution introduces a very vague concept that seems to exclude the possibility that particular initiatives can be taken other than those objectively required by the circumstances. Thus, after the Government Council under Abbas Al-Fassi resigned on 28 December 2011, it was still able to approve a draft decree on the appropriation of funds for the conduct of public services and the performance of duties. However, this notion of the expedition of current business does not apply to all executives, since it did not prevent the king from appointing a few individuals to positions that normally require a proposal from the head of government (e.g., ambassadors) or are within his own competence (e.g., university deans).

As far as voluntary resignation is concerned, it can be spontaneous or provoked. In Morocco, no text forces the head of government to resign in the wake of parliamentary elections, as is the case in Spain, and up until now no prime minister in Moroccan history appears to have resigned voluntarily. In other cases, resignations are provoked by the head of state.

Other government members


The appointment of other ministers is to some extent the result of a joint decision between the king and the head of government, but this does not mean that the head of government presents a list that the king is obliged to validate. During the most recent formation of the current government, the Moroccan press spoke of the palace's objection to a number of candidates proposed by the new head of government. The authority to dismiss a minister or several members of government belongs to the king and the head of government.

As far as appointments are concerned, the king appoints the members of government upon the proposal of the head of government. The constitution does not specify either the size of the government or the norms requiring the existence of a ministerial portfolio. In comparative constitutional law, the Belgian Constitution is among the few constitutions that strictly regulate the composition of the government, limiting the maximum number of cabinet ministers to 15. This limitation does not include the secretaries of state, and requires linguistic parity between ministers with the exception of the prime minister. In the United Kingdom, the 1975 law on the salaries of ministers sets a maximum of 30 cabinet ministers that may be paid. It also limits the number of secretaries of state to 50 and undersecretaries of state to 83. The king and the head of government in Morocco are not obliged to comply with specific numbers, denominations or structures. In the most recent government, the king reserved the right to appoint ministers at the head of some departments and ministries (*Habous* and Islamic affairs, national defence and agriculture). The economically strategic departments and institutions are still under the significant control of the palace.

The number of individuals in the government has varied throughout Moroccan constitutional history (currently the number is 31). The *dahir* concerning appointment determines an order of protocol between ministers that is legally equal. The principle of collegiality should not, however, hide the reality that there is a certain hierarchy among the ministers. The distinction made in the constitution between ministers, state secretaries and members of government implies that a member of government may not be a minister, at least as far as the title is concerned. In practice, there are also deputy ministers, whose status can be, as appropriate, closer to that of a secretary of state than that of a minister in 'full service'. The title of minister of state (there is only one in the current government) is mainly honorary, and is accompanied by a ceremonial presence. As such, the deputy ministers are with either the head of the government or a minister. The secretary of state also works under a minister, unless he is placed at the head of a ministerial department with its own budget, in which case the department is called 'autonomous'. Under section 48, secretaries of state are not part of the cabinet. The government's structure is not fixed, and very often ministries may change their names.

Resignation or removal

Depending on the individual, any member may theoretically resign from the government. However, his decision may be revoked, depending on the willingness of other authorities. Theoretically, freedom of resignation is the corollary of the principle of governmental solidarity: a minister who feels unable to support a decision is free to leave the government. But as long as he remains in office he must show solidarity with the actions of his colleagues, even when they are not



necessarily political partners. In practice, resignation is seen as a discourteous gesture (or rebellion) vis-à-vis the monarch, and the only known cases of resignation are part of the so-called 'concerted resignations' that have his approval.

As for revocation, the king may, after consultation with the head of government, terminate the appointment of one or more members of the government. This prerogative allows the king to intervene in shaping the composition of the government. The head of government can also ask the king to terminate the appointment of one or more members of the government, either on his own initiative or because of individual or collective resignation.

Appointment to military positions

During the reign of Hassan II, the army was a major tool for coercion and for the strengthening of monarchical legitimacy. Because the army has been historically viewed as an apolitical institution since its inception, there has not been much concern for the ways in which it has directly or indirectly affected politics, in the sense that it was used by the monarchy to coerce other political forces, including the parties and trade unions. But, while the military has constantly been conceived and presented as apolitical in the Moroccan context, this should not imply that it had no effect on politics and political outcomes in the country. Throughout its history, the Moroccan army has been capable of shaping politics, and in the long run it will continue to do so.

Currently, the king, as supreme commander of the Royal Armed Forces, alone appoints individuals to military positions. The abolition of the Ministry of Defence, which took place in 1972 (*dahir* 19 August 1972), resulted in the transfer of the powers of the minister of national defence to the king. This transfer means that the king may take any decision necessary for the organization and functioning of this institution. In addition, all draft texts relating to military matters are presented to the Council of Ministers, presided over by the king (article 48). The right of appointment to the military may be delegated (article 53). This right is set by the previous constitutions, and its exercise is not subject to any restrictions. The constitution does not specify to whom and in what conditions the right of appointment might be delegated. It is therefore up to the king to predict the limits within which he intends to relinquish that power.

Thus, while the king has delegated some of his powers to the head of the government, as the supreme commander and chief of staff of the Royal Armed Forces, he still has an exclusive monopoly over military appointments. In order to further consolidate his control over state security, the king also chairs the newly created Supreme Security Council, which was created to manage internal and external security affairs. Its members will come from the legislative, executive and judicial

branches of government. In addition, the king maintains the power to declare a state of exception.

The presidency of the Council of Ministers

In Morocco there is a distinction between the Council of Ministers and Council of Government. When the government meets under the chairmanship of the head of the government, it is referred to as the Council of Government, but it is the king who chairs the Council of Ministers. It meets at the request of either the king or the head of government. But the head of government cannot substitute for the king unless this is done through delegation and based on a specific agenda. The Council of Ministers is composed of the head of government and the ministers; its functioning is not governed by any constitutional provisions. The participation of the secretary of state is, in principle, excluded in the new constitution. It should be noted that in practice any other person that the monarch deems useful (e.g., the king's advisors, or others) can attend the Council of Ministers. No vote is taken in the Council of Ministers, because the monarch is the head of the council and no votes can be imposed upon him. The rule of secrecy is necessary, and an official statement is generally issued after the meetings.

It is clear from the practice of presiding over the Council of Ministers that it is the king who is the master of the agenda. The latter is prepared by the general secretariat of the government, which is 'responsible for organizing meetings for the secretariat of government, for the Council of Ministers and for the Council of Government' (cabinet in the *dahir* of 10 December 1955). In contrast to the councils of ministers in France and Spain, which are required to have weekly meetings, the Moroccan Constitution does not impose any meeting requirements. The fact that the Council of Ministers does not meet regularly accentuates the subordination of the government to the king. The Council of Ministers is responsible for key issues that relate to 'strategic orientation and arbitration'. It deliberates on the strategic directions of state policy, general guidelines for project finance law, the draft framework law, the project for the revision of the constitution, the projects for organic laws, the bill for amnesty, the draft texts relating to the military (the declaration of war, the declaration of martial law), draft decrees to dissolve the House of Representatives and appointments to certain strategic positions that are proposed by the head of government or the minister concerned. The unchallenged power of the king is also more clearly articulated through his presiding over a number of other councils that include, but are not limited to, the Security Council, the Superior Council of Magistrates and the Council of the Ulama.



Royal powers during a crisis

In contrast to the situation in Spain, where the government has emergency power after the approval of parliament (article 116 of the Spanish Constitution), in Morocco the king has those powers without legislative approval. The royal powers in a situation of crisis relate to all the rights and dispositions, different in nature and scope, that the constitution grants to the king in order to deal with exceptional situations. We will deal with two emergency powers here: the state of siege and the state of exception.

State of siege

The first example of a law that emerged in a situation of crisis in Morocco was the 'state of siege' initially applied under the French protectorate but later constitutionalized in 1962. It has never been applied in independent Morocco, but was invoked by King Hassan II during the Gulf War. According to article 74 of the current constitution, 'the state of siege can be declared, by *dahir* countersigned by the head of government, for a time of 30 days'. The declaration of the state of siege is deliberated in the Council of Ministers (article 49). The parliament does not intervene to authorize the declaration of a state of siege, but it does intervene in order to extend the period of 30 days.

State of exception

After the death of Mohammed V in 1961, Hassan II assumed power. He sought to establish his own legitimacy through a referendum for a new constitution, but his powers remained concentrated. In response to political opposition in the late 1960s, and as a result of two successive but unsuccessful attempted military coups, Hassan II declared a 'state of exception' that lasted from 1965 to 1970. The 2011 constitution still allows the concentration of power in favour of the king when the conditions established under article 59 exist (i.e., when territorial integrity is threatened or when events occur that can hinder the smooth functioning of the constitutional institutions). Compared to article 16 of the French Constitution,¹⁷ the definition of 'exceptional circumstances' given by article 59 of the current constitution is very broad. Article 16 of the French Constitution envisages the possibility of a serious and 'immediate' threat that would weigh on the country, coupled with the interruption of the 'normal functioning of constitutional public authorities'. Article 59 of the Moroccan Constitution is much more imprecise, since it applies '[w]hen the integrity of the national territory is threatened or in case there are events that obstruct the regular functioning of constitutional institutions'. Thus, while article 16 of the French Constitution requires the existence of two conditions (the threat and its consequences on the functioning of government), article 59 of the Moroccan Constitution poses an alternative. In addition, it does not describe the

threat as either immediate or imminent. Finally, article 59 refers to events that hinder the *smooth functioning* of institutions and not their *interruption*. The vagueness of the definition is coupled with the fact that the king is ultimately the sole judge of the existence of exceptional circumstances.

Like the president of the French Republic, the king, before resorting to article 59, is called upon to respect certain rules that do not necessarily limit his power: he must consult the head of government, the presidents of the two chambers and the president of the Constitutional Court¹⁸ and address a message to the nation in addition to promulgating a *dahir*. These artificial conditions require two remarks. First, there are no clear-cut rules about how the consultation of the head of government should take place. Second, the king does not consult the institution of the Constitutional Court, but only the president, whom he has appointed. In addition, the constitution makes no mention of the nature of this consultation or of the value of the opinion of the president of the Constitutional Court. Is it a reasoned opinion that is published in the official state bulletin (*bulletin officiel du royaume*), or is it simply a confidential opinion?

The measures that the king is empowered to take under the state of exception rule are indeterminate. The king alone decides their nature and extent. Article 59 qualifies the aim of these measures, indicating that they are those that 'the defence of the territorial integrity imposes and to return, in the least time, to the normal functioning of the constitutional institutions'. But, unlike article 16 of the French Constitution, it does not establish the obligation to consult the Constitutional Court concerning planned measures. The only novelty is that fundamental rights and freedoms shall be guaranteed (article 59, paragraph 3). This raises another problem: the king is the only guarantor of freedoms in the constitution, and it is he who concentrates all power in his hands by virtue of article 59.

As in the 1996 constitution, the king can dissolve parliament during a state of exception under the new constitution. But the guarantees given to the parliament are not sufficient, because if the parliament is not dissolved, it does not meet of its own accord. Parliamentary meetings in a state of exception are mandatory, and therefore not subject (as they normally are) to a request made by the head of the government, one-third of the members of the House of Representatives or the majority of the House of Councilors, as is the case for an extraordinary session. Furthermore, the role of the parliament during the application of article 59 is unclear. Does it legislate normally? Can it censure the government?



The organization of power at the local level

The preamble of the constitution defines the kingdom as a 'united state', that is to say a unitary state. 'The territorial organization of the kingdom is decentralized. It is based on an advanced regionalization.' The constitution lays out the framework for decentralization and advanced regionalization, but it relies on an organic law to secure the essentials (conditions of democratic management of the business of regions, the number of councils, the rules of eligibility, the electoral system, conditions of implementation of the deliberations and decisions by the presidents, shared and transferred powers, financial arrangements and other territorial collectivities).

At the institutional level, Morocco is divided today into three levels. The regional level consists of a region headed by a *wali* (regional governor) and a regional representative council. These regions have the status of local governments. In the new constitution the regional representative councils must be elected by direct universal suffrage, which was not the case under the 1996 constitution. Level two consists of prefectures and provinces. The third level consists of three rural urban communes.

There is no hierarchical relationship between the three territorial levels. No local authority exercises authority over another. However, the regional representative council plays a prominent role in the development and monitoring of regional development programmes and regional patterns of territories (article 143, paragraph 3). All local authorities are equipped with an elected body (council, prefectural or provincial assemblies, regional council) and subject to the supervision of an officer who represents the state authority and executive power (the *caïd* for rural communes, the *pasha* for urban communes, the governor for provinces or prefectures and the *wali* for regions). Enforcement officers both represent the executive power of the territorial collectivities and have powers delegated by various ministries, including that of the interior, as part of a devolution of power.

The prefectural and provincial level is tightly controlled by the state, and it would be misleading to talk about real decentralization even if the prefectures and provinces had elected assemblies. Their powers are limited, and their budgetary autonomy is almost non-existent (compared with that of communal councils). These levels are rather extensions of central administration and a means of territorial control of the population.

Territorial collectivities have specific powers, shared powers with the state and powers that are transferable by the state (article 140). Territorial collectivities have the statutory power to perform their duties (article 140, paragraph 2) and the state provides them with financial resources. But the regions and other territorial


collectivities do not have legislative powers, as is the case with the Spanish and Italian regions.

The most important powers of the local municipalities, especially the communes, are mainly related to economic and social matters. The Communal Council is empowered to define the plan for social and economic development in accordance with the guidelines and objectives set by the national plan. These powers must, however, be within the guidelines established by the national plan. Communes also have power in terms of finance, taxation and communal property. They can review and vote on the budget and administrative accounts; open accounts and trusts with new credits; set tax rates, royalty rates and various fees; borrow money and receive donations; and manage, conserve and maintain common property. Communes also have the right to take any action of cooperation, association or partnership that helps promote their development.

The president of the Council also has control over the communal administrative police. However, central government representatives continue to play an important role in the territorial collectives. This is clearly a very limited decentralization and an authoritarian implementation of regionalization that has a long history in Morocco.

The notion of regionalization was initially introduced by the colonial powers. The processes of colonial control—and the subsequent division of the country into seven distinct military regions—were perceived as part of the ‘pacification of the territory’. Under the French protectorate (1912–56), the ‘region’ was a framework for both military and political control of the population. The national state soon after independence (1956–71) inherited this regional organization. Seven ‘economic regions’ with their own regional consultative bodies were created in 1971. These regions were conceived as a space for engaging in research and economic activity in order to deal with the problems associated with economic and administrative centralization. These economic regions were not local collectives, and their regional assemblies were only consultative bodies.

In the context of the Western Sahara conflict, a new geostrategic dimension of regionalization appeared in the 1980s. A royal speech in 1984 was intended to provide the regional assemblies with more legislative and executive powers. In 1988 reference was made to the German experience, but nothing was ever concrete. The 1992 and 1996 revised constitutions made the region part of a local government. The 47-96 law on the regions made them an ‘instrument of solidarity’ that would facilitate ‘social cohesion’. An August 1997 decree raised the number of regions from seven to 16. In April 2007, Morocco proposed autonomy for the Sahara to the United Nations. This proposal was supposed to be negotiated and then submitted for referendum. However, since the proposal was rejected by the Polisario, the 2011 constitution did



not make any reference to the issue of autonomy. The regional organization created by the constitution establishes unequal power relationships between the elected regional assemblies and the *walis* and governors as representatives of the central government. Article 137 states that regions 'participate in the implementation of the general policy of the state and in the elaboration of the territorial policies through their representatives in the Chamber of Councilors'. The presidents of the regional assemblies implement the deliberations and decisions of these assemblies.

The *walis* of the regions and the governors of prefectures and provinces represent the central government. They enforce laws, implement regulations and government decisions, and exercise administrative control on behalf of the government. They also coordinate the activities of the dispersed offices of the central government and ensure their proper functioning, and help the presidents of the territorial collectivities implement plans and development programmes (article 145). In relation to the balance of power at the regional level, it is clear that the *walis* and the governor play a central role in local politics, at the expense of the elected assemblies and their representatives.


The parliament in the 2011 constitution: changes and continuities

Morocco experienced eight legislatures between 1963 and 2007. Apart from a short period during which the parliament was dissolved by the monarchy, it has generally continued to exist on a permanent basis.¹⁹ From one constitution to the other, the powers of the parliament were reinforced in an organic manner. During the first parliaments, with the exception of that in 1963, the legislature was considered a 'rubber-stamp chamber': its role was to consult about and legitimize decisions taken outside it. The more recent experiences of the late 1990s, and those under the reign of Mohammed VI, show that the parliament has tended to play an increasingly effective role in the field of lawmaking and government oversight. Its prerogatives were strengthened with the 1996 constitutional reform, which established a bicameral system to replace the unicameral one.

Morocco's current legislature is regulated by the 2011 constitution, which gives more powers to the parliament, especially to the Chamber of Representatives,²⁰ and has enlarged the domain of lawmaking and recognized the opposition's status. The new constitution also changed the composition of the legislature, reinforced its powers and renewed its rank.²¹ For the first time in the history of legislative elections, a single political party gained more than 25 per cent of the seats in one chamber: the PJD won 107 seats in the Chamber of Representatives.

Maintaining a bicameral system with pre-eminence to the Chamber of Representatives

The 2011 constitution maintains a bicameral parliament composed of a Chamber of Representatives (*majlis al-nuwwab*), which is elected by universal direct suffrage for five years, and a Chamber of Councilors (*majlis al-mustasharin*), which is elected indirectly by local and national electoral colleges. The composition of the Chamber of Councilors, and the duration of its mandate, have witnessed some changes. The new status of the region was taken into account: 'The one-third reserved to the region is elected at the level of each region by the Regional Council from among its members' (article 63). Although trade unions are still represented, the new text gives similar rights to the most representative professional organizations of employers, which was not the case in the 1996 constitution. The number of councillors, as well as the duration of their mandate, has been reduced. The Chamber of Councilors has a minimum of 90 members (maximum of 120) who are elected for six years. In the previous legislature, the Chamber of Councilors consisted of 270 members who were elected for nine years.²² A different trend can be observed in the Chamber of Representatives; the number of its members increased from 325 to 395²³ due to the regime's attempts to increase the representation of women and youth in parliament.



However, the bicameral system, as defined by the new constitution, is different from that of 1962 or 1996. Pre-eminence is given to the Chamber of Representatives, and various provisions aim to ensure better coordination between the two chambers.²⁴ In terms of provisions that give pre-eminence to the Chamber of Representatives, the head of government presents the governmental programme to both chambers, and it is debated in each chamber but only the Chamber of Representatives votes on it. The government also needs a confidence vote in the Chamber of Representatives to be invested. Moreover, joint meetings between the two chambers are chaired by the president of the Chamber of Representatives (article 68); the law of finance is deposited by priority before the Chamber of Representatives (article 75); and the decree-laws made by the government between parliamentary sessions are deposited before the Bureau of the Chamber of Representatives and examined successively by the relevant committees of the two chambers. However if no common decision is taken, the relevant committee in the Chamber of Representatives takes the final decision (article 81).²⁵

Other provisions aim to increase coordination between the two chambers and make their work more harmonious. The 2011 constitution defines cases in which joint meetings between the two chambers must be held, and permanent committees in both chambers may hold joint meetings (article 68). It requires the harmonization of the internal rules of the two chambers: 'Both chambers of the parliament are held to take into consideration, during the drafting of their respective internal rules, the imperatives of their harmonization and their complementariness, in a manner that guarantees the efficiency of their parliamentary work' (article 69). The introduction of this kind of rule constitutes a first step towards increasing the efficiency of parliamentary work.

Reinforcing parliamentary powers and enlarging the domain of the law

Parliamentary powers have been reinforced in the fields of legislation and government oversight. The domain of the law has been enlarged to cover different sectors of political, economic and social life (article 71). The power to initiate laws concurrently belongs to the head of government and to MPs (article 78). To encourage MPs to make use of this prerogative, at least one day per month is reserved for the examination of proposed bills, including those put forward by the opposition (article 82).

In the field of government oversight, the current parliament reserves one meeting per year to evaluate public policies (articles 70, 101). One meeting per month is reserved for the head of government to respond to general policy questions (article 100) and for a report on the government's activity (article 101). Committees in both chambers 'can ask to hear high officials in the administration and in public

institutions and enterprises, in the presence of and under the responsibility of the ministers concerned' (article 102).²⁶

The Chamber of Representatives maintains the power to hold the government accountable through a motion of censure. The conditions for introducing such a motion have been simplified by requiring the signature of only one-fifth of the members of the chamber (article 106).²⁷ If approved by an absolute majority of the members of the chamber, the motion requires the collective resignation of the government (article 105). The Chamber of Councilors has lost its power to issue censure or warning motions, as it could do under the 1996 constitution. The current constitution gives the Chamber of Councilors the right to address the government through a motion that needs to be signed by at least one-fifth of its members. This motion does not lead to the resignation of the government and it is not followed by a vote (article 106).

The establishment of fact-finding committees is another tool that the parliament can use to control the executive branch. The new constitution makes it easier to create such committees. The majority of members of one of the chambers is no longer required to establish these committees; one-third will now suffice (article 67). A public meeting is held by the chamber concerned to discuss the reports of these committees (article 67). The reports of instances and institutions in charge of protecting human rights and liberties, good governance, human development and participatory democracy are also presented and debated before the parliament at least once a year (article 160). All of these prerogatives strengthen the Moroccan Parliament's role in legislation and government oversight.

New status for the opposition

The new constitution defines the opposition as 'an essential component of both chambers. It participates in the functions of legislation and oversight' (article 60). It gives the opposition a status that will allow it to accomplish its missions more efficiently in the fields of legislation (the inclusion of proposed bills on the agendas of the two chambers; preside over the committee in charge of legislation in the Chamber of Representatives); and exercise oversight (censure motions, interpellation of the government, fact-finding committees, oral questions). The opposition is given air time (*temps d'antenne*) with the official media that is proportional to its representation in the parliament, access to public finance and participation in the election of members of the Constitutional Court (article 10).

Another important change in the 2011 constitution is its condemnation of parliamentary transhumance. Thus, 'any member of one of the two chambers who renounces his political affiliation in the name of which he ran for the elections or (renounces) the parliamentary group to which he is affiliated, is discharged from his



mandate ...' (article 61). The decision is taken by the Constitutional Court once the matter has been referred to it by the president of the chamber concerned.

Weakness of the parliament

Despite the relative strengthening of the parliament's constitutional powers and the change in its composition, the legislative body still confronts limitations imposed by the constitutional provisions. The parliament remains relatively inaccessible to civil society organizations, and the constitutionalization of the secrecy of committee meetings (article 68) contradicts the principle of access to information and transparency of parliamentary work. It does not correspond to the expectations of Moroccan civil society organizations, which have been asking for the establishment of mechanisms and procedures to allow increased participation in the legislative process and government oversight.

The parliament remains subordinated to the government. In terms of parliamentary oversight powers, the famous article 51 of the 1996 constitution, considered by MPs in previous legislatures to be a major limitation to parliamentary control of the budget, has not changed in the current constitution. The government can still oppose any MP's proposition or amendment aimed at the 'diminishment of the public resources, or the creation or aggravation of the public expenditures' (article 77). Parliament's powers are limited by the constitutional rule to maintain macroeconomic balance.

The head of government can dissolve the Chamber of Representatives (article 104). This is a new provision that gives the government more control over parliament. The decree of dissolution must be initiated in the Council of Ministers, which is presided over by the king.

Some sectors, such as the security services, escape parliamentary control altogether. The constitution established a Superior Council of Security, which is in charge of coordinating the country's internal and external security; it also aims to institutionalize norms of good governance in the security field. The Council is presided over by the king and 'can delegate to the head of government the presidency of a meeting of the Council, on the basis of a specific agenda' (article 54).

The regime of parliamentary sessions proposed by the new constitution is very strict (two sessions lasting at least four months), and the government determines the duration of the sessions (e.g., that the session cannot last more than four months). The conditions for demanding an extraordinary session have become more difficult. The new text requires the signature of one-third of the members of the Chamber of Representatives and of the majority of the Chamber of Councilors. Sessions can be closed by decree (article 66), and can also be demanded by decree.

The monarchy maintains its predominance over the parliament, which allows it to orient and influence parliament's work. The king addresses messages to the parliament when presiding over the opening sessions of the legislative year. These messages set the political and parliamentary agenda for the year and serve as a reference for MPs in their debates. The king's messages cannot be the object of any debate (article 52). The king promulgates laws in the 30 days following their transmission to the government (this deadline is only 15 days in Spain). The promulgation concerns laws and not administrative acts. The king can demand that the two chambers proceed to a new reading of any draft or proposed bill, and the parliament cannot refuse (article 95). The king's demand is not subject to any conditions, and the constitution does not specify a deadline for this new reading; however, the king's demand results in a suspension of the promulgation of the law. Thus the parliament and the government have no choice but to proceed to a new reading.

The king maintains the power to dissolve one or both chambers (article 96); this provision is not similar to that defined in the framework of parliamentary regimes, rather it is part of the powers bestowed on the king.


Finally, the king signs and ratifies treaties. Parliamentary approval is asked for only for 'treaties of peace or of union, or those relative to the delimitation of the frontiers, commercial treaties or those which engage the finances of the state or the application of which necessitate legislative measures, as well as those treaties relative to the individual or collective rights and freedoms of the citizens ...' (article 55). Parliament does not have the power to approve treaties that have a political or military dimension, or those that can result in a law being either abrogated or modified, as is the case in other countries such as Spain.

The Moroccan Parliament is confronted with the challenge of translating its new constitutional powers into practice. Additional measures should be undertaken in order to guarantee the conditions for more efficiency and greater autonomy in parliamentary work.

The image crisis of the parliament and of MPs

Although parliament is becoming more assertive in its roles of legislation and oversight, it still suffers from an image crisis. According to different studies, the majority of Moroccans do not perceive parliament as an efficient institution. MPs are perceived as serving their own interests, and media coverage of parliamentary activities reinforces this image among the population.

Parliament also suffers from a crisis of representativeness: the right to vote is not guaranteed to all Moroccans, including those who live outside the country. The new constitution recognizes their right to vote; however, the organic law of the Chamber



of Representatives introduced the procedure of proxy voting. There is also a tendency among Moroccans to vote less, which is very much indicative of the present crisis. During the last legislative elections, the rates of abstention were very high compared with previous elections (37 per cent in 2007 and 45 per cent in 2011).

The electoral system and districting (gerrymandering) do not favour the emergence of a strong parliamentary majority. For example, in the last legislative elections the PJD won 107 seats out of 395, so the party leader had to negotiate with ideologically different political parties to be able to build a majority.

Beyond the constitutional and structural restrictions, the Moroccan Parliament is also confronted with some internal shortcomings. It does not have the necessary human and material resources to improve the quality of its work. Parliamentarians do not have qualified and specialized staff to assist them in their work in the fields of legislation and oversight. Parliament does not have the culture or the mechanisms to evaluate its work and identify the obstacles to better performance.


Executive power

In the new constitution, the prime minister becomes head of government and is designated from within the party that won the majority of seats in the legislative elections (article 47). He has the power to propose members of the government and can demand that the king terminate the mandate of one or more members of the government, which can lead to their individual or collective resignation.

The government exercises executive power and regulatory power, ensures the execution of the laws and performs administrative functions. The head of government appoints individuals to civil offices/positions in the public administration and to senior positions in public institutions and enterprises. However, the king maintains his prerogative to appoint high officials, upon the proposal of the head of government. According to article 49, the Council of Ministers (presided over by the king) deliberates, among other things, on appointments 'to the following civil offices: *wali* of bank al-maghrib,²⁸ ambassador, *wali* and governor, and persons of the administrations in charge of internal security, as well as officials in strategic public institutions and enterprises [...]'. As stated above, the appointment to military positions is also part of the king's prerogatives as the head of the Royal Armed Forces.

As mentioned above, the head of government has the power to dissolve the Chamber of Representatives, but the decree of dissolution must be examined in the Council of Ministers. This is a new prerogative that gives more power to the executive over the legislature.

Another novelty of this text is the fact that the Council of Government has been constitutionalized. The Council of Government is chaired by the head of government, who calls the meetings. The Council deliberates on certain issues, such as the general policy of the state, public policies, the engagement of the responsibility of the government before the Chamber of Representatives, and the current situation of human rights and public order. Moreover, it deliberates on a number of texts such as draft bills, including those on finance/budget, decrees-laws, drafts of regulatory decrees, and international treaties and conventions before their submission to the Council of Ministers. The appointment of a number of state officials is discussed within the Council. According to article 92, the Council deliberates on 'the appointment of the secretaries-general and the central directors of the public administrations, the presidents of universities, of the deans and directors of the superior schools and institutes ...'. The head of government informs the king of the conclusions of the deliberations of the Council of Government.



The Council of Government has some important prerogatives; nevertheless, strategic issues are the domain of the Council of Ministers, which is presided over by the king who rules on/decides on them within the framework of the strategic powers that are reserved for him. It is worth mentioning here that the king wants to preserve macroeconomic and financial equilibrium. Another limitation of the powers of the current government is the fact that it has the administration at its disposal, but not the armed forces. The king is the head of the armed forces in order to ensure the execution of laws. In Spain, the government conducts civil and military administration as well as the defence of the state (article 97).

Progressive forces in Morocco have criticized the fact that the prime minister became head of government but not head of the executive branch. Although the new constitution made it clear that the king has to choose the head of government from within the party that ranked first in the legislative elections, he can still appoint or dismiss ministers at will. The constitution states that the king has to consult the head of government before taking such decisions, but he has the power to take the final decision without necessarily taking the views of the head of government into account. The king appoints the head of government, while in other countries (such as Spain) the king nominates a candidate for the presidency of the government after consulting with representatives appointed by the political groups with parliamentary representation and through the speaker of the Congress (article 99, Spanish Constitution).

The relationship between the Council of Ministers and the Council of Government is that of control by the first and submission of the second. The Council of Ministers has veto power over all decisions made by the Council of Government. In other monarchical regimes, such as Jordan, the executive branch is composed of the Council of Ministers (cabinet), which consists of the prime minister and other ministers. The king has predominance over this Council, and all decisions taken by the Council must be ratified by the king of Jordan. In Morocco, the constitution establishes two councils with disproportionate powers, which gives more guarantees to the powers of the king. While article 25 of the 1996 constitution stipulates that the king presides over the Council of Ministers, the current constitution provides more details of the king's prerogatives and powers. It has constitutionalized the supremacy of the monarchical institution over the government and positions it as the head of the executive. This structural change is a step backward when it comes to establishing democracy in Morocco.

The judiciary: towards more independence

The new constitution reserves one chapter for the judiciary, which is presented in article 107 as 'independent of the legislative power and the executive power'. There is a semantic shift from a conception of the judiciary as a 'judicial authority' in the 1996 constitution to a 'judicial power' in the new constitution. Theoretically, the independence of justice refers to both the independence of jurisdictions and the independence of judges.


The independence of jurisdictions essentially means the constitutional interdiction of any kind of interference from other public powers in judiciary procedures. It also means that neither the government nor the parliament can transfer to any ad hoc jurisdictions competences that are normally the domain of common law jurisdictions or order a judgement on a specific case, which would undermine the presumption of innocence and nullify the principle that 'no one can be deprived of his natural judges'.

The 2011 constitution ensures the independence of justice through the principle that presiding magistrates are irremovable (article 108). Indeed, judges cannot be fired, dismissed or transferred without their agreement. A legal procedure is required.

The new constitution stipulates that it will create a Higher Judicial Council presided over by the king. This Council will replace the High Council of Magistrature. The Higher Judicial Council will have financial and administrative independence. The first president of the Court of Cassation acts as a president-delegate, as opposed to the arrangement under the 1996 constitution, according to which this role was played by the minister of justice.

The number of elected magistrates on the Council has increased. Women should be represented in proportion to their presence within the entire body of the legislature. The Council's prerogatives have been extended to include missions of investigation. The Council also has the right to offer its views concerning legislative and regulatory bills relating to justice or to the evaluation of the judiciary system in Morocco.

A Constitutional Court replaces the Constitutional Council of the 1996 constitution. The Constitutional Court has had its prerogatives reinforced. It keeps the prerogatives of the Constitutional Council (control of the constitutionality of the internal rules of both chambers, organic laws and ordinary law, and announcement of the results of referendums). The Constitutional Court also has the power to take cognizance of a pleading of unconstitutionality that is raised in the course of a process, when one of the parties maintains that the law on which the issue of litigation depends infringes on the rights and freedoms guaranteed by the constitution (article 133).



Despite the progress made at this level, the judiciary is not the guardian of the constitution, nor is it the guarantor of individual and collective liberties. Where the principle that judges are irremovable is concerned, it is limited only to the *magistrat de siège*. The public prosecutor is the representative of the executive power and has the power to take decisions on issues such as health.

In the light of this analysis of the structure of power in the new constitution, the judiciary is fundamentally related to the power of the king as the head of state, a modern authority. The analysis also reveals that the king's power is based on the notion of *imamat* or 'commander of the faithful' (article 41). This relationship appears at different levels. For example, the king presides over the Higher Judicial Council in order to be able to exercise oversight over the Council. Sentences are given and executed in the name of the king, even though the constitution added 'according to the law' and the king approves the appointment of magistrates by *dahir*.

The king has the prerogative of pardon (article 58), which allows him to provide the beneficiary with all or part of the execution of a criminal sentence. The personal prerogative of the head of state is distinguished from amnesty (when the parliament clears an offence or a sentence) in that it has no effect in the future and does not erase the conviction, which remains on the individual's criminal record. Pardons can be total or partial (e.g., avoiding prison by paying a fine), final or conditional (e.g., avoiding prison only after actual payment of the fine) or relative (commuting a sentence or granting a more lenient penalty). As a favour, pardons can either be granted automatically or after a request. The death sentence automatically initiates the clemency process, and the death penalty can be enforced only if a pardon is denied (article 649 CPP). Requests for pardons are heard by a committee that sits in the Ministry of Justice and is composed of representatives of the various relevant administrations. It serves as a filtering instrument. The file is then transmitted to the king by the minister of justice. Pardons take the form of *adahir* and always coincide with religious festivals or national holidays. The amnesty bill is deliberated in the Council of Ministers, which is headed by the king (article 48). The king also has the power to refer matters to the Constitutional Court.


Revision of the constitution

Title 13 of the constitution gives the initiative of constitutional revision to the king, to the head of government and to both houses of parliament (article 172). In the first case the text of the constitution speaks of a 'project' and in the second and third cases it refers to a 'proposition for revision'. Parliamentary proposals may come from one or more members of the House of Representatives or the House of Councilors.

The constitutional text does not treat royal projects in the same way that it deals with proposed revisions. Revision projects are discussed in the Council of Ministers (article 49), but are not the subject of parliamentary debate as was the case in the 1962 constitutional text. The 1962 constitution stipulates that proposals that emanate from the prime minister should be subject to a parliamentary debate. Proposals originating from one of the two chambers must be adopted by a two-thirds majority vote of its members. Then the proposal is submitted to the next chamber, and may be adopted by a two-thirds majority vote there (article 104). The text does not give any other details about the procedure.

Proposals initiated by the head of government are debated in the Council of Government and then submitted to the Council of Ministers. The king is not obligated to respond to them. The projects and proposals are subject to mandatory referendum by *dahir*, and do not need to be countersigned by the head of government (article 42, paragraph 4). The review is final after approval by referendum (article 174, paragraph 2). The king may, after consultation with the head of the Constitutional Court, submit to parliament (by *dahir*) a project for the revision of certain provisions of the constitution (article 174, paragraph 3). After being called by the king in a joint session, the parliament has to approve revisions by a two-thirds majority. The Constitutional Court checks the regularity of the revision procedure and announces the results.

There are clear limits to the exercise of power for constitutional revisions. We can distinguish between formal limits and material limits. In formal terms, there are circumstances in which constitutional revisions may not take place. If the king is still a minor, the Regency Council cannot revise the constitution.²⁹ In addition, when a new monarch comes to the throne there is nothing to prevent revisions (article 43). As for the use of article 59 and the ban on revisions during a 'state of exception', the text contains no provision related to this subject. Unlike French constitutional judges, Moroccan judges have not ruled on this issue. In practice, however, the constitution has been revised during a state of emergency (e.g., the 1970 constitution). In addition, the text does not prohibit revisions when the country's territorial integrity is threatened. This would amount to a limitation of the king's powers, because he is the guarantor of national independence and the territorial integrity of the kingdom



within its authentic borders (article 42). At the material level, revisions cannot take place with regard to 'Islamic provisions', nor can they relate to the monarchical form of government or to the democratic choice and the fundamental rights and freedoms acquired. This analysis clearly shows that the king alone can revise the constitution, and that the powers of the head of government and the parliament are in this regard only formal. We should bear in mind that all the constitutional amendments that have taken place in independent Morocco (1970, 1972, 1980, 1992, 1995, 1996 and 2011) were the work of the king.

Conclusions and recommendations

The defenders of the new constitution insist that it is designed to gradually introduce the principle of checks and balances in the Moroccan political system. As far as the executive branch of government is concerned, the new constitution states in article 47 that the 'head of government', which has replaced the position of 'prime minister', will be appointed from the party that has won the elections, thus implicitly affirming the principle of universal suffrage. At least in the constitutional text, the 'head of government' is supposed to have authority over cabinet members (including the power to dismiss them) and be able to coordinate government action, appoint high-ranking officials and supervise public services. According to the new constitution, the head of government can dissolve the House of Representatives after consultation with the king.

The legislative branch has been given stronger legislative and regulatory powers to oversee and assess government policy, which will make the government more accountable to parliament. An important aspect of the new constitution is that article 61 outlaws the practice of 'political transhumance', which has negatively affected the image of the parliament and its effectiveness. Under the new constitution, the parliament has the potential to be more assertive and to play a politically more meaningful role. More importantly, parliament can exercise its power of oversight of the executive branch by launching investigations if only one-fifth of its members decide to do so. Another aspect of parliamentary leverage is the need for only a one-third vote to pass a censure motion against cabinet ministers.

The new constitution also enhances the judiciary's independence. More specifically, there is now a Constitutional Court, which has important powers to check the constitutionality of international conventions and rule on disputes within the context of the new regionalization of the country. Articles 113–116 of the new constitution provide a better basis for the independence of the judiciary from the executive power by giving more authority to the Higher Judicial Council. Article 6, which states that 'the law is the supreme expression of the will of the nation', provides new guarantees for the primacy of law over individuals and public institutions.

Optimistic Moroccan observers see the new constitution as creating a more decentralized system and promoting sustainable development through a new administrative organization based on regionalization. The new constitution pushes the process of decentralization further by giving more power to elected regional councils. These changes represent part of Mohammed VI's programme of reforms on the policy of regionalization and the redistribution of powers between constitutional institutions. Thus the constitutionalization of new local and regional councils is viewed, from this perspective, as part of a process of devolution of powers from the



central state to the regions. However, the process of regionalization is likely to be confronted by a number of problems.

Although the new constitution has made advances in the slow process of political liberalization, more critical and progressive voices have considered it insufficient at this stage to guarantee the establishment of democratic institutions in Morocco. They draw attention to a number of weaknesses in the constitutional text, the most important of which are the centrality and concentration of the monarch's powers, which have not been affected. The king continues to retain major executive powers without accountability on the Moroccan political scene—in contradiction of his 9 March speech, which insisted on the notion of accountability. Under article 42, the king still continues to exercise his own legal powers via royal decrees known as *dahirs*. Article 42 stresses the fact that the king is the 'supreme representative, symbol of the unity of the nation, guarantor of the permanence and of the continuity of the state and supreme arbiter between the institutions'. The king exercises his missions by '*dahirs* by virtue of the powers that are expressly devolved to him by this constitution'.

While improvements have been made in relation to the independence of the judicial system, the king is still the head of the Constitutional Court and appoints half of its members. This is another example of the concentration of power that does not square well with the basic principles of democracy. In addition, the new constitution's major achievement in the field of human rights still has certain limits. Respect for human rights comes within 'the legal framework of the constitution and the *thawabit* (pillars) and laws of the kingdom'. Even though Islam is declared the religion of the state in article 41, there is still the issue of the freedom of conscience, whereby a Muslim is still constrained in terms of religious choice. Morocco has not yet ratified the international human rights covenants to which the constitution refers. Putting some of the positive achievements of the constitution into practice will be a major challenge as far as these new laws are concerned.

Consensus politics continues to postpone the democratic project. Revealingly, one month after the 1 July referendum, Moroccan officials and dignitaries were once again lined up to bow to the monarch in the classic ritual of the *bay'a* (allegiance) that has turned out to be one of the most symbolic acts of obedience and servitude. With the help of rejuvenated and independent political parties, Moroccans should write a new social contract that puts the *bay'a* aside if real democracy is to be established. The role of the monarchy ought to be only one element of this contract, not the major determinant force. In short, if the monarchy and political parties are serious about democracy, they should be serious about crafting a real democratic constitution. Some of the very basic recommendations for crafting a new democratic constitution would have to include:

- The election of an assembly to draft the constitution.
- The provisions on fundamental rights and freedoms recognized by the constitution should be interpreted in accordance with the Universal Declaration of Human Rights and in accordance with pacts related to civil, political, social and economic rights.
- The powers of the head of government need to be strengthened.
- The Council of Government should be the true centre of executive power.
- The powers of parliament and the judiciary need to be further strengthened.
- The right to life and physical integrity should be accompanied by an explicit abolition of the death penalty.
- Sexual equality should be recognized without restrictions.
- The Moroccan state should recognize the supremacy of treaties ratified by Morocco over domestic law.



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Endnotes

- 1 International IDEA organized a seminar to debate the first draft of this study on 9 April 2012 in Rabat, Morocco. In addition to the study's authors, the seminar was attended by Zaid Al-Ali (International IDEA), Omar Bendourou (Morocco), Philipp Dann (Germany), Abdelhay Moudden (Morocco), Sufian Obeidat (Jordan), Mohamed Sassi (Morocco), and Cheryl Saunders (International IDEA). The authors are grateful for all the comments and contributions that were made to the study by these individuals. This study was written collectively by Mohamed Madani, Driss Maghraoui and Saloua Zerhouni. It was coordinated and partly translated by Driss Maghraoui.
- 2 In December 2011, the Justice and Charity group left the February 20 movement, which will gradually weaken it.
- 3 See the official Arabic communiqué of the movement: *al-bayanarrasmi li harkat 20 fibrayar*, 16 February 2011, available at <http://al-manshour.org/node/195>.
- 4 'The person of the king shall be sacred and inviolable.'
- 5 'The king shall appoint the Prime Minister. Upon the prime minister's recommendation, the king shall appoint the other Cabinet members as he may terminate their services. The king shall terminate the services of the Government either on his own initiative or because of their resignation.'
- 6 'The king may dissolve the two houses of parliament or one thereof by royal decree, in accordance with the conditions prescribed in articles 71 and 73.'
- 7 'The king shall be the commander-in-chief of the Royal Armed Forces. He shall make civil and military appointments and shall reserve the right to delegate such a power.'
- 8 The notion of *makhzen* has come to refer to the system of power in the traditional conception of political authority but it has gradually come to include the close entourage of the king as the effective centre of power and political control. When speaking about *makhzen and makhzenization*, what is implied is generally an authoritarian practice of government without any form of accountability.
- 9 'Il n'ont rien compris', *Telquel*, No. 468/9 (15 April 2011)
- 10 *Adala*, April 2011.
- 11 Since the constitution of 14 December 1962, Morocco has experienced eight constitutional amendments. The first was on 31 July 1970, and the second was on 10 March 1972. The 1972 constitution went through two amendments: one lowered the king's age of majority to 16 years from 18 (referendum of 23 May 1980) and the other extended the duration of the mandate of the Chamber of Representatives (referendum of 30 May 1980). The fifth revision dates back to 9 October 1992. The revised constitution of 1992 also went through



an amendment that related to fiscal year 1995. The 7 October 1996 revision introduced bicameralism, among other things. The last revision came about as a result of the 1 July 2011 referendum.

- ¹² In the king's conception, an 'executive monarchy' is part of a system of rule in which the king both reigns and rules, and subsequently exercises complete executive power.
- ¹³ Royal speech on 6 November 2006 in the context of the 30th anniversary of the Green March.
- ¹⁴ Royal speech during the opening of the first session of the fourth legislative year on 14 October 2005.
- ¹⁵ Royal speech, *Le matin du Sahara et du Maghreb*, 10 November 2009.
- ¹⁶ Royal decisions are traditionally formulated as *dahirs* (royal decrees), a legal reality that puts them above the law and the constitutional text. *Dahirs* are part of the king's discretionary action in a variety of fields that are related to the administration, religion, legislation and other regulatory mechanisms. The invocation of the religious nature of the *dahirs* makes them sacrosanct and therefore not subject to invalidation. *Dahirs* are regularly invoked in most royal appointments. The *dahir* remains immune to any judicial control.
- ¹⁷ When the institutions of the republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are immediately and gravely threatened, and when the regular functioning of the constitutional public authorities is interrupted, the president of the republic takes measures required by these circumstances after formally consulting with the prime minister, the presidents of the assemblies and the Constitutional Court. He informs the nation through a speech.
- ¹⁸ In France, the Constitutional Council is consulted.
- ¹⁹ Between 1965 and 1970, Morocco was under a state of emergency declared by King Hassan II.
- ²⁰ The Chamber of Representatives adopted an organic law that set up several rules related to the number of representatives, the voting system, eligibility requirements, incompatibility cases and legal contentions concerning elections.
- ²¹ According to the Ministry of Interior, 87 per cent of the candidates who ran for the legislative elections of 25 November 2011 were new.
- ²² Changes in the composition of the Chamber of Councilors should be analysed in the light of the regime's new vision of its bicameral system. More importantly, with the establishment of the Economic and Social Council in February 2011, many observers are questioning the Chamber of Councilors' role within the new institutional political landscape.

- ²³ This number was defined by the organic law of the Chamber of Representatives 27-11.
- ²⁴ In the 1996 constitution, the two chambers had almost the same prerogatives in the fields of legislation and government oversight. Both chambers could form fact-finding committees, and the Chamber of Councilors was given the power to present warning motions to the government (article 77) and to draw its attention to more specific issues. The initiative to revise the constitution was also a common prerogative of the two chambers.
- ²⁵ According to article 54 of the 1996 constitution, when a decision is not reached a mixed commission is formed to propose a common decision to submit to the relevant commissions.
- ²⁶ It is worth mentioning that members of both chambers used to invite directors and heads of public institutions and enterprises to ask them questions; the new constitution institutionalizes this parliamentary practice and gives it more strength. Not all directors are invited for consultation, especially those appointed by the king.
- ²⁷ The 1996 constitution required the signature of one-quarter of the members of the chamber to issue a motion of censure.
- ²⁸ This refers to the head of the Moroccan Central Bank.
- ²⁹ Article 44, paragraph 1: 'The king is a minor until reaching 18 years. During the minority of the king, a Council of the Regency (Conseil de Régence) exercises the powers and the constitutional rights of the crown, except those relating to the revision of the constitution. The Council of the Regency shall function as a consultative organ before the king until the day he has attained the age of 18 years.'



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