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The 2011 Constitutional reform in Morocco: more flaws than merits

by Francesco Biagi (University of Bologna)



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The 2011 constitutional reform in Morocco: more flaws than merits

by Francesco Biagi*

1. Introduction

In the speech given to both Houses of Parliament on 11 October 2013 during the first parliamentary session, King Mohammed VI said that the “Moroccan democratic model” was “a precursor in the region as well as on the continental level.”¹ Similarly, with the purpose of stressing the “democratic exceptionalism”² of the country, the new government, led by Abdeilah Benkirane,³ often emphasised that Morocco represents a “third way” compared to countries such as Tunisia, Libya or Egypt since it “...has not embarked on a limited process of reform from the top, driven and controlled by the King. Nor has it experienced a revolution brought about by angry citizens rising up against the regime. Rather, it has chosen an alternate path based on a genuine partnership between the King and the PJD (*Parti de la justice et du développement*) that promises to bring about

more far-reaching reform than what the palace alone would grant, without the disruption caused by uncontrolled popular upheaval.”⁴

It should not be at all surprising that the regime and the new Government consider Morocco a “democratic model” or a “third way.” After all, they are referring to their own country. What is harder to understand is that when discussing the Arab uprisings, even prominent Western political leaders, representatives of the European Union institutions and the mainstream media (when they do not forget about Morocco) often tend to praise the process of democratic reform carried out by Mohammed VI. For example, on 12 September 2012, Hillary Clinton, former US Secretary of State, said, “in many ways, the United States looks to Morocco to be a leader and a model [...] On political reform, we have all seen remarkable changes taking place across North Africa and the Middle East. I commend Morocco and your government for your efforts to stay ahead of these changes by holding free and fair elections, empowering the elected parliament, taking other steps to ensure that the government reflects the will of the people.”⁵ Similarly, former French President Nicolas Sarkozy sang the praises of the process that led to the adoption of the new 2011 Constitution: “King Mohammed VI has shown the path towards a profound, peaceful and modern transformation of Moroccan institutions and society [...] France fully supports this exemplary process.”⁶ Interestingly enough, even at the European Union level the constitutional reform that took

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¹ The speech is available, along with all other official speeches of the Sovereign, online at:

<http://www.maroc.ma/PortailInst/Fr/>.

² See L. Lalami (2011), “The Moroccan ‘Exception’”. *The Nation*, 24 August,

<http://www.thenation.com/article/162967/moroccan-exception>.

³ Leader of the *Parti de la justice et du développement* (PJD), the moderate Islamic party which won the November 2011 elections.

⁴ As highlighted by M. Ottaway (2012), *Morocco: Can the Third Way Succeed?* Carnegie Endowment, 31 July, www.carnegieendowment.org.

⁵ H. Clinton (2012), “Remarks at the Opening Plenary of the US-Morocco Strategic Dialogue”. US Department of State, 13 September, <http://www.state.gov/secretary/rm/2012/09/197711.html>.

⁶ Le monde (2011), “La France salue les réformes annoncées par le roi du Maroc”. 18 June, http://www.lemonde.fr/afrique/article/2011/06/18/la-france-salue-les-reformes-annoncees-par-le-roi-du-maroc_1538011_3212.html.

place in Morocco was considered an extremely positive step taken by the country, as well as a means to strengthen the cooperation between the EU and Morocco. Indeed, according to the High Representative Catherine Ashton, this reform “constitute[s] a significant response to the legitimate aspirations of the Moroccan people and [is] consistent with Morocco’s Advanced Status with the EU.”⁷ When it comes to the media, it is worth noting that following the ratification of the 2011 Constitution, *The New York Times* headlined: “All Hail the (Democratic) King.”⁸ Even sections of the academic literature have commended the constitutional reform carried out by the Moroccan Sovereign.⁹

In this paper I argue against the aforementioned idea, according to which Morocco should be considered a model in the region, and in particular I show that the constitution-making process, the 2011 Constitution and its subsequent implementation have more flaws than merits.

Accordingly, this paper proceeds in five steps. First of all, I examine the reaction of the regime to the upheavals that broke out in the country after 20 February 2011. Secondly, I analyse the process of constitution-making, showing its main strengths and weaknesses, and comparing it with other constituent

⁷http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/Morocco_6_Joint%20Statement_HR_and_Commissioner.pdf. On the relations between the EU and Morocco see F. Bicchi (2010), “The Impact of the ENP on EU-North Africa Relations: The Good, the Bad and the Ugly”, in R.G. Whitman and S. Wolff (eds.), *The European Neighbourhood Policy in Perspective. Context, Implementation and Impact*, Basingstoke: Palgrave Macmillan.

⁸ A. Charai and J. Braude (2011), “All Hail the (Democratic) King”. *The New York Times*, 11 July, http://www.nytimes.com/2011/07/12/opinion/12Charai.html?_r=0.

⁹ See, in particular, A. Bouachik, M. Degoffe and C. Saint-Prot (eds.) (2012), “La Constitution marocaine de 2011: Lectures croisées”. *Publications de la Revue marocaine d’administration locale et de développement, Série “Thèmes actuels”*, no. 77; C. Saint-Prot and F. Rouvillois (eds.) (2013), *L’exception marocaine*. Paris: Ellipses.

processes that took place in the region following the Arab uprisings. In the third section, I highlight the most significant elements of continuity and discontinuity with the previous 1996 Constitution. The fourth section deals with the process of implementation: specifically, I show that this process is proceeding quite slowly and that in some cases ordinary legislation is in contrast with the new Constitution and international human rights treaties. Moreover, I discuss the role that the judiciary and the Constitutional Court can play in the implementation and interpretation of the Constitution. Finally, I draw some concluding remarks.

2. A New Constitution in Response to the Uprisings

Before the 2011 Constitution, Morocco had adopted five Constitutions (in 1962, 1970, 1972, 1992 and 1996); all entered into force under the reign of Hassan II, the father of Mohammed VI. Although the 1992 and 1996 Constitutions introduced some democratic novelties (such as the Constitutional Council, the Economic and Social Council and stronger protection of fundamental rights), the legal system represented an important tool for Hassan II to exercise his authoritarian power over the country. In fact, all five Constitutions granted him almost unlimited powers. In particular, Article 19 gave him both secular and spiritual powers: he was both the head of State, the supreme representative of the nation, and the “*Amir Al Mouminine*” – that is, the “Commander of the Faithful.”

The need to adopt a new Constitution had become apparent since Mohammed VI came to the throne in 1999. It was specifically the *Mouvement de Revendication d’une Constitution Démocratique*, made up principally of members of left-wing parties, that pushed for the adoption of a new Constitution that would provide greater protection of fundamental rights, a more robust recognition of the pluralist nature of

Moroccan identity, and a far-reaching reform of the system of distributing political power.

There appear to be two main reasons why, despite a rather intense debate on this issue, the 1996 constitutional reform was not implemented until after the King's 9 March 2011 speech, when he announced to the country his decision to complete a "global constitutional reform." The first reason results from the fact that the adoption of a new Constitution did not represent a priority for the major parties represented in Parliament; in fact, these parties considered the 1996 Constitution to be satisfactory, "and that what needed to be changed was not the Constitution, but practices; compliance with the [then-] Constitution was all that was needed."¹⁰

The second and more important reason resulted from the fact that the Sovereign did not have any interest in making amendments to the 1996 Constitution, nor in adopting a new one when he was not under any political pressure to do so.¹¹ It was therefore not particularly surprising that Mohammed VI had no intention of debating constitutional reform. Besides, history has demonstrated that democratic reforms are only implemented in Morocco when the Monarchy is put under significant pressure (from the army, the parties, the population or the international community), and it is for this reason that the most prevalent expression used in the literature is "top-down democratisation."¹²

The Sovereign's decision on 9 March 2011 to announce a far-reaching reform of the Constitution undoubtedly provides further confirmation of this tendency. In fact, through the enactment of a new Constitution, Mohammed VI wanted to appease public

dissatisfaction and calm down the protests that had started to break out in Morocco after 20 February 2011: the date from which the eponymous "*Mouvement du 20 Février*" took its name. This movement which largely composed of young people, specifically denounced the systematic and endemic corruption, the high cost of basic products, low wages and increasing poverty; it also called for greater social justice, free access to health care, greater employment opportunities and the right to housing. Young Moroccans also hoped for the achievement of profound and radical constitutional and political reforms, the construction of a State based on the rule of law, and a free and independent legal system in order to enable the country to become a parliamentary monarchy.¹³ It should be noted that the regime managed to keep the protest movements under control, also because it was able in many ways to provide tangible responses extremely quickly. In fact, the King's announcement of constitutional reform on 9 March 2011 occurred less than three weeks after the first protests.

3. The Constitution-Making Process

On 9 March 2011, under the pretext of pursuing the process of an "advanced regionalization system,"¹⁴ and without mentioning the 20 February Movement, Mohammed VI gave a genuine "constituent speech," in which he asserted the "seven key elements" on which the constitutional reform was to be based: 1) a guarantee of the pluralist nature of Moroccan identity, including the *Amazigh* component; 2) consolidation of the rule of law, the promotion and expansion of the scope of fundamental rights, and the guarantee of their exercise; 3) a guarantee of the independence of the

¹⁰ L. Storm (2007), *Democratization in Morocco: The Political Elite and Struggles for Power in the Post-Independence State*. London: Routledge, p. 157.

¹¹ Ibid.

¹² Ibid.

¹³ I. Fernández Molina (2011), "The Monarchy vs. the 20 February Movement: Who Holds the Reins of Political Change in Morocco?" *Mediterranean Politics*, 16(3), pp. 436-37.

¹⁴ See section 4.1.

judiciary and reinforcement of the powers of the Constitutional Council; 4) consolidation of the principle of the separation of powers through the transfer of new powers to Parliament, the appointment as Prime Minister of a member of the party obtaining the largest number of votes in elections, and the reinforcement of the Prime Minister's status as the head of the executive branch; 5) consolidation of the role of political parties within a pluralist system, and reinforcement of the roles of the parliamentary opposition and civil society; 6) a bolstering of mechanisms intended to guarantee moral integrity in public life to favour responsible conduct within public office; and 7) a guarantee of the institutions concerning good governance, human rights and the protection of freedoms.

On 10 March, the day after the speech was delivered, the King appointed an *ad hoc* body, the Consultative Commission on Constitutional Reform, which was charged with the task of preparing a new draft Constitution. The Commission was chaired by Abdellatif Mennouni, a renowned constitutionalist and former member of the Constitutional Council, and was composed of 18 members, all appointed by the King, most of whom were university professors and activists in human rights associations. It should be stressed that, with the exception of Rajae Mekkaoui,¹⁵ the Commission lacked any religious members or *Ouléma*, thereby highlighting the path towards secularisation that the new Constitution was intended to pursue.

In parallel with the appointment of the Commission, Mohammed VI ordered the establishment of a "Political Mechanism Accompanying the Constitutional Reform," consisting of representatives of political parties and the trade unions and led by his advisor, Mohammed Moatassim, a university professor and expert in constitutional law. This mechanism was expected to facilitate

dialogue and concerted action between the various political actors, and was intended to operate as a channel for communication between the Commission and the political forces and trade unions.

All of the political and social organisations within the country, including the 20 February Movement, were invited to submit proposed constitutional amendments to the Commission, which also organised approximately a hundred meetings in order to enable the representatives of the organisations to present their requests orally. Only a small number of minority left-wing parties failed to reply to the Commission's invitation, along with the 20 February Movement, which complained that the Commission lacked democratic legitimacy and the Constitution was being granted as an act of "largesse."

It should be pointed out that the requests presented by the political and social organisations were largely of the same tone as the "constituent speech" delivered on 9 March 2011. Indeed, most of the proposals were already stated in the King's speech, and therefore they did not introduce any significant novelty in the debate.¹⁶ Therefore, the practical consequence was that the Commission merely wrote the text of a Constitution whose content had been "dictated" directly by Mohammed VI. Driss Maghraoui has rightly stressed the fact that the political parties' passive reaction was an excellent example of their "domestication"¹⁷ by the King, thus confirming the "politics of

¹⁶ There were some exceptions, such as the request presented by the leftist Vanguard Party to eliminate the "old" Art. 19 of the Constitution, which granted unlimited powers to the King (see A. Tourabi (2011), *Constitutional Reform in Morocco: Reform in Times of Revolution*. November, p. 6, http://www.arabreform.net/sites/default/files/Morocco_EN.pdf).

¹⁷ D. Maghraoui (2013), "Constitutional reforms in Morocco: Between Consensus and Subaltern Politics". *North Africa's Arab Spring*, G. Joffé (ed.). London: Routledge, p. 182.

¹⁵ A member of the High Council of the *Ouléma*.

consensus” that has been characterising Morocco for many years. According to this notion, the role and the absolute powers of the King are not the object of discussion and dissent among the parties. The latter, regardless of their ideological orientations, “seem comfortable with not taking the initiative and leaving the palace full control of the political game and orientations of the country.”¹⁸

The work of the Commission, the meetings of which were not open to the public, was completed with particular speed, given that in his speech the King had stated that he expected an initial report to be presented to him before the end of June. The Commission met with the political parties and trade unions on 7 June 2011; on that occasion, Commission President Mennouni made an oral presentation on the key features of the reform, although he did not distribute a written version of the new text of the Constitution. This led several political parties and trade unions to walk out of the meeting as a sign of protest. Subsequently, on 10 June, Mennouni presented the plan for constitutional reform to Mohammed VI, whilst Moatassim informed the Sovereign of the decisions adopted by the Political Mechanism accompanying the Constitutional Reform. Most political parties and trade unions were strongly critical of the fact that they had only received a written draft of the Constitution the day before the King’s speech to the nation (17 June), when he set out the key objectives of the reform and invited the population to participate in a constitutional referendum to be held on 1 July, urging them to approve the new text.¹⁹

¹⁸ D. Maghraoui (2013), *op. cit.*, p. 182.

¹⁹ It also appears that Moatassim had made certain changes to the draft Constitution a few hours before the King’s speech on 17 June, and that as late as the day before the referendum, three articles from the new Constitution were “furtively corrected” (I. Fernández Molina (2011), *op. cit.*, p. 439).

The referendum result was a success for Mohammed VI, since the new Constitution was approved by 98% of those who voted. With some rare exceptions (such as the 20 February Movement), political parties, trade unions and social organisations invited the population to vote “yes” in that consultation. The turnout of 73.5% may be read in diametrically opposed terms depending upon one’s point of view: whilst on one hand, it is double the rate registered in the 2007 parliamentary elections (which was a meagre 37%), it did nonetheless represent the lowest rate in the history of the constitutional referendums held in the country, being more than 11 percentage points lower than the 1996 consultation.²⁰

3.1. Strengths and Weaknesses of the Constituent Process

In the following paragraphs I identify the main strengths and weaknesses of the Moroccan constitutional process, and I will also make some references to the constitution-making processes in the other neighbouring countries involved in the Arab uprisings.

The Lack of a Democratically Elected Constituent Assembly

The Moroccan constitutional process was heavily criticised by several political parties, as well as by social organisations and in a section of the academic literature. The principal objection, as was already asserted, regarded the lack of democratic legitimacy of the Commission on Constitutional Reform, since it had been appointed entirely by the Sovereign. Once again, in fact, requests to elect a constituent assembly were disregarded. It should be pointed out that some political parties, trade unions and associations had been calling for the election of a constituent assembly since the 1962 Constitution. The

²⁰ See the data reported by J. Montabes Pereira and M.A. Parejo Fernández (1999), “Morocco”. *Elections in Africa: A Data Handbook*, D. Nohlen, M. Krennerich, B. Thibaut (eds.). Oxford: Oxford University Press, pp. 632-33.

Union Nationale des Forces Populaires, the *Parti Communiste Marocain*, the *Parti Démocratique Constitutionnel* and the trade union *Union Marocaine du Travail* rejected that Constitution because it was not the outcome of a constituent assembly but came directly from the palace. The difficulties, which were practically insurmountable, in electing a body of that type may be summarised succinctly by a commentator writing in 1963: “The Constituent Assembly is vested with supreme power and, in Morocco, *such supreme power lies with the King alone*. This power of His Majesty was not challenged even prior to the Protectorate” (emphasis added).²¹

Fifty years later, in 2011, Mohammed VI continued to pursue this tradition of a “*roi constituant*” (“constituent King”);²² in fact, it was he who decided to engage in a far-reaching constitutional reform, to identify the “key elements” on which that reform was to be based, to appoint the Commission on Constitutional Reform, and finally to grant his approval of the draft presented to him by Mennouni. The King therefore had the first and the last word. Consequently, down to the present day, “*octroyées*” Constitutions²³ have been a constant feature of Moroccan history. The lack of a democratically elected constituent assembly represents one of the main differences compared to the constitution-making processes taking place in neighbouring countries involved in the Arab uprisings. For example, in Tunisia, the 217

²¹ A.R. Guédira (1963), “Une constituante ni nécessaire ni possible”. *Confluent*, 27, January, p. 67, cited in M. Tozy (1999), *Monarchie et Islam politique au Maroc*. Paris: Press de Sciences Po, pp. 90-91.

²² B. Cubertafond (2011), “La transition marocaine après le printemps arabe et la nouvelle Constitution”. *Les Etudes et Essais du Centre Jacques Berque*, no. 5, Rabat, November, p. 3, http://www.cjb.ma/images/stories/publications/Cubertafond_EE_5.pdf

²³ In the past, some members of the opposition parties even defined it as “*Constitution mon bon plaisir*” (M. Rousset, “L’évolution constitutionnelle du Maroc de Mohammed V à Mohammed VI”, in A. Bouachik, M. Degoffe, C. Saint-Prot (2012), *op. cit.*, p. 31).

members of the National Constituent Assembly were elected by the people in October 2011 on the basis of a closed-list and a proportional representation electoral system. The Assembly works both as an interim legislature and constitution-making body. In Egypt, the Constitution adopted in December 2012 was drafted by a 100-member Constituent Assembly elected by the Parliament. It should be noted, however, that the Assembly did not have a quiet life, since its work was suspended by a judgment of the Supreme Administrative Court in April 2012.²⁴ Moreover, many of its non-Islamist members withdrew from the Assembly, accusing representatives of Islamist forces of doing their best to draft a constitution aimed at turning Egypt into a radical Islamist state.²⁵ In Libya, the constituent assembly that is scheduled to be elected on 20 February 2014, will consist of 60 members so that each of the three traditional provinces (Cyrenaica, Fezzan and Tripolitania) is equally represented. The registration for candidates of the Assembly started at the beginning of October 2013.²⁶

²⁴ S. Mourad (2012), “Court ruling brings Egypt’s constitutional crisis to climax”. *Ahram Online*, 10 April, <http://english.ahram.org.eg/NewsContentPrint/1/0/38983/Egypt/0/Court-ruling-brings-Egypt-s-constitutional-crisis-t.aspx>

²⁵ A. Aboul Enein (2012), “More withdraw from Constituent Assumbly”. *Daily News Egypt*, November 18, <http://www.dailynewsegypt.com/2012/11/18/more-withdraw-from-constituent-assembly/>. It should be noted, however, that on 8 July 2013, following President Mohamed Morsi’s removal from office, Egypt’s Interim President, Adli Mansour, issued a new constitutional declaration that suspended the 2012 Constitution and laid out a three-step process for amending it. First, a 10-member technical committee was given the task of proposing amendments to the 2012 Constitution. Second, a 50-member constituent assembly will have two months to debate the proposed changes. Finally, a referendum will be organised to ratify the new Constitution.

²⁶ A. Elumami (2013), “Constitutional assembly candidates being registered – deadline extended till end of November”. *Libya Herald*, 21 October, <http://www.libyaherald.com/2013/10/21/44941/#axzz2ii rRRoHN>

Democratic Referendum or (more likely) Authoritarian Plebiscite?

An argument that may be proposed in support of the position that the 2011 Moroccan Constitution did not result from an act of “largesse” flows from the fact that it was ratified – as was the case in Egypt²⁷ and potentially even in Tunisia²⁸ – by popular referendum. However, this argument is decidedly weak, above all in the light of the fact that during the two weeks running up to the consultation, the Monarchy made every effort to promote the reform and strongly restricted the space available to those (such as the representatives of the 20 February Movement) who urged a boycott of the vote. Moreover, on election day, reports of fraud were reported all over the country. Thus, there was never going to be any doubt over the referendum result. It is evident, then, that as happened in the past, this consultation was much more like an authoritarian plebiscite than a democratic referendum.²⁹ Indeed, “[autocratic] referenda [are] motivated more by a desire to legitimise the autocrat’s control

²⁷ The constitutional referendum was held in two rounds, on 15 and 22 December 2012. The new Constitution was approved by 63.8% of those who voted. However, it should be pointed out that “[...] only 32.9% of eligible voters cast their ballots in the elections and most importantly the new constitution was approved with the support of 20.9% of eligible voters. Only 17.1 million people out of nearly 52 million registered voters in Egypt participated. [...] Demographically, only 10.9 million Egyptians voted yes to approve the new constitution. This is not even a quarter of the population in a country of nearly 82 million people. This means that about 13.3% of the Egyptian population supported the new constitution.” See M.D. Nazemroaya (2013), *Egypt’s Constitutional Referendum: Did President Morsi Hijack Democracy?* Global Research: Centre for Research on Globalization, July 5, <http://www.globalresearch.ca/statistically-examining-cairos-constitutional-referendum-did-morsi-hijack-democracy/5320067>

²⁸ The Constitution has to be approved by a two-thirds majority of the Constituent Assembly; if it fails that majority, the Constitution will be submitted for a public referendum.

²⁹ See the “referendums” that took place before the promulgation of the 1962, 1970, 1972, 1992 and 1996 Constitutions.

of a polity than to allow the citizens to render a considered verdict on the constitution.”³⁰

A Very Short Constitution-Making Period

Another criticism that has been made is that the constitutional process was too short. It took just a little over three months to prepare the draft Constitution and to consult with the representatives of political parties and trade unions. Similar criticisms were made against the constitution-writing process in Egypt, where former President Morsi confirmed the decision made by the Supreme Council of Armed Forces (SCAF) to impose a six-month timeframe for the entire constitution-drafting process. Indeed, Morsi pushed ahead to get the constitution ratified by December 2012: “[I]n the end, meeting the deadline became one of the process’ essential goals, regardless of what it meant for the prospects for national unity.”³¹ Therefore, the Moroccan and Egyptian cases seem to confirm that very rapid constitution-making periods are typical of “non-democracies.”³²

In Tunisia, the National Constituent Assembly met for the first time on 22 November 2011, and as of the date of this paper, the Constitution has not yet been adopted.

The Lack of Transparency

A further objection addressed the lack of transparency within the work of the

³⁰ J. Blount (2011), “Participation in Constitutional Design”. *Comparative Constitutional Law*, T. Ginsburg, R. Dixon (eds.). Cheltenham-Northampton: Edward Elgar, p. 50. On the differences between authoritarian plebiscites and democratic referendums, see also G. de Vergottini (2011), *Diritto costituzionale comparato*. Padua: Cedam, pp. 244-48.

³¹ Z. Al-Ali (2012), “The New Egyptian Constitution: An Initial Assessment of its Merits and Flaws”. *Open Democracy*, 26 December, <http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws>

³² J. Blount, Z. Elkins and T. Ginsburg (2012), “Does the Process of Constitution-making Matter?” *Comparative Constitutional Design*, T. Ginsburg (ed.). Cambridge: Cambridge University Press, p. 41.

Commission, since its meetings were not open to the public. It should be specified that secrecy in itself is not an absolute evil; on the contrary:

“[D]ebates in front of an audience tend to generate rhetorical overbidding and heated passions that are incompatible with the kind of close and calm scrutiny that ought to be the rule when one is adopting provisions for the indefinite future. By denying the public admission to the proceedings and by keeping the debates secret until the final document has been adopted, one creates conditions for rational discussion that are less likely to prevail in the presence of an audience.”³³

However, initial secrecy should be offset by subsequent publicity – for example, in the form of discussions in a plenary assembly. In fact, with total secrecy, “partisan interests and logrolling come to the forefront”.³⁴ In this sense, the Spanish constitutional process (of the 1980s) was considered by Jon Elster as one that came closest to striking an “optimal balance” between secrecy and publicity.³⁵ In

³³ J. Elster (2006), “Legislatures as Constituent Assemblies”. *The Least Examined Branch. The Role of Legislatures in the Constitutional State*, R.W. Bauman and T. Kahana (eds.). Cambridge: Cambridge University Press, p. 191.

³⁴ J. Elster (1995), “Forces and Mechanisms in the Constitution-making Process”. *Duke Law Journal*, 45, p. 395. With regard to this aspect, two diametrically opposed processes of constitution-making are the 1787 Federal Convention in Philadelphia (which met in complete secrecy) and the 1789 French Constituent Assembly (which was fully public). On this point, see J. Elster (2000), “Arguing and Bargaining in Two Constituent Assemblies”. *University of Pennsylvania Journal of Constitutional Law*, 2(2), p. 345 ff.

³⁵ J. Elster (1995), *cit.*, p. 395. Initially, in fact, the Constitutional Affairs and Public Freedoms Committee appointed a *Ponencia* (comprised of seven members from the main political parties) with the task of drawing up a draft Constitution, and the decisions of this limited body were taken in secret. The draft Constitution was only subsequently presented to the *Cortes* and discussed publicly in both Houses of Parliament (see J. de Esteban (1989), “El proceso constituyente español, 1977-1978”. *La transición democrática española*, J.F. Tezanos, R.

Morocco, on the contrary, as noted above, the second *public* stage was entirely lacking.

The Moroccan case is in sharp contrast with what happened in Tunisia, where the constitutional committee chairs invited civil society groups, international advisors and legal scholars to their meetings. Moreover, the Constituent Assembly released draft texts as they were completed, and its members had the chance to consult and receive feedback from their constituencies.³⁶ The transparency and openness of the Tunisian constitutional process is also evident in the fact that even external actors played a role in this process: for example, on 3 June 2013, the Speaker of the National Constituent Assembly requested the opinion of the Venice Commission on the final draft of the Constitution of Tunisia. The observations of the Commission were made public on 17 July 2013.³⁷

Higher Level of Participation by Political Parties and Social Organisations

The level of participation by political parties, trade unions and social organisations in the drafting of the Constitution was undoubtedly higher compared to the past. In fact, for a very long period of time, the principal (if not only) instrument available to the parties in order to propose constitutional amendments to the King was to send him “*memoranda*.” This practice “affirmed the domination and authority of the King in the process of drafting the constitutional text, but at the same time it allowed other parties to get involved in the process and add their remarks and demands

Cortarelo and A. de Blas (eds.). Madrid: Editorial sistema, p. 275 ff.).

³⁶ See D. Pickard (2012), *Lessons from Constitution-making in Tunisia*. Atlantic Council, December, http://www.atlanticcouncil.org/images/files/publication_pdfs/403/mec121213tunisia.pdf

³⁷ The observations of the Venice Commission (Venice Commission (2013), “Observations on the final draft constitution of the Republic of Tunisia”. Council of Europe, 17 July) are available online at: [http://www.venice.coe.int/webforms/documents/?pdf=C DL\(2013\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=C DL(2013)034-e)

to the reform agenda.”³⁸ On the contrary, while adopting the 2011 Constitution, parties and associations were also given the opportunity of meeting with members of the Commission on Constitutional Reform and to present their requests orally, whilst dialogue and concerted action were also promoted by the presence of the Political Mechanism Accompanying the Constitutional Reform.³⁹

Considered overall, the 2011 Moroccan constituent process was characterised by a greater degree of democracy than in the past, particularly when it comes to the participation of political parties and social organisations in the process. However, some major democratic deficits remain: the Constitution continues to be a “concession” made by the Sovereign,⁴⁰ the constitutional referendum was in reality much more similar to an authoritarian plebiscite, and the work of the Commission was too rapid and characterised by a lack of transparency. Moreover, compared to other constitution-making processes in the region (in particular, Tunisia’s),⁴¹ the Moroccan constituent process seems in many ways less democratic.

³⁸ A. Tourabi (2011), *op. cit.*, p. 3; see also M. Tozy (1999), *op. cit.*, pp. 101-102.

³⁹ However, it should be noted that given the strong tie between the King and Moatassim (head of the Political Mechanism), this body was *de facto* also assigned the task of identifying what was “politically acceptable to the palace and what was not” (M. Rousset (2012), “L’interprétation des pouvoirs du roi dans la nouvelle Constitution”. *La Constitution marocaine de 2011: Analyses et commentaires*, Centre d’Études Internationales (eds.). Paris: L.G.D.J., p. 60).

⁴⁰ It should be noted that part of the literature has praised the constituent procedure adopted in Morocco, defining the process of drafting the Constitution through a constituent assembly as “cumbersome, ineffective and disappointing” (F. Rouvillois (2012), “Réflexions sur la monarchie démocratique à la marocaine”, in A. Bouachik, M. Degoffe, C. Saint-Prot (eds.), *op. cit.*, p. 67).

⁴¹ The 2012 Egyptian constitution-making process was more democratic compared to the country’s past (e.g., for the first time, the Constitution was drafted by an elected body, as stressed by Z. Al-Ali (2012), *op. cit.*), but it was still characterised by many flaws.

4. The 2011 Constitution

The new Constitution – promulgated by Mohammed VI through *dahir* (royal decree) no. 1-11-91 of 29 July 2011 – is characterised by discontinuity and continuity with the previous Constitution, which came into force in 1996 under Hassan II.⁴² In fact, as shown below, although it introduced some relevant democratic novelties, it continues to grant the King near absolute powers.

4.1. Between Discontinuity...

As regards the recognition and protection of fundamental rights, it should be pointed out that the preamble states that the international conventions ratified by Morocco shall take precedence over domestic law, and that national legislation must consequently be brought into line with the former. Particular emphasis is also given to equality between men and women, thus pursuing the spirit of the 2004 reform of the Family Code (“*Moudawana*”).⁴³ Moreover, Article 5 of the Constitution recognizes *Amazigh* as an official State language alongside Arabic, thus accepting the long-standing claim of the Berber peoples. As will be discussed below, it is also important to stress that in addition to the *ex ante* review (already provided under

⁴² For a commentary on the new Constitution, in addition to the volumes mentioned in footnote no. 9, see Centre d’Études Internationales (eds.) (2012), *op. cit.*; International IDEA (2012), *The 2011 Moroccan Constitution: A Critical Analysis*. Stockholm: International Institute for Democracy and Electoral Assistance; F. Biagi (2012), “La Monarchia nella Costituzione del Marocco del 2011”. *Percorsi costituzionali*, 3, p. 415 ff.

⁴³ It should be pointed out that the preamble of the Constitution enshrines the supremacy of international conventions, but “within the framework of the provisions of the Constitution, the laws of the Kingdom, and respect for its *immutable national identity*” (emphasis added). Similarly, Article 19 of the Constitution subjects the principle of equal rights for men and women to compliance with the “provisions of the Constitution and [...] the *immutable values* and the laws of the Realm” (emphasis added). In both cases, it is evident that the reference made by the Constitution pertains to the Islamic religion. On this issue, see section 5.2.

the previous Constitution), the new Constitution introduced the *ex post* constitutional review.

The 2011 Constitution also introduced significant novelties in relation to the horizontal separation of powers. Indeed, the Constitution reinforces the powers of the executive, the legislature and the judiciary, and it guarantees greater independence and autonomy to each of them. The Government is no longer responsible to the King and to Parliament, but exclusively toward Parliament. Moreover, whilst under the previous Constitution the Council of Government had no official recognition and was limited to the exercise of “a function involving the preparation of decisions adopted by the Council of Ministers,”⁴⁴ the new Constitution expressly recognizes its status and vests it with important functions. Furthermore, while in the past the Prime Minister was appointed at the discretion of the King, the 2011 Constitution states that the Sovereign shall appoint the head of Government from the party that wins the most seats in the elections to the House of Representatives.⁴⁵ As far as the legislature is concerned, the number of areas falling within the exclusive remit of the legislature increased significantly, whilst the role of the opposition was also reinforced. It is also important to highlight that the judiciary has been elevated from a mere “authority” (as defined under the 1996 Constitution) to the status of a full-blown branch of the State, independent of the legislature and the executive. As will be shown below, this independence is guaranteed principally through the Higher Council of the Judicial Power, the functions of which have been expanded.

⁴⁴ A. Harsi (2012), “Séparation et équilibre des pouvoirs dans la nouvelle Constitution de 2011”, in A. Bouachik, M. Degoffé, C. Saint-Prot (eds.), *op. cit.*, p. 55.

⁴⁵ This practice had already been followed on two occasions (following the 1998 and 2007 elections), although since it had no constitutional status it could be disregarded at any time, as occurred after the 2002 election.

Other relevant democratic novelties introduced by the new Constitution include the territorial organisation of the State – now defined as “decentralised” and “based on an advanced regionalization system” (Article 1) – and the fight against corruption, which is undoubtedly one of the main scourges of Moroccan society. In this regard, particular note should be afforded to the provision of institutions to oversee good governance and regulatory matters, such as the High Authority for Audiovisual Communication, the Competition Council, the National Authority for Probity and the Prevention and Combat of Corruption.

4.2. ...and Continuity

First and foremost it is important to stress that Morocco, despite what is stated in Article 1 of the Constitution,⁴⁶ did not turn into a parliamentary monarchy based on the British or the Spanish model, where “the King reigns but does not govern.” Indeed, the Sovereign continues to be the key figure in determining political direction and adopting decisions of strategic importance for the country. The Sovereign continues to chair the Council of Ministers, the body that resolves matters of decisive interest for the State.⁴⁷ Moreover, after consultation with the head of Government, the King can dismiss ministers (Article 47) and has the power to dissolve the Houses of Parliament (after consultation with the President of the Constitutional Court and after informing the presidents of the two Houses of Parliament and the head of Government) (Article 96). The Sovereign also continues in his role as president of the Higher Council of the Judicial Power (Article 56),

⁴⁶ Article 1 defines the Monarchy not only as “constitutional,” “democratic” and “social,” but also as “parliamentary.”

⁴⁷ Such as strategic orientations of State policy; any proposed revisions of the Constitution; drafting organic laws and framework laws; the general guidelines of the finance bill; drafting amnesty law; drafting texts related to the military domain; the declaration of a state of siege and of war; and appointments to high public office (Article 49).

supreme commander of the Royal Armed Forces (Article 53), and is also required to chair a new national security body, namely the Supreme Security Council, defined under Article 54 as the “forum for consultation on strategies regarding the internal and external security of the country, and for the management of crisis situations.”

Undoubtedly, the most important innovation (at the very least, in formal terms) introduced by the new Constitution results from the fact that Article 19 of the previous constitutions (which granted the King practically unlimited powers)⁴⁸ has been “split” into Articles 41 and 42. The intention was to separate spiritual power from temporal power in order to remedy the “confusion of powers” resulting from the provisions of the previous Constitution. Article 41 in particular sets forth the King’s prerogatives in the religious sphere, stipulating that as the “Commander of the Faithful” he shall ensure respect for Islam, shall be a guarantor of freedom of worship and shall preside over the High Council of Ulemas, which is the only body empowered to issue officially approved religious opinions (*fatwas*).

Article 42 states that the King, as “Head of State, Supreme Representative, symbol of the unity of the nation, guarantor of the permanence and continuity of the State and supreme arbitrator between institutions, shall ensure compliance with the Constitution, the proper functioning of constitutional institutions, protection of the nation’s democratic options and of the rights and freedoms of citizens and communities, as well as compliance with the international commitments of the Kingdom. He shall be a guarantor of the independence of the country and of the territorial integrity of the Kingdom, within its authentic borders.” From a symbolic point of view, the reform of the old Article 19 is a true revolution. For the first time in 50

years, the most important provision of the Moroccan Constitution has been changed, thus losing its “sacredness.” As highlighted by the literature, however, it is far from certain that this “split” will bring about significant novelties from a practical point of view.⁴⁹

In addition, Article 42 goes on to specify that the Sovereign shall exercise his powers through royal decrees (*dahirs*), which must be countersigned by the head of Government. It should be stressed that whilst the *dahirs* that do not require countersignature by the head of Government are now the exception, they do relate to matters of particular importance: in addition to the appointment of the head of Government (Article 47), they cover the religious prerogatives inherent in the institution of the Commandership of the Faithful (Article 41), the appointment of the ten members of the Regency Council (Article 44), the dissolution of Parliament (Article 51), the approval of appointments of magistrates by the Higher Council of the Judicial Power (Article 57), the proclamation of a state of emergency (Article 59), the appointment of half of the members of the Constitutional Court (Article 130), and the presentation of proposed constitutional amendments for referendum (Article 174). This appears to be quite a busy schedule for a King pretending to reign in a parliamentary monarchy!

5. A Slow Process of Implementation

One of the principal challenges faced by Morocco now concerns the process – which will undoubtedly be very delicate – of effective implementation of the provisions of the Constitution. This process will imply the adoption of numerous ordinary and organic laws depending on the circumstances of each case. In order to speed up the implementation

⁴⁹See D. Melloni (2012), *Le nouvel ordre constitutionnel marocain de la “monarchie gouvernante” à la “monarchie parlementaire”?* in Centre d’Études Internationales (eds.), *op. cit.*, p. 40.:

⁴⁸ See section 2.

process, Article 86 stipulates that the organic laws provided under the new Constitution must be presented to Parliament for approval before the end of the first legislature. Whilst it is significant, this provision does not appear to be conclusive, and it has certainly not been drafted in exceptionally precise terms. In fact, as stressed by Cesare Pinelli, Article 86 does not require Parliament to *approve* organic laws during the first legislature, but is limited to stipulating the duty to *submit* such laws to Parliament before the deadline specified. Moreover, the provision does not assert the consequences of the failure to comply with that time limit.⁵⁰ It is certain that the implementation of the constitutional provisions is “one of the decisive factors in measuring the sincerity of the ambitious innovations introduced by the 2011 Constitution.”⁵¹

When addressing the Houses of Parliament on 12 October 2012 and 11 October 2013 during the first parliamentary sessions, Mohammed VI urged Parliament to speed up the process of implementing the Constitution.⁵² In fact, on both occasions, the Sovereign invited Parliament to give full effect to the Constitution, particularly in the following areas: advancing Morocco’s regionalisation initiative, ensuring the independence of the judiciary, recognising the official character of

the *Amazigh* language, and promoting the practice and institutions of good governance.

More than two years after the promulgation of the Constitution, one cannot fail to notice that the process of implementation is proceeding at a rather slow pace. Up to the time of writing, Organic laws implementing the Constitution have only been enacted in relation to the Chamber of Representatives (no. 27/11), the Chamber of Councillors (no. 28/11), political parties (no. 29/11), the election of the members of local government bodies (no. 59/11),⁵³ and appointment to high office within the public administration in accordance with Articles 49 and 92 of the Constitution (no. 02/12). It must be pointed out that the most “delicate” constitutional provisions, representing the real novelty compared to the previous Constitution, have not yet been implemented: these include the provision recognising *Amazigh* as an official language, the provisions on the independence and autonomy of the judiciary, the provisions on the process of “advanced regionalisation,” the provisions in the field of good governance, the provisions on the organisation and functioning of the Constitutional Court, as well as the regulation of concrete constitutional review.

5.1. Ordinary Legislation vs. the Constitution and International Human Rights Treaties

The issue of constitutional implementation has also been stressed by the Human Rights Watch 2013 World Report, according to which the “human rights conditions were decidedly mixed in Morocco, as a 2011 constitution containing strong human rights provisions did not translate into improved practices.”⁵⁴ The situation is such that constitutional provisions

⁵⁰ C. Pinelli (2012), “La démocratisation par voie législative après la transition à la démocratie”. Commission de Venise – Association internationale de droit constitutionnel, *Processus constitutionnels et processus démocratiques: les expériences et les perspectives*, Marrakech, 29-30 March, p. 6, [http://www.venice.coe.int/files/2012_03_29_MAR/Prese](http://www.venice.coe.int/files/2012_03_29_MAR/Prese%20ntation_Pinelli.pdf)

⁵¹ *Ibid.*, p. 5.

⁵² It is important not to underestimate the fact that the presidency of the opening of the first session of Parliament, which is reserved under Article 65 of the Constitution to the Sovereign, allows the King the opportunity to provide inspiration for and to guide legislative action. To a certain extent, this speech given by the Monarch has some analogies with the “message on the state of the Union” delivered by the President of the United States.

⁵³ In relation to these four organic laws, see the commentary by M. Abdelaziz Lamghari (2012), *Développements constitutionnels récents au Maroc (juillet-décembre 2011)*, 2 February, [http://www.venice.coe.int/docs/2012/CDL\(2012\)002-f.pdf](http://www.venice.coe.int/docs/2012/CDL(2012)002-f.pdf)

⁵⁴ *Human Rights Watch 2013 World Report*, p. 588, https://www.hrw.org/sites/default/files/wr2013_web.pdf

that grant rights and freedoms are often not implemented or they are even denied by ordinary legislation. The 1962 Criminal Code contains a number of provisions at odds with the 2011 Constitution, as well as with international human rights treaties. Article 475, for example, provides for a prison term from one to five years for a person who “abducts or deceives” a minor, but prevents the prosecutor from charging him if he then marries the minor. According to rights activists in Morocco, courts have applied Article 475 in rape cases, thus allowing rapists to escape prosecution.⁵⁵ Another example is given by Article 496, which criminalises the harbouring of a married woman who leaves her husband. The Criminal Code also prohibits apostasy (Art. 220), the ostentatious break of fast in a public space during Ramadan (Art. 222), homosexual relations (Art. 489), as well as sexual relations between individuals of opposite sexes who are not religiously married (Art. 490).⁵⁶

Even the Code of Criminal Procedure fails to comply in some cases with the provisions stated in the 2011 Constitution and in international human rights treaties.⁵⁷ Article 290, for example, states that “the records and reports prepared by officers of the judicial police in regard to determining misdemeanours and infractions are to be deemed trustworthy unless the contrary is proven in accordance with the rules of evidence.” In a June 2013 report on the flaws

⁵⁵ See *Human Rights Watch 2013 World Report*, cit., p. 591.

⁵⁶ In relation to these issues, see F. Alicino (2013), “La libertà religiosa nella nuova Costituzione del Marocco”. *Rivista telematica dell’associazione italiana dei costituzionalisti*, no. 4, http://www.associazionedeicostituzionalisti.it/sites/default/files/rivista/articoli/allegati/4_2013_Alicino.pdf; H. Souktani (2012), “Le code pénal et le nouvel engagement international du Maroc”. *Revue marocaine d’administration locale et de développement*, no. 107, p. 133 ff.

⁵⁷ Human Rights Watch (2004), *Morocco: Human Rights at a Crossroads*, October, <http://www.hrw.org/print/reports/2004/10/20/morocco-human-rights-crossroads>

of the Moroccan judicial system,⁵⁸ Human Rights Watch stressed the fact that courts often quote this rule in written verdicts where they decide to convict defendants based on incriminating statements made to police, even if the defendants allege their statements were obtained through torture or ill-treatment. Human Rights Watch has rightly pointed out the need to amend the Code of Criminal Procedure “to indicate that where there is an allegation of torture or ill treatment, the burden of proof lies on the prosecution to prove that any confession made has not been obtained by unlawful means.”⁵⁹ Therefore, as often happens in non-democracies or in countries transitioning from authoritarian rule,⁶⁰ “old” ordinary legislation needs to be brought in line with the new Constitution and with international human rights treaties.

5.2. The Role of the Judiciary and the Constitutional Court

It is important to stress that the implementation of the new Constitution depends not only on the King, the Government and the Parliament, but also on other actors such as the judges and the Constitutional Court. For this reason, the

⁵⁸ In particular, the report analyses some politically sensitive cases adjudicated between 2008 and 2013, where the courts violated the right of defendants to a fair trial (Human Rights Watch (2013), “*Just Sign Here*”: *Unfair Trials Based on Confessions to the Police in Morocco*, June, <http://www.hrw.org/sites/default/files/reports/morocco0613webwcover.pdf>)

⁵⁹ Human Rights Watch (2013), “*Just Sign Here*”: *Unfair Trials Based on Confessions to the Police in Morocco*, cit., p. 6.

⁶⁰ For example, in Italy, for many years after the entry into force of the 1948 Constitution, instead of the constitutional provisions, several statutes from the fascist period that were in contrast with the Constitution were enforced – the most important being the 1931 Unified Code on Public Security, the 1930 Code of Criminal Procedure and the 1930 Criminal Code. The Constitutional Court, set up in 1956, played a pivotal role in eliminating the Fascist legislation that still limited civil, political, religious and social rights and freedoms (see E. Cheli (1996), *Il giudice delle leggi*. Bologna: il Mulino).

constitutional provisions in the field of judicial independence and constitutional adjudication ought to be implemented as soon as possible.

Significant novelties have been conferred to the Higher Council of Judicial Power. This body, which replaces the High Council of Magistracy, is still chaired by the King; however, under the new Constitution, the executive president is not the Minister of Justice (as provided under the 1996 Constitution) but is the first president of the Court of Cassation, thus making this body more independent (Article 115). The Council can draw up reports on the status of justice and the judiciary, and make recommendations in this field (Article 113). It is important to stress that now “individual decisions by the Council [...] may be challenged before the highest administrative jurisdiction in the Kingdom [i.e., the Administrative Chamber of the Supreme Court], on the grounds of abuse of powers” (Article 114). This form of appeal seems to depart from the tradition of immunity to royal *dahirs*. However, as has been stressed in the literature,⁶¹ these are not genuine royal *dahirs*, but decisions made by the Higher Council of Judicial Power, which is chaired by the King.

On 8 May 2012, Mohammed VI established the “High Authority for national dialogue on the reform of the justice system.” This body is charged with preparing reform proposals for the judicial system in the light of the provisions contained in Title VII of the Constitution, which is dedicated to the judiciary. In September 2013, the High Authority presented the results of its work, consisting of a “Charter on the Reform of the Judiciary System.”⁶² This charter is a long

⁶¹ Y. Gaudemet (2012), “Le pouvoir judiciaire dans la Constitution marocaine de 2011”. Centre d’Études Internationales (eds.), *op. cit.*, p. 203; B. Mathieu (2013), “L’émergence du pouvoir judiciaire dans la Constitution marocaine de 2011”. *Pouvoir*, 145, p. 57.

⁶² The Charter is available at http://www.justice.gov.ma/App_Themes/ar/img/Files/Charte_Reforme_JusticeFr.pdf

document containing a number of proposals aimed at implementing the constitutional provisions in the field of judicial independence, strengthening the judicial protection of fundamental rights, and improving judicial procedures. The Charter also recommends the amendment of the Criminal Code and the Code of Criminal Procedure in order to meet the democratic standards provided in the 2011 Constitution and in international human rights treaties. This document undoubtedly represents an important step, and the proposals contained therein should be turned into law as soon as possible.

The 2011 Constitution also introduced significant novelties in the field of constitutional adjudication. The new Constitutional Court, which replaces the Constitutional Council provided in the 1996 Constitution, will be made up of twelve members: six will be appointed by the King (who also appoints the President), and the other six will be appointed by the House of Representatives and the House of Councillors (Article 130). This body, besides deciding on the validity of the election of the members of Parliament and the organization of referendums, has to make sure that organic laws, ordinary laws and regulations of both Houses of Parliament are not in conflict with the Constitution (Article 132). Moreover, Article 55 states that when “the Constitutional Court [...] declare[s] that an international commitment involves a provision which is inconsistent with the Constitution, the said text may not be ratified until the Constitution has been revised.”

It is important to stress that in addition to the *ex ante* review (already provided for under the previous Constitution), the new Constitution introduced the concrete constitutional review. In fact, Article 133 provides that “the Constitutional Court shall have competence to look into an exception of unconstitutionality raised in the course of a trial, when one of the

parties argues that the law on which depends the outcome of a trial undermines the rights and freedoms guaranteed by the Constitution.” The introduction of such *ex post* review thus appears to be extremely important in order to enable the Constitutional Court to reinforce its position as a counter-majoritarian body and may thus contribute to the process of democratisation in a more effective manner than in the past.⁶³ Indeed, the previous Constitutional Council has not “fulfilled the expectations in the field of protection of fundamental rights.”⁶⁴ This is due to the fact that the parliamentary opposition has appealed to the Council only in a very limited number of cases, in spite of the fact that in many instances the constitutionality of a whole series of laws was more than doubtful.⁶⁵ Precisely for this reason, in the field of constitutional review the Constitutional Council has been compared to the “sleeping beauty castle.”⁶⁶

However, it should be noted that the organic laws regulating the organisation and functioning of the Higher Council of the Judicial Power and of the Constitutional Court, as well as the regulation of concrete constitutional review, have not yet been adopted. Therefore, as provided for by Articles 177 and 178 of the Constitution, the High Council of Magistracy and the Constitutional Council will continue to carry out their functions until the new bodies have been set up.

⁶³ For example, it may increase the chances that the Constitutional Court will rule on the constitutionality of the aforementioned articles of the Criminal Code and Code of Criminal Procedure.

⁶⁴ I. Gallala-Arndt (2012), “Constitutional Jurisdiction and Its Limits in the Maghreb.” *Constitutionalism in Islamic Countries. Between Upheaval and Continuity*, R. Grote and T.J. Röder (eds.). Oxford: Oxford University Press, p. 254.

⁶⁵ See I. Gallala-Arndt (2012), *op. cit.*, pp. 254-55.

⁶⁶ This was the metaphor used by Robert Badinter, cited by N. Bernoussi (2012), “La Constitution de 2011 et le juge constitutionnel”, in Centre d’Études Internationales (eds.), *op. cit.*, p. 211. On the contrary, the Council has been very active in the field of electoral justice.

As underlined by Nadia Bernoussi, it remains to be seen how constitutional judges will interpret a series of provisions that may be read in diametrically opposed terms.⁶⁷ Consider, for example, the priority of international conventions over national law. What will the judges decide when, for example, the law on succession is challenged on the grounds that it is considered to breach the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Civil and Political Rights? Will they implement the international conventions, basing their arguments on the superiority of the latter over the law, and on the interpretation of an open and moderate Islam (in accordance with the Preamble and Article 1 of the Constitution) and the principle of non-discrimination? Or will the law be implemented on the grounds that the constitution enshrines the superiority of international conventions, but “within the framework of the provisions of the Constitution, the laws of the Kingdom, and respect for its *immutable national identity*” (emphasis added)?⁶⁸

Similar questions arise in relation to Article 19 of the Constitution, which subjects the principle of equal rights for men and women to comply with the “provisions of the Constitution and [...] the *immutable values* and the laws of the Realm” (emphasis added). When interpreting that article, the judges may base their reasoning on the reference by the Constitution to “universally recognised” human rights and the values of open and moderate Islam or, alternatively, give greater emphasis to the “immutable values and the laws of the Realm” – which, as noted above, are also expressly enshrined within the Constitution.⁶⁹

Accordingly, the interpretative option appears to be between “*ijtihad*” on the one hand and

⁶⁷ N. Bernoussi (2012), *op. cit.*, pp. 225-26.

⁶⁸ *Ibid.*, p. 226.

⁶⁹ *Ibid.*, p. 225.

“*taqlid*” on the other. Indeed, the former refers to “the hermeneutic effort, the independent interpretative reasoning of the lawyer aiming at extrapolating or highlighting by analogy a new legal rule from the sources of law,” while the latter consists of “the faithful compliance with doctrines previously developed by the principal *mugtahid* lawyers which, during the initial formative period, operated within the individual law schools.”⁷⁰

6. Concluding Remarks

Contrary to what has been stated by some prominent Western political leaders, the representatives of the European Union institutions, the mainstream media and even a section of the literature, the analysis of the 2011 constitutional reform reveals more flaws than merits.⁷¹ Indeed, on the one hand, the constitutional process became more democratic compared with the past, and the Constitution introduced some relevant democratic novelties. However, on the other hand, the Constitution is still a “grant” of the Sovereign and did not result from a democratically elected constituent assembly – not to mention the fact that the separation of powers is more theoretical than substantive and the King continues to hold near absolute powers. Additionally, the process of implementation is proceeding quite slowly and ordinary legislation in some cases is in sharp contrast with the Constitution and with international human rights treaties.

⁷⁰ G. Piccinelli (1999), “La dimensione etica del diritto musulmano classico e contemporaneo”. *Roma e America Latina*, VII.

⁷¹ There appear to be three possible explanations why the constitutional reform process has received much praise. First, the analysis of the process has been conducted superficially. Second, the image of himself that Mohammed VI managed to transmit abroad (i.e., a reformer who intends to improve living conditions for the poor and downtrodden, and who wants to create a country based on the rule of law) is still strong in the Western world. Third, good allies of Morocco, such as France and the United States, often prefer to turn a blind eye to democratic deficits of the country for reasons of *realpolitik*.

Evidently, the main reason that the constitutional reform has been coloured by these major democratic deficits is strictly linked to the role played by Mohammed VI. Indeed, on the one hand it is true that thanks to the reforms introduced by the King since the beginning of his reign (such as the Family Code and the establishment of the Equity and Reconciliation Commission),⁷² Morocco has ceased to be an autocratic regime (as it was under Hassan II). However, on the other hand, Mohammed VI turned the country into a hybrid regime, although not a democracy.⁷³ The impression is that the 2011 Constitution mainly responded to the need to appease people’s discontent so as to ensure the regime’s stability and continuity. The Moroccan King allowed the constitutional reform to take place as long as his key powers and prerogatives were not questioned. It appears from the analysis summarised in this paper that his main purpose was not to democratise the country, but to guarantee his own survival.

It is accepted that Mohammed VI has (so far) achieved his aim: the Moroccan Monarchy continues to be an *executive* Monarchy, and the country remains a *hybrid* regime. At the same time, however, the 2011 Constitution has in some of its parts *great potential* that should not be wasted. Therefore, all efforts should now be concentrated on the implementation of the most innovative parts of the Constitution, particularly those related to the independence of the judiciary, constitutional review, territorial decentralisation, *Amazigh* as an official State language and good governance.

⁷² The 2004 Family Code (*Moudawana*) entailed a tangible improvement in conditions for women. The 2004 Equity and Reconciliation Commission (the first Truth Commission to be created in the Arab world) was requested to investigate cases of “disappearances” and arbitrary imprisonment between 1956 (the year in which the country gained independence) and 1999 (the year in which Hassan II died).

⁷³ F. Biagi (2012), *op. cit.*, p. 403 ff.