



**THE EVOLVING ROLE OF CONSTITUTIONAL
JURISDICTIONS IN UPHOLDING DEMOCRACY
THROUGHOUT HISTORY
(THE MOROCCAN EXPERIENCE)**

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*The evolving role of Constitutional Jurisdictions in upholding
democracy throughout history.*

Your Excellency, Prof. Dr. Anwar Usman, Chief Justice of Constitutional Court of Indonesia, President of the World Conference on Constitutional Justice,

Dear Chairperson,

Dear Panelists, ladies and gentlemen,

As the Chair of the Constitutional Court of Morocco, I am particularly delighted to take part, through this written contribution, in this outstanding forum dedicated to the role of Constitutional Jurisdictions in strengthening democracy, which brings together Chief justices from around the world, and held on the occasion of the 20th Anniversary of the Constitutional Court of the Republic of Indonesia.

My Esteemed colleague, His Excellency Anwar USMAN has kindly suggested that I contribute to this session, which will present, from a historical perspective, some leading national experiences in Upholding Democracy throughout the action of Constitutional Jurisdictions with which we share the principles and values of the rule of law, democratic constitutionalism, and separation of powers, that are, indeed, enshrined in our fundamental charter, the Constitution of 2011 in force.

I initially planned to take part in person in this forum, and to deliver a speech in front of this distinguished audience but due to agenda constraints that occurred at the last minute, I have decided to maintain the participation of the Constitutional Court by this written contribution.

First of all, allow me to recall some main historical features of our constitutional jurisdiction. The Constitutional Court of Morocco that is established by Art. 129 of our Constitution, marks a third phase in the institutional evolution of constitutional justice in Morocco.

A first phase saw the establishment of the 'Constitutional Chamber of the Supreme Court' by the Constitution of 1962, and subsequently maintained both by the Constitutions of 1970 and 1972.



The second phase began with the establishment of the 'Constitutional Council' by the Constitution of 1992, Art. 76 (Morocco), and subsequently kept under the Constitution of 1996

In the transition towards the third and current phase, under Art. 177 of the Constitution of 2011, the Constitutional Council continued to exercise its powers on a transitional basis until the installation of the current Constitutional Court since April 4th 2017.

Over six decades, the successive constitutional jurisdictions have bequeathed a heritage of 821 decisions rendered by the Constitutional Chamber of the Supreme Court and 1043 by the Constitutional Council.

Since its establishment on 4 April 2017, the Constitutional Court has issued 215 decisions aiming at upholding democracy by ensuring, through their motivations and rulings, the supremacy of the Constitution; the consolidation of fundamental rights protection; the regulation of the action of constitutional powers; and the fostering the freeness, fairness, and transparency of elections of the Members of Parliament.

With this in mind, I propose to shed some light on the historical evolution of Constitutional justice in Morocco (I) before providing an overview of its main jurisprudential trends (II) from the perspective defined by the organizers.

I: Historical evolution of Constitutional justice in Morocco

Considering the time available for the session, this presentation does not claim to give an overall account of the historical evolution of Constitutional justice in Morocco, Conversely, I propose to focus on some significant milestones of this historical process.

For this purpose, It is important to note that the evolution of constitutional justice in Morocco has been marked by an incremental logic, whose most significant trend is the continuous extension of



powers attributed to a series of successive constitutional justice organs.

Belonging to the “concentrated model” of review, the evolution of Moroccan constitutional justice is marked by two major trends:

– The first consisted in the transition from a specialized constitutional jurisdiction, organically integrated into the Supreme Court (*the Constitutional Chamber of the Supreme Court*), to a specific constitutional jurisdiction (*the Constitutional Council and the Constitutional Court*), separated from judicial courts.

– The second evolutionary trend saw the progressive extension of a priori review powers vested in successive constitutional justice organs and the emergence of a posteriori constitutionality control starting with the Constitution currently in force.

The Constitutional Chamber (1963-1994) was entitled to exert some powers typically attributed to constitutional jurisdictions in concentrated models. The Chamber ensured the mandatory a priori review of organic laws and of internal regulations of Parliament. Moreover, it ruled on the modification by decree of provisions taken in legislative form and it settled any disagreement between the Parliament and Government (legislative admissibility). It also decided on the regularity of the election of Members of Parliament as well as on the regularity of referendum operations.

The constituent of 1992 instituted a Constitutional Council and, therefore, marked a decisive step forward by establishing an organically differentiated constitutional jurisdiction. This choice was re-endorsed by the Constitution of 1996. The Constitutional Council was entitled to exert all the competences previously vested in the Constitutional Chamber, In addition to a new competence which was attributed to the Constitutional Council, the optional a priori review of laws, upon referral.



The progressive, but continuous extension of the powers of the constitutional jurisdiction was strongly linked to the evolving democratic trajectory and to the successive institutional reforms undertaken at the instigation of His Majesty The KING Mohammed VI, since His accession to the throne in 1999.

In 2004, a transitional justice mechanism, namely, 'the Commission of Equity and Reconciliation' was established by a Royal Decree. The 1st volume of the Commission's final report, released on 16 December 2005, contains a specific Chapter dedicated to recommendations, which proposed to strengthen the control of the constitutionality of laws and independent decrees issued by the executive power and to include, within the Constitution, the right of a person involved in judicial proceedings to raise an exception of unconstitutionality before the seized court.

In 2011, a constitutional revision process was initiated. Specifically, on 10 March 2011, The King appointed a Consultative Commission for the Revision of the Constitution. In His framing speech on 9 March 2011, the King announced that relevant recommendations of the Equity and Reconciliation Commission should be constitutionalized and the powers of the Constitutional Council strengthened.

As settled in the agenda of the constitutional revision, the objective of strengthening constitutional justice received a positive feedback from political, social, and civil actors. Among 215 memorandums and individual contributions addressed to the Consultative Commission for the Revision of the Constitution, more than a half of them presented propositions concerning the establishment of ex post control mechanisms, ex officio referral or the review of the constitutionality of international commitments. In this context, the configuration of the current Constitutional Court has emerged out of a convergence of both institutional and societal agendas and as an outcome of a democratic process culminating by the adoption of the Constitution in force by referendum in 1st July 2011.



The result of this process, is the current Constitutional Court, established in April 4th 2017, which is entitled to exercise, not only all the powers conferred to constitutional review bodies before 2011, but also new powers, two of which, assigned to the Court, are particularly worthy of note:

- Aware of the challenges of articulation between domestic and international legal orders, which are closely related to the protection of fundamental rights and freedoms, the constituent of 2011 conferred a new jurisdiction to the Court concerning the optional a priori review of the constitutionality of international commitments.

- The exception of unconstitutionality, established under Art. 133 of the Constitution, represents a new mechanism in the domestic system of jurisdictional human rights protection. This consecration also marks the establishment of a posteriori review at the level of the Constitutional Court, thus consolidating its concentrated vocation. The Organic Law that will allow the full operationalization of this mechanism is currently being drafted.

II: The role of Constitutional jurisprudence in upholding democracy

From a historical perspective, the role of successive Constitutional jurisdictions can be approached from two angles: As concentrated constitutional jurisdictions, the constitutional protection of human rights, as of the principle of the "Separation of Powers" is ensured through both *a priori* and *a posteriori* reviews (1). The settlement of electoral disputes is aimed at protecting the free, equal, and fair enjoyment of political rights within the context of parliamentary elections (2).



1. Constitutional protection of Human rights, and the Consecration of the Separation of Powers

The constitutional jurisprudence on human rights protection has evolved progressively under the respective mandates of the Constitutional Chamber of the Supreme Court, the Constitutional Council, and the current Constitutional Court.

As examples, the former Constitutional Chamber established the principle of criminal legality, preserving, thus, the competence of the legislative power on that matter. Freedom of vote was recognized in one of the first rulings of the Constitutional Chamber.

Under the mandate of the Constitutional Council, human rights jurisprudence was developed within the context of a priori control of organic laws and laws. As an example, a decision recognized the categorical electoral rights of Moroccans residing abroad. The Council also strengthened the constitutional guarantees resulting from the right to a fair trial, as equality between the defence and the prosecution and the right to an effective remedy in electoral disputes.

The Constitutional Council also defined the constitutional principle of gender parity as an objective of constitutional value, and consecrated the principle of functional independence of human rights protection bodies.

Under its current mandate, the Court has consolidated certain principles established by former Constitutional bodies, such as the presumption of innocence and the equal opportunities between candidates in the context of electoral disputes

The Constitutional Court has recognized, under Article 5 of the Constitution, a series of linguistic and cultural rights arising from the consecration of the official nature of the Amazigh language. These rights consist, in particular, in the use, without discrimination, of the Amazigh language to communicate in all forms, for all functions, and through all media. It is also incumbent on the State to guarantee its



teaching and learning following the principle of equality of citizens in the enjoyment of cultural rights.

The Court has to deal with certain aspects related to the design of the national system of human rights protection, both at the procedural and substantive levels. Within this framework, the specific mandate of the Authority for Parity and the Fight against all Forms of Discrimination (Anti-discrimination Body), in complementarity with the global mandate of the National Council for Human Rights (National Human Rights Institution)

Confirming the progressive nature of affirmative action mechanisms, the Court affirmed, in three recent decisions that gender parity measures include non-elective mandates and not only electoral ones. Within the same line, the Court consecrated the non-regressive nature of gender parity legal measures, reinterpreting in this way Articles 19 and 30 of the Constitution.

The Court has given a universal scope to the positive obligation incumbent on the State, public establishments, and local authorities to facilitate equal access for citizens to the conditions enabling them to enjoy the right to social protection.

Concerning the consolidation of the Separation of Powers, the Court's interpretative approach, seeks constantly to preserve the autonomy and independence of the constituted powers, in conformity with the principles of the separation, balance, and collaboration of powers, which are part of the foundations of the constitutional system of the Kingdom of Morocco.

By way of example the Court consolidates Constitutional Council's precedent rulings of which is confirmed that judges and prosecutors are members of a sole judicial body, and, accordingly, encompassed by the inherent independence of judicial power. This principle prevents the possibility to chair the Public Prosecutor's Office by an official who does not belong to the judiciary.



As global interpretive attitude the Court adopts a maximalist interpretation of the constitutional norms concerning fundamental rights and freedoms, in order to ensure, to the maximum, the useful legal effects of the constitutionally guaranteed rights and freedoms

Concerning the regulation of public authorities' actions, the Court adopts the principle of maximizing their autonomy and independence.

2. Protection of the Freeness, Fairness, and Transparency of Parliamentary elections

The established jurisprudence of the Court aims to guarantee the freeness, fairness, and transparency of the ballot.

Concerning electoral communication, the Court adopts a line that tends to preserve the constitutional freedom of expression while ensuring effective compliance with the legislative and regulatory framework of the electoral campaign.

In settling electoral disputes by the Court, the fairness of the vote is often examined in light of two parameters: the difference in votes obtained and the determining influence of the irregularity generating the lack of fairness. However, the Constitutional Court proceeds to the annulment of the election of the contested candidate, without taking into account the criterion of the influence on the results, in the case of serious electoral offenses, such as the use of administrative resources during electoral campaign or the attempt to obtain the vote of voters by illegal, coercive or unfair ways.

These are just a few highlights of the key contribution of constitutional justice in upholding democracy in the Kingdom of Morocco. I hope that the elements I have shared you would benefit the comparative effort from a historical perspective. The Constitutional Court remains at the participants' disposal to provide additional elements.

Le Président de la Cour
Constitutionnelle

Said IHRAI