



From the Plurality of Guardians to the Necessity of a Protective Constitutional Court

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Abstract

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The abstract This article examines the role of the constitutional judge, particularly in Morocco, as a protector of rights and freedoms. It highlights that within the Moroccan system, this protective mission is explicitly entrusted to the King, while the Constitutional Court shares this landscape with other institutions that have more limited mandates. The central argument is that the constitutional judge was historically established to regulate powers but had to evolve, under the influence of global conceptual shifts, towards a role as a guarantor of rights. The article concludes that despite this potential, the full and effective realization of this protective mission in Morocco remains a work in progress.

I. Introduction

Far from being an exception in the world, the protection and promotion of rights and freedoms are matters that command the attention of the Moroccan state, as is the case for any state claiming to be democratic and governed by the rule of law. If the law is the supreme expression of the will of the nation, the "makers" of the law can, in some cases, fail to embody this will or even contradict it by enacting norms that infringe upon the rights and freedoms of citizens.

Thus, although benefiting from democratic and/or constitutional legitimacy, the government and parliament are not infallible and can, willingly or not, violate rights even when they are constitutionally guaranteed [1]. For any state under the rule of law, where citizens rely on institutions entrusted with the missions of regulation, arbitration, oversight, and sanction, the existence of a body responsible for controlling legislative production and ensuring respect for the hierarchical supremacy of the Constitution—and consequently the protection of the rights and freedoms contained within it—is indispensable. Therefore, in most countries, this body exists and exercises, among other attributions, the constitutional review of laws and the settlement of electoral disputes, which are undoubtedly the functions most closely related to the protection of rights and freedoms [2]. This leads us to ask: how can the role of the constitutional judiciary be decisive in protecting rights?

II. Plurality of Actors in the Protection of Rights

Questioning the place occupied by the constitutional court as an institution for the "protection of rights and freedoms" can only be meaningful if a "mapping" is undertaken to identify the various actors in this field. In this sense, we first point out that the constitutional judge is not the only one to act in this capacity [3]. Since the 2011 Constitution, like its predecessors, expressly affirms that the King "ensures the protection of the rights and freedoms of citizens, and of the collectivities," the monarchy remains the institution endowed with this specific mandate. This role draws on the King's religious legitimacy as Commander of the Faithful (Amir Al Mouminine), particularly in spheres of religious proximity such as the Family Code or the Code of Succession.

As for the ordinary judge, it is true that under the new constitution, they are "in charge of rights and freedoms," but the expression "in charge of" remains a weaker and less committed term than "guarantor" or "protector." [4] Thus, they are not a protector or guardian in the way that, for example, the "French judicial authority, guardian of individual liberties" is, despite attempts at the autonomization of justice that evolved from an "Authority" to a "Power" in the constitutional fabric of 2011 [5].

Regarding other institutions, such as the National Human Rights Council (CNDH) and the Médiateur (Ombudsman), the reference texts speak more of a mission to address questions relating to human rights or to defend them rather than to protect these rights. Thus, the CNDH is "charged (the institution) with addressing all questions related to the defense and protection of human rights and freedoms, guaranteeing their full exercise and promotion, as well as preserving the dignity, rights, and individual and collective freedoms of citizens, all within the strict respect of national and universal frameworks in this area." Furthermore, it contributes to strengthening the human rights system and works towards its protection, promotion, and development while respecting the universality and indivisibility of said rights, and encourages the application of the principles and rules of international humanitarian law in coordination with the National Commission of International Humanitarian Law.

As for the Médiateur, being an independent and specialized national institution, its mission, within the framework of relations between the administration and users, is to defend rights, contribute to strengthening the rule of law and disseminating the principles of justice and equity. It works towards spreading the values of ethics and transparency in the management of public services, and to ensure the promotion of efficient communication between, individuals whether natural or legal, Moroccan or foreign, acting individually or collectively. On the other hand, between public administrations, local authorities, public establishments, bodies vested with public authority prerogatives, as well as any other enterprises and organizations subject to the financial control of the State.

Admittedly, this is progress compared to its initial version as the Diwan Al-Madhalim, which has a mission of mediation between, on one hand, citizens or groups of citizens and, on the other, administrations or any body holding public authority prerogatives, and of encouraging them to observe the rules of the rule of law and equity. However, protection in the strict sense does not fall within its purview.

It follows that the only institution to which the constituent power has expressly entrusted the mission of protecting rights and freedoms is the monarchical institution. So, how can the role of the constitutional judiciary be decisive in protecting rights?

III. From Constitutional Judge as Regulator to Judge as Protector of Rights

From a jurisdictional standpoint, and within the normative structure, the general competence in matters of protecting rights and freedoms naturally falls within the purview of the ordinary judiciary. However, this protection is based on the principle of the hierarchy of norms, which subjects the entirety of the legislative framework in this area to constitutional or constitutionally ranked norms, depending on the specificities of legal and political systems.

This submission is the essential condition for a state governed by the rule of law, as in its absence, the constitution would have only a symbolic scope [6]. However, the rule of law, gradually acquiring a qualitative dimension, submits not only to the law but also to guarantees rights to citizens. An independent judge who embodies the central figure of the rule of law and imposes limitations on sovereignty should ensure this protective mission. Furthermore, this judge subjects the creators of the law—the rulers—to the interpreters of the law, who are the judges themselves. [7]

The interest aroused by this body can be explained, on the one hand, by the belief in the necessity of constitutional review and its supposed essential, even inevitable, character, insofar as it appears to some as bearing a number of reassurances, including prevention against potentially oppressive majorities or a legislature that could err [8]. On the other hand, it is explained by an evolution in constitutional thought.

Regarding the first point, it should be noted that Draft Law No. 22.20 relating to the use of social networks reminded us of a historically affirmed reality: the Power holding delegation from the people to guarantee their security, order, and protection can act against their will by enacting and applying norms that violate their rights and freedoms. [9]

The legislator can err. This was proven when human rights were violated in the heart of Europe during the Second World War. In France, the distribution of powers was destabilized under the Third and Fourth Republics to such an extent that the omnipotence of Parliament and governmental instability appeared as the two vices that led to the demise of these two Republics. Certainly, after 1789, the revolutionary conception of the law enshrined the infallibility of the expression of the general will. However, the "terrible lessons" of Nazi, Fascist, and later Communist regimes showed that the law could

fail, that majorities, even those arising from suffrage, could be oppressive and violate the constitution, the rights proclaimed therein, and the organization of powers provided for by it.

It was within this line of thought presiding over the elaboration of the first Moroccan constitution that it was necessary to master such a drift of legislative power by channeling the chambers and strengthening the executive. Thus, the institution of the constitutional judge would manifest as an element of rationalized parliamentarianism, a "safeguard" intended to regulate competences for a better approach to constitutional and political balance. However, the situation requires another balance that one dares to call "normative and legalistic," alluding to the proper balance that should be established between legislative production and the concern to protect the rights of citizens, and not just institutions. These institutions continually reference a vague "legal lexicon" such as Public Order, General Interest... to harm, willingly or not, the situation of rights and freedoms.

Furthermore, regarding the second point, that of the evolution of constitutional thought, it has undeniably changed. It is no longer a matter of solemn declarations of rights and a summary description of the organization of powers, but of their guarantee in light of the constitution. The transition from a declaratory constitution to a guarantor constitution can only be achieved through the provision for control and sanction [10]. Moreover, the consecration of Parliament would give way to that of norm-creators since the law is no longer the work of Parliament alone, but the fruit of several actors, "multiple legislative entrepreneurs," namely the Government, Parliament, but also the constitutional judge determining what has been called "the regime of concurrent enunciation of norms." Finally, is the majority, however minimal considering low electoral turnout rates, expressive of the general will? Undoubtedly, provided that respect for the constitution is preserved.

In summary, the adoption of a constitution and the affirmation of fundamental rights only take on real meaning if public authorities are placed in a situation where they cannot violate the fundamental text with impunity. Its supremacy requires the establishment of a judicial body responsible for protecting this text and the implementation of a review that sanctions violations of the fundamental charter.

The provision for this specific body, charged with exercising constitutional review, in the constitution appeared as a sign of the liberalization of regimes. Since then, each country having its own constitutional rhythm has given rise to five waves of establishment of the constitutional judiciary institution.

The first corresponded to the period after the First World War with the emergence of the Austrian Constitutional Court. The second is situated after the Second World War with the fall of the Nazi and Fascist regimes. The third was triggered by waves of decolonization where most newly independent countries drew inspiration from the French Constitutional Council of 1958—the case of Morocco—or the American model.

The fourth wave announced the end of the Spanish, Greek, and Portuguese dictatorships, and their constitutions accorded an important place to constitutional review, surpassing the symbolic aspect given their dynamic jurisprudence. Finally, the fifth wave coincided with the fall of the Berlin Wall and the proliferation of constitutional courts in the East and the South [11].

If for several countries, particularly the most democratic ones, the constitutional review exercised by these constitutional jurisdictions, which today ensures the protection of rights and freedoms, was originally born to enforce the boundaries between public powers, even though it must be noted that today, "few decisions of the Council concern the regulation of competences," whether to protect the horizontal (legislative/executive) or vertical (federation/federated states) distribution of powers. In Morocco, the achievement of a significant shift in the role of the constitutional judge from a mission of arbitration and preservation of balances, particularly political and constitutional ones, to that of protecting rights finds its foundation in the new constitution.

Within the framework of the comprehensive and profound constitutional revision undertaken by the Kingdom under the Constitution promulgated on July 29, 2011—a revision which established a new atmosphere conducive to openness and pathways toward the Rule of Law—a Constitutional Court was instituted to replace the former Constitutional Council. This Court is designed to be a prime venue for a rich and fruitful jurisprudence, with the ultimate aim of protecting public rights and freedoms, solidifying institutions and mechanisms for perfecting the edifice of a modern democratic state. It benefits from a reconfigured composition, additional competences, a procedure that includes individuals, a rich frame of reference, and a foundation abundant in rights and freedoms.

IV. Conclusion

The question of rights and freedoms is a permanent concern for any democratic society or any society aspiring to be one. Moroccan society, in this regard, continually demonstrates its involvement in this process of democratizing the

public sphere. Thus, at every available opportunity, the active forces of society call for the promotion, development, and protection of rights in all their facets.

The efficient protection of rights and freedoms by the Moroccan constitutional judge, as well as their effectiveness, reveal a certain precariousness and marginality. This comes on the eve of implementing a new mechanism whose contribution in this field is hoped to be significant by the various active forces of society. The Constitutional Court is thus called upon to guarantee the constitutional protection of rights and freedoms by ensuring the supremacy of the constitution—a constitution which is not supreme but must become so. This task is to be accomplished by employing "tools" such as constitutional review and by referring to the fertile block of norms presented by the 2011 constitutional fabric, which has been qualified as a "Constitution of Rights."

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