THE STATUS OF INTERNATIONLL LAW IN THE MOROCCAN LEGAL SYSTEM

DOMESTIC APPLICABILITY AND ATTITUDES OF NATIONAL COURTS

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INTRODUCTION

Since Morocco became independent in 1956, its successive constitutions in 1962, 1970 and 1972 revised in 1992, and in 1996, it had elaborate provisions asserting the state commitment to International Law and protecting fundamental rights and freedoms. In practice, however, the status of International Human Rights standards remained, until 1992, fully unacknowledged.

The purpose of the present essay is to examine the evolution of the interrelationship between International Law of Human Rights and domestic law from the perspective of the Moroccan legal system. The essay focuses, beyond the doctrinal topics relating to the monist-dualist dichotomy, on the practical methods and procedures through which International Human Rights norms may or do receive domestic application.

The essay endeavours in particular to assess the juridical and practical treatment of these topics in the light of the evolving impact of international instruments of Human Rights within the Moroccan legal order. The novelty of International Human Rights instruments, both in terms of the rights and obligations established by them and the domestic implementing measures, they require as well as the signally important role they impose on the judiciary, have raised, however, unexpected challenges to academic writers and magistrates. One of the most significant difficulties springing from the receipt of international Human Rights Law is the serious lack of preparedness of training programmes of both universities and the magistrates' institute to cope with International Law and the evolving jurisprudence of Human Rights.

The key issues that have emerged s problems, particularly with the ratification of the international covenants (1979) and ensuing instruments on torture, discrimination against women and child rights (1993), concern the conditions the Moroccan legal system ought to fulfil in order to comply with the requirements of Human Rights treaties.

The analysis will be conducted along with three main questions :

(i) Does the Moroccan constitutional law comply with International Law of Human Rights ?

(ii) Is the judiciary in a position to apply International Human Rights norms, and how and to what extent national courts enforce them, whether these norms have been directly incorporated or subsequently transformed?

(iii) Is it really well equipped to do so, both in terms of qualification and jurisdiction?, Does it enjoy a real independence

and could it apply all Human Rights norms with the required competence and fairness ?

Whereas a strong trend among scholars and the legal profession and Human Rights activists and researchers has long pleaded for the pre-eminence of International Law and still endeavours for a better constitutional recognition, the jurisprudence is still fluctuating between uncertain traditional legal culture and inaccessible modern Human Rights culture.

I. CONSTITITIONAL SETTINGS *AND STATE PRACTICE :*

The classical topics concerning the Moroccan approach to the relationships between the two legal systems is generally analysed as follows. The Moroccan Constitution contains a single tersely phrased operative clause on the interrelationship between International Law and constitutional law, which does not specify the exact legal position of treaty law within domestic law.

The clause in question, article 31 which has remained unchanged since the 1962 first constitution, submits the ratification of a treaty to a test of consistency whereby it is generally admitted that it endorses implicitly the superiority of ratified international treaties at least over ordinary laws.

Further support for such a reading can be adduced from different sources. Some existing legislative texts that assign express primacy to treaties over their provisions, an evolving jurisprudence coming increasingly to assert such a principle, an finally state practice openly and constantly proclaiming full observance for international obligations, while impairing, in practice any effective implementation of Human Rights and humanitarian norms.

1. Formal status of International Law :

Successive Moroccan constitutions have since 1962 **(1)** invariably provided for the formal status of International Law and State policy regarding international organisations in a same clause inserted in the Preamble. A single article in the operative part of the constitution, article 31 (2-3), determines tersely and in a sibylline manner the whole issue of the position and legal force of International Law.

For the first time in 1992 a constitutional revision surreptitiously subjected Moroccan constitutional law to a signally important test of compliance with International Human Rights Law, whose insertion in the Preamble of the constitution attracted however a mitigated, if not superficial, interest.

1.1. Preamble clause on International Law and Human Rights :

The main provision on international law reads as follows :
“ Aware of the necessity of setting its action within the framework of international organisations of which it is an active and energetic member, the kingdom of Morocco subscribes to the principles, rights and obligations resulting from the charters of the aforesaid organisations …” (paragraph 3).

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(1) Constitutions of 7 December 1962, 4 April 1970 abrogated in the same year, 1972 revised in 4 September 1996. Two **“supreme”** laws were adopted prior to the promulgation of the first constitution, the **“Charte Royale”** in May 1958 and the “Loi fondamentale” on 2 June 1961. Attempts to establish modern constitutional arrangements had been started since the nineteen-century and a **“democratic”** project failed to gain the ruling elite’ confidence in 1908, at the eve of the French colonial invasion.

The last constitutional revision of September 1992 **(2)** introduced for the first time the following significant sentence on universal Human Rights, maintained in the revised constitution of 1996. Completing the same phrase, the sentence proclaims :
“and reaffirms its attachment to the Human Rights as they are universally recognised” (Par.3).

Before examining the scope and the legal value of these commitments, it is worth noting that the insertion of the last clause on Human Rights is one of the most forceful results of a longstanding pressure of international and national movements of Human Rights. The novelty of the formula in terms of discourse deserves equally to be mentioned. The phrase **“Human Rights”** barely ever used in official rhetoric before 1990 **(3),** except in the United Nations and related forums, happens to be strikingly elevated to the high rank of a constitutional principle. Its inclusion is one of the most important successes of the longstanding international and Moroccan Human Rights movement engaged in since the mid-seventies. Its scope and legal consequences have still not been fully examined.

It is asserted in the following analysis that the new clause is also indicative of the State’s legal and political determination to legitimate the nascent reformation of the official Human Rights regime. Although it is an ambiguous test of consistency with International Law, it has the merit of opening a new stage in the legal process of implementing international law of Human Rights. It ought to be taken as perfectible yardstick that can be used against the failure of the still incoherent constitutional order itself.

(2) Revised by referendum on the initiative of the King on September 4, 1992, promulgated by Dahir N° 1-96-157 on 7 October 1996. Published in the Bulletin Official N° 4420 bis on 10 October 1996.
(3) The establishment of the Consultative Council for Human Rights, by Dahir N° 1-90-12 on 24 April 1990, is in principle, a Moroccan application of the United Nations recommendation for the establishment of "national institutions" (UN General Assembly Resolutions 44/64 and Commission on Human Rights Resolutions 1990/73 and 1991/27).It gave the occasion for the King to deliver his first explicit policy on Human Rights. In the "exposé des motifs" of the constitutive Dahir, it is asserted that Human Rights have constantly been taken into account in the constitutive Dahir, it is asserted that Human Rights have constantly been taken into account in the whole process of achievement of the rule of law in Morocco. The reason for the creation of that body is that the implementing means of Human Rights have constantly been taken into account in the whole process of achievement of the rule of law in Morocco. The reason for the creation of that body is that the implementing means of Human Rights have often proved to be insufficient to ensure a perfect achievement of the pursued purposes. The object of the Council is thus to counter any "abuses or errors inherent to the Human nature". ***Conseil Consultatif des Droits de l'Homme,*** Royaume du Maroc, 1994, at Status of the Council, pp.2-3. See also Susan E. Waltz, Human Rights and Reform, 1995 at 190-192.

1.2. Scope and legal effect and legal effect of the Preamble :

whether the preamble is of normative of declaratory character is not only of theoretical interest. It raises, basically, in a non-democratic society like Morocco, the whole coherence of the constitutional order and the effectiveness of the rule of law **(4).** The discrepancy between the actual and systematic infringement of International Law of Human Rights and the sudden inclusion of the universally recognised Human Rights clause in the preamble instead of the operative device of the constitution raised questions and doubts with respect to its real legal effect. Commentators and Human Rights activists legitimately not satisfied with the wording and the content of that clause, generally found the clause insignificant and still contemplate it as a mere platitudinous statement. It is said to be no more than a new statement of the well-established state policy in international relations and diplomacy matters or at worst a new malicious camouflage, and a mere declaration of good intentions avoided of any mandatory character.

From a pragmatic point of view, however, and according to reiterated state practice, the principles entrenched in the preamble from an integral part of the constitution and enjoy the same higher normative value over ordinary laws. Official representatives and governmental periodic reports to various Human Rihgts treaty-bodies have pleaded

during the last six years the normative and mandatory character of the new clause on Human Rights. **(5)**

The significant effect of the new Human Rights formula introduced in 1992 is that it greatly broadens the scope of the classical conception of Human Rights, recognised as public liberties since 1958, three years before the adoption of the first constitution. The point at issue is whether and to what extent such an umbrella provision confers positive rights and freedoms resulting from the incorporation of International Human Rights norms.

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(4) The Moroccan constitution is often seen as a double-folded text : A traditional and **"patrimonialistic"** constitution, based on article 19, embodied in a modern and positive one. Article 19 provides for the intangible and absolute prerogatives of the king as **"Commander of the Faithful"** and supreme **"protector of the freedoms of individuals and groups".** The King has given himself thus both religious and political legitimacy and although rulings head of state, considers himself above, and not concerned with the principle of the separation of powers. The principle applies exclusively to the repartition of powers between the Cabinet, the legislature and the judiciary (articles 67 to 87). The king is deemed to perdform the role of super power and ultimate arbiter in cases of conflicts.

(5) Reports to the Human Rights Committee, Committee Against Torture, Committee for the Elimination of Racial Discrimination. See respectively, CCPR/C/76/Add.2 (1994), CERD/MOR/(1993-1994). For a summary of the official position of the Government on the general receipt and applicability of International Law of Human Rights see HRI/CORE/1/Add.23, 23 April 1993, Morocco March 16, 1993, at p.5-7.

Besides the main provision on International Law and Human Rights, it is worth noting that the first two paragraphs deal exclusively with the highly sensitive issue of national, linguistic, religious and regional identity features. The country is characterised as a **"Muslim Sovereign State"**, **"whose official language is Arabic".** It constitutes a part of the **"Great Arab Maghreb"** and is an **"African State"** pledging the achievement of the **"African unity"** (par.1). It is evident that those principal characteristics are of high normative value. The Muslim character, further developed in an operative article 6 on the extent of religious liberties afforded by a modern confessional State, is the basis for the whole conservative **"Islamic public order",** governing and fostering of facilitating legal discrimination against women and non Muslim citizens and minorities. Similarly, the non-recognition of the Amazigh language (Berber) is of great concern insofar as the Berber

speaking communities are estimated to constitute, at least, two-third Morocco's population.

The jurisprudence has not yet decided on the whole issue, both on the normative value of the preamble and its interpretative effect over the substantive content of the Human Rights guarantees of the constitution. In view of the range of the fundamental principles entrenched therein, the newly established Constitutional Council, when it comes to define its terms of constitutional references, will have to decide whether to include the principles of the Preamble as an integral part of the **"bloc of constitutionality"(6).**

The principle of constitutional interpretation that a constitution must be construed as a whole, taking into account not only to the operative dispositions of the constitution but also ascertained in the most leading African and common wealth jurisprudence **(7).**

It is unlikely that national courts, including the Supreme Court, may risk disputing the current positive attitude of the executive branch. The only question that remains to be answered is the extent to which national courts will be able to use the new clause of the preamble both to give a new impetus to the implementation of international Human Rights norms and to infuse their sprit in constitutional Rights and freedoms.

1.3. Content and consequences of the Human Rights clause :

As has already been mentioned, the clause on universal Human Rights may encompass multiplying interplay and effects on the whole Rights issues at the level of the constitutional order. The interplay with the whole paragraph on international organisations, as well as the Human Rights provisions of Title One of the constitution, authorise to improve its infuse impact on the legal sources of interpretation and the exercise of Human Rights itself.

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(6) French Constitutional Council, Receuil des Décisions du Conseil Constitutionnel, 29, 1971 (Decision of 27 July 1971), and 25, 1973 (Decision of 27 December 1973) ; see also Grandes Decisions du Conseil Constitutionel, 8th ed.1995.

(7) For a resent survey see Article 19, the Interpretation of Fundamental Rights Provisions. International and Regional Standards in Africa and Other Common Law Jurisdictions, London, 1997 : 1-93 at pp.1-12. See also Interights, Common wealth Human Rights Law Digest, 1996, 1.

Construed in conjunction with the commitment to abide by the **"principles, rights and obligations resulting from the charters"** of international organisations, the proclamation on **"the Human Rights as they are universally recognised"** enables national judges to use conventional and customary International Law of Human Rights as sources of Law **(8).** A part from extra-judicial interference and inherent legal culture, it is in the competence of the judiciary to rely upon such a reading and to initiate courageous interpretations in the field of Human

Rights. It reinforces the universal dimension of the traditional constitutional guarantees and may stand as a minimum standard against which the judiciary will be legally entitled to measure any infringement of Human Rights and the compatibility with the constitution.

Additionally, as will be further analysed below, the absence of precise and detailed provisions on the formal reception and domestic applicability of International Law in the Moroccan legal order may be also appraised in the light of the application f the Human Rights clause of the Preamble.

2. Interrelationship between treaties and Moroccan domestic law :

As has already been referred to, the single operative provision on international treaties, **article 31,** defines the treaty-making authority (paragraph 2) and tersely, outlines the relationship between treaty law and constitutional law (par.3).

Having persisted unchanged for more than thirty years the weight of the widespread state practice and evolving jurisprudence relating to International Law constitute a valuable basis for the assessment of the legal and practical conditions to giving direct effect to treaty law in Moroccan Internal Law.

The first salient feature of this provision is that it does not specify the categories of treaties nor their exact position and rank within the Moroccan legal hierarchy. The subjacent trend is, however, assimilated to the monist approach and as will be detailed below, the method of integration of International treaty provisions according to article 31 is the automatic incorporation.

Article 31 stipulates **(9) :**

2- "[The King] sings and ratifies treaties. However, treaties relating to the State finance cannot be ratified without prior approval by law.

3- Treaties susceptible to being inconsistent with the provisions of the constitution are approved accordance with the procedures necessary for the revision of the constitution**".**

The process of the entry into treaties is examined in the following part before an analysis of the implication of test of consistency in terms of compliance with general principles of international treaties and the obligations resulting from International Human Rights instruments.

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(8) It may also be an impetus to International Humanitarian Law still too much ignored. The last phrase of the preamble "reaffirms" the state commitment to **"work for the maintenance of peace and security in the World" (par.4)**

(9) Revised constitution of 14 September 1996. As to paragraph 2, the previous invested the Chamber of Representatives with its prior approval.

2.1. Exclusive responsibility of the executive branch :

The treaty making is constitutionally vested with the King and in the case of treaties incurring public expenditures, with the (bicameral)

Parliament. The requirement of an “approval by law” prior to ratification of treaties relating to State finance was until now of limited significance even with regard to multifarious multilateral and bilateral treaties of commercial, industrial of financial character. It is immaterial, however, whether and to matter or not. The practice under the earlier provision has been that the parliament was required to agree to accommodate eventual financial charges with the annual law of finance. Besides the fact that most of that category of treaties are generally supervised by the ministries concerned and though decree-law signed y the Prime minister, the parliamentary approval is not a determinative authorisation and cannot by any means prevent or excessively delay a ratification decided by the **“Council of Ministries”(10).** The ratification of international treaties of Human Rights and of humanitarian concern is overall beyond the reach of the legislature despite the financial charges resulting from some of them.

In Fact, the whole process of conclusion of treaties is the exclusive prerogative of the King. The paradoxical phrase “he signs and ratifies treaties” is a traditional formula probably taken from the 1946 French constitution, which confuses two different stages of the process, the negotiation leading to eventual signature and the authentication by means of ratification generally carried out by different official representatives of a State. It does not reflect the actual practice in Morocco. The process of negotiating or expressing the consent of the State to accede to a treaty, is conducted by delegates mainly pertaining to the ministry of foreign affairs with “full powers” issued by the King to the effect of signing, subject to subsequent ratification by the King himself **(11).**

2.2. Administrative procedures giving obligatory force to treaties :

There is no constitutional or legislative arrangement designed to regulate the legal technical aspect of the incorporation of treaties into domestic law. An administrative practice for that purpose has progressively evolved to become an imperative condition for the domestic entry into force. The Jurisprudence is also coming to ascertain that the legal force of treaty within internal law in conditional not only on a dahir (decree) promulgating domestically its ratification but also on its publication in the Moroccan official Gazette, the Bulletin Official.

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(10) The Council of Ministries is directly chaired by the King, while the premier directs the **“Council of Government”.**

(11) The confusion is, however, not a matter of procedural misleading only. It happens in the **"Etat d'exception period"** (1965 – officially to 1970) that the King, who cumulated the function of prime minister and head of state, signed as prime minister through what was specially called a **"Royal decree"** and ratified subsequently in his quality of King through an ordinary Dahir. This peculiar technique has been subsequently revoked due to diplomatic criticism.

- ***Case law on the publication of laws and treaties :***

A part from one dissenting judgement, national, court, including the Supreme Court, determined in the rare cases involving application of treaty provisions that an official publicity is a necessary criterion for a treaty to be taken into account as a law in force. (Cases 3 and 4 Below). In the absence of any legal rules for the publication of International Law, the national courts established equally the principle of obligatory publication in the official gazette (1 and 2).

Case 1 : Court of First Instance of Rabat, 13 October 1940 (12) ; Stating the absence of legal provisions regulating the publication of laws the Court decided that :

"For a text of law to have obligatory force it has to be brought to the knowledge of the public in such a manner that the adage <<ignorance of law is no an excuse >> conforms, at least, to the reality of things"

Case 2 : Court of Appeal of Rabat, 13 July 1947 (13) ;

The court held that, although a treaty becomes binding from the time it was promulgated, namely according to the date of the promulgating dahir,

"It cannot become enforceable and opposable to a third party unless it has been duly published".

The court explained as to the modes of publicity that :

"A publication may be carried out by means of measures designed to inform all those interested, often through the Official Bulletin". **(14)**

Case 3 : Court of First Instance of Rabat, 29 April 1964 (15) ;

This is the only case in which a national court refused to subordinate the obligatory force of a treaty in Moroccan domestic law to its publication in the official gazette. The court held that :

"It is of settled doctrine that the giving force to a next (of law)is not dependent on any condition of obligatory publication in the [Moroccan] 'Bulletin Official'. It suffices that an effective publicity has been made prior to the application of the text. Publicity resulting from the publication in the [French] Journal Official, which is largely diffused in Morocco, is notably sufficient**".**

In fact, the treaty in question was ratified by the French Government during the French colonial rule over Morocco and a promulgating decree had been published in the French 'Journal Official de la Republique' on 27 December 1932.

The ruling in this case is generally considered to be of limited effect.

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(12) Cited in P.Decroux, Droit prive, vol. II, Droit International prive, Rabat, 1963 at : …
(13) Recueil des Arrêts de la Court d'Appel de Rabat, 1950 at 84 et seq.
(14) In affaire Compagnie fermiere des sources minérales Oulmes c/Président du Conseil et Gouverneur de la ville, the Administrative Chamber of the Supreme Court decided on the retroactive application of a law. It held that only « infractions committed subsequently to the publication in the 'Bulletin Officiel' of a decree establishing the penalities for such infractions are applicable", in Receuil des Arrets de la Cour Supreme, Volume 1 (1960-1961) at 11.
(15) Dame Veuve Ecoffard c/Compagnie Air France, in Gazette des Tribribunaux Marocains, no 1357, 25 October 1964 at 97 ; and Revue Marocaine de Droit, 1st October 1964. at 354. For a summary on related jurisprudence upholiding the Court Of Appeal decision, Juris-classeur du Maroc, item6-13 January 1958, (2) 5 : Accession of Morocco to the Court of Appeal decision, Juris-Classeur du Maroc, item6-13 January 1958, (2) 5 : Accession of Morocco to the 1929 Treaty of Warsaw on 8 January 1958, Paris 1987.

Case 4 : Court The Supreme Court, Administrative Chamber, 13 November 1972 (16) ;

In affaire Zahra BENNANI c/Company Air France, the Supreme Court decided for the first time on the issue of publicity of laws, setting the then fluctuating jurisprudence on the issue. The High Court decided that for the publication of a treaty to be legally valid it has to be made through the Bulletin official**.(17)** The decision consequently annulled a contrary judgement of a Tribunal of First Instance.

Administrative practice

The uncertainty was so pervasive during the sixties that, in a controversy
Between the Minister of Foreign affairs and the Secretariat of the Government concerning the exact date of ratification of a bilateral treaty concluded with France.

The issue concerned the date to be retained as valid : The date on the instrument of notification that was exchanged with France or that of the promulgating dahir ordering its domestic publication. [Double imposition treaty].

A part from the other confusion, the Ministry of foreign affairs endorsed the ruling in 1964 Court of Appeal in the Dame Veuve Ecoffard case while the secretariat asserted the importance of the publication in the same terms of the other judicial decisions. **(18)** What is at issue, and the two ministerial departments agreed on this is that the legal force of ratification of a treaty on the international plane is not dependent on any measure of domestic integration. Similarly a vice de former is not opposable to a contracting party.

In previous Moroccan practice it has often happened that a ratified treaty is internally incorporated before the deposit of the instrument of ratification. Conversely, the opposite "technique" is usually used with

regard to international treaties of Human Rights, delaying for a long time the formal promulgation validating the domestic incorporation.

Views within the two departments have been divided on various occasions about the adequate internal procedures required for giving treaties obligatory force in international procedures that Moroccan authority confused, during the first post independence period, the mode of expressing the State conent to abide by international obligations with the internal measures undertaken to the effect of validating the domestic integration. A, internal act of ratification or ratification and publication of a treaty, issued in the form of a royal dahir served equally, in the form of certified copy, as an instrument of ratification at the international level. It followed, then, that notification of ratification and publication of a treaty, issued in the form of a royal dahir served equally, in the form of certified copy, as an instrument of ratification at the international level.

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(17) Some ordinary laws recognise explicitly the precedence of treaty provisions provided those treaties are duly ratified and published. Respectively Article 1 of the Code of Moroccan Nationality (6 September 1958), the Law on Extradition of Aliens (1958) and the law on the "Moroccanisation" of certain Economic Activities (2 March 1973).

(18) Archives du Ministère des Affaires Etrangères, Doc,. See large excerpts of the notes exchanged between the two ministries, in H.Ouazzani Chadi, op.cit at 402 and 450.

It followed, then that notification of ratification and the internal incorporation operated simultaneously, depriving the contracting States from the usual **"droit de regard",** giving rise to various conflicts about the date of the entry into force of treaties. Following recommendations from the United Nations General secretary **(20),** separate instruments have been established. Instruments designated to notify ratification at the international level have taken since then the form of distinct "letters of ratification" duly signed by the King, as head of state, authenticating previous negotiation and signature. It is only after receipt from the ministry of foreign affairs, of the **"process-verbal"** of deposit or exchange of a ratification instrument, that the Secretariat of the Government devise the domestic act (dahir) promulgating the treaty and ordering its publication in the Bulletin Officiel. The drafted dahir is then forwarded to the Cabinet Royal for signature and royal Seal of the King.

2.3. Legislative recognition of treaty precedence and jurisprudence :

Four legislative texts provide expressly for the prevalence of treaty provisions over their provisions in case of conflict.

- The code of Moroccan Nationality (6 September 1958) **(21)** provides in article 1, under the heading "Sources of law in matters of nationality", that "provisions relating to Moroccan nationality are established by law and if necessary, by treaties or international agreements (duly) ratified and published"

- Dahir relating to extradition of aliens (8 November 1958) **(22)**

provides in its saving article 1 “except contrary provisions resulting from treaties, conditions, procedures and effects of extradition are determined by the following article”.

- The law relating to the organisations of the Bar the practice of the

profession of the barrister (19 December 1968), **(23)** applies “without prejudice to the contrary international conventions to which Morocco is a party”.

- The law relating to ‘Moroccanisation’ of certain economic activities (2

March 1973)**(24)** provides for a similar primacy of treaties in case of conflict.

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(19) Pratique Marociane du droit des traities, at.. In 1968 France, as the depository of a multilateral treaty, refused to accept a « certified copy » of a domestic royal decree promulgating the ratification. Id. at

(20) In 1964, the United Nation General Secretary urged the Moroccan authorities to distinguish the two procedures suggesting the adaptation of two kinds of instruments.

(21) Dahir N° 1-58-250 du 6 Septembre 1958 portant Code de la nationalité Marocaine, Bulletin officiel du 12 Septembre 1958, vol.I, item 25 Aout 1956-6 Septembre 1958, Paris, 1988 at (2-5).

(22) Dahir N° 1-58-057 relatif a l’extradition des étrangers du 8 novembre 1958, Bulletin officiel du 19 Décembre 1958, p.2057. also reproduced in Juris-classeur du Maroc, vol.1958-1971, Paris, 1988, at 13-15.

(23) (Decret royal N° 816-65 portant loi relative a l’organisation du Barreau et l’exercice de la profession d’avocat, Bulletin officiel du 8 janvier 1968, P. 34. The law was revised by Parliament in 1979, Bulletin Officiel N° 3499, 21 November 1979, p.846, maintained the provision on treaties with explicit reciprocity.

(24) (Dahir portent loi relative a la marocanisation de certaines activités économiques).

It should be noted, in this context, that some of those texts contain discriminatory provisions, notably against the rights to nationality of women. A new exercise of compatibility and reformation of main legislative texts relating to Human Rights is currently being launched to the effect to insert an express recognition of the primacy of international treaties over the provisions of important laws such as the Code of Criminal Procedures.

Although these legislative texts are indicative of the propensity of the Moroccan legal system to absorb treaty law, the scope of their stipulations remains, however, limited to specific treaties and doesn’t enable the judiciary to expand the application of the principle of the precedence of treaties. Paradoxically such stipulations added to the confusion of Moroccan judges confronted with the enforcement of lex

posterior Human Rights provisions conflicting with existing domestic laws, as is illustrated in a famous judgement below, Alla Abdellah v. Bellat Ahmed.

Jurisprudence on the precedence of treaties : cases and comments :

- A part from the above mentioned ambiguous decisions about the non applicability of the Warsaw Convention on the cheque of 1931 (Cases Dame Veuve Ecoffard V Cie Air France, and Dame Zahra BENNANI Veuve Cherkaoui V Cie Air France), four main judicial decisions have asserted, in the course of the past thirty years, the prevalence of treaty law over domestic law.

- Prevalence of a judicial co-operation treaty between Morocco and France over domestic law.

- In Conseil de l'Ordre du Barreau de Casablanca V. Marc Meylan **(25),** the Order Council of the Bar of Casablanca lodged a pourvoi en cassation against a previous decision of the tribunal of Appeal of Rabat (1969) on the grounds that the latter decision doesn't comply with a domestic law enacted subsequently to the conclusion of a French-Moroccan judicial treaty.

- Laborious recognition of the applicability articles 11 and 18 of the ICCPR.

- Two contradictory decisions on Article 11 : 1 case : not directly applicable, 2 cases : directly applicable.

In Alla Abdallah V. Bellat Ahmed (1986) **(26)** a young judge, who later wrote a study advocating the enforceability of International Human Rights instruments within the Moroccan legal system, dismissed a request for annulment of imprisonment for contractual debt, based on article 11 of the ICCPR **(27).**

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(25) Supreme Court, Decision N° 249 on 1st January 1976, reported in Arabic in Revue Juridique, Politique et d'Economie du Maroc, N° 5, September 1979. The Challenged judgement was delivered by the Tribunal of appeal on 1969, Public Prosecutor and Marc Meylon v. The Order Council of the Bar of Casablanca, published in Al-Mouhamat, N°5, 1970.

(26) Alla Abdellah v. Bellat Ahmed, Tribunal of First Instance of Rabat, ordonnance de Référé, N° 2394 on 24 November 1986.

(27) Mohamed Lididi, Obsevance and prevalence of international treaties over internal law, in M. Cherif Bessiouni et al (eds), Human Rights, Vol. II, Application, 1989 pp. 177-180 ; (In Arabic). Judge Lididi who is also a teacher at the National Institute of Judicial Studies has served as General-Director of the Penitentiary since 1992.

He held that "Moroccan legislation contains no explicit provision that establishes the superiority and primacy of an international treaty nor the obligation to apply its provisions in case of conflict with a legal or constitutional provision". Lawyers and commentators expressed legitimate criticism to the effect that the court was not free to ignore

article 11 of the ICCPR, because the legislature failed to repeal an outdating domestic law.

Article 18 : The court admitted that it is in force but does not apply in cases involving proselytising. The Baha'I cases are analysed at p.31-33 below.

II. INTERNATIONAL COMMITMENTS AND JUDICIAL ENFORCEMENT :

3. Domestic legal position and effects of International Human Rights treaties :

The key constitutional disposition governing the rank and legal effects of conventional law within the Moroccan legal hierarchy proceeds from the already mentioned 3rd paragraph of article 31 which raises crucial issues relating to compliance and consistency between treaty and constitution.

Inconsistent treaties with the provisions of the constitution, it is stipulated have to be approved in accordance with the procedures provided for in articles 103 to 106 of the constitution. **(28)** The terse and sibylline wording of this provision has occasioned very few debates **(29)** from which it results, however, in the light of the Moroccan practice of the past thirty-six years, that treaties ratified under the constitutional test of consistency are implicitly made part of the domestic legal system. In addition, because the entry to a treaty, is formally received through automatic incorporation. The Moroccan approach to the relationship between international and national legal systems is, in principle, deemed to be of monist character. **(30)**

3.1. Domestic application and obstacles to direct applicability ;

The formal uncertainty surrounding the exact rank of treaty provisions within the whole normative hierarchy, both in relation to the constitution and ordinary laws, raises, however, legal and practical constraints to the effective implementation of Human Rights treaties.

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(28) Article 106 excludes categorically **"the monarchic from of the State"** and the **"provisions relating to the Islamic religion"** from any constitutional revision. The procedures are too cumbersome and tend to leave the matter under the exclusive control of the King. The initiative of the revision may come from both the (bicameral) parliament and the King (article 103-1). While the King has the competence to initiate and directly submit to referendum any project of revision he has initiated (article 103-2), a majority vote by two-thirds of the members of each one of the two Chambers of Parliament is required for a proposal to be adopted. The adopted proposal by one Chamber is forwarded to the second one to be adopted by a referendum called for by the King.

(29) H.Ouazzani Chahdi, op. cit…; Ihrai, les droits de l'homme et la constitution, D. Basri et al (eds), Le Maroc et les Droits de l'Homme, 1994 ; M.Mouaqit, les normes du droit international et le droit interne, unpublished paper prepared for the Chaire de l'Unesco pour les droits de l'Homme of the University Rabat-Agdal, 1996 ; id, Liberté et libertés publiques, 1996 at 97-98 ; Y.Fassi Fihri et M. Laayachi, 1996.

(30) According to Y.Fassi Fihri and M.Laayachi, supra, at 70, Morocco has used in 1939 a **"dualist"** method to transform the Geneva Convention on the Cheque of 19 Mach 1931 through a law promulgated by Dahir of 19 January 1939.

It is generally admitted that the constitutional exercise of consistency confers de jure upon treaties that meet such a test a high normative character resulting from the legal supremacy pertaining to the constitution itself. It is that same test that consequently validates the principle of the precedence of treaty provisions over ordinary laws.

The fact that the constitution outranks treaties raises, however, controversial debates that question the very criteria of compliance of Moroccan constitutional law with international law of Human Rights. The flagrant discrepancy between Moroccan law and internal practice, on the one hand and international Human Rights norms, on the other hand, raises serious doubts about the extent of compliance of the constitution itself with the core purposes and object of Human Rights treaties.

3.2. Conflict and consistency between constitutional law and International Human Rights Law ;

Construed as a whole, that is, taking into account the **"supra-constitutional"** article 19, the constitution ascribes a theocratic course to fundamental issues such as the separation of powers, government accountability and the independence and role of the judiciary in protecting individual and collective rights.

As already mentioned the entire "modern" part of the constitution is ancillary to the traditional paradigm epitomised in article 19, which is a true "constitution within the constitution". Article 19 reads as follows :

"(1) The King, Commander of the Faithful, supreme representative of the nation, Symbol of its unity and guarantor of the permanence and continuity of the State, ensures the observance of Islam and the Constitution. He is the protector of the rights and liberties of the citizens, social groups and collectivities.

"(2) He guarantees the independence of the Nation and the territorial intergrity of the Kingdom within its authentic borders".

Any construction of the Moroccan constitution in the sole terms of its **"Positive"** portions may fail to grasp the internal incoherence of the whole Moroccan constitutional law. In addition, some of the provisions of the constitution (Article 106 on the monarchic form and Islam), categorically excluded from any test of compliance with international law entail a serious infringement of International Law. As will be seen below, in some important cases, such intrinsic flaws have engendered inhibiting effects on the performance of the rule of law and the implementation of fundamental Human Rights through national courts.

3.3. Constitutional rights and freedoms ;

The Moroccan Constitution includes some basic principles of the rule of law and a set of rights and freedoms that have remained almost unchanged for thirty-six years. Those generous provisions remained, however, inapplicable during almost three decades of a systematic repressive regime.

The constitution declares that the State, is a **"constitutional, democratic and social Monarchy"** (article 1) and that the sovereignty belongs to the Nations which exercises it directly by means of referendum or indirectly though constitutional institutions (article 2). It prescribes the role of the political pluralism in organising and representing the citizens and prohibits the single party system (article 3).

Title one of the constitution prescribes, under the heading Basic Principles, three main procedural safequards and a set of rights and liberties both individual and collective.

Basic principles

The constitution establishes the principle of legality (article 4). The supremacy of the law (article 9) as well as the equality before the law (article 5) and the non-retroactivity of law (article 5) are expressly asserted.

Fundamental freedoms

The category of rights and freedoms enumerated in 10 provisions (articles8 to 15) comprises civil and political rights as well as economic, social and cultural rights.

- Liberty and security (article 10-(1))
- Freedom of movement and residence in the Kingdom (article 9-1(1))
- Freedom of opinion and expression in all its forms (article 9-(2))
- Freedom of worship is guaranteed for all (article 6)
- Freedom to assembly (article 9-1(2))
- Freedom to organise, to join trade union and political parties (article-1(3)) and the right to strike (article 14)
- Equal political rights for men and women (article 8-1)
- Equal rights to be electors (8-2)
- Rights to equal education and work (article 13)
- Access to public functions and employment under equal conditions (article 12)
- The right to property and freedom of undertaking or contracting a business (article 15)

3.4. Inherent restrictions and limits :

In 1979, as has been seen, Morocco ratified the two Covenants without reservation, despite the contrary view expressed by the Ministry of Justice in 1968. The very slow move towards reforms and harmonisation of domestic laws, launched in 1991, twelve years after the ratification of the two international covenants, has not yet given its full effect.

Article 9 of the constitution, which provides for the citizen's rights of movement and residence, opinion and expression, organisation and political or trade union activism, establishes that "no restriction can be imposed on such freedoms other than by law".

This clause, however, has proved to be incapable of curbing the prompt propensity of the executive branch to invoke national security, public order, and the protection of public morals and safety as an excuse to impair fundamental rights and freedoms. The principle of legality is often violated on administrative grounds not prescribed by law or in contravention with existing laws. In fact, the predominant practice amounts to exclude or modify the legal effect of both constitutional and treaty provisions in their application in times of 'social peace' as well as in situations of internal strife and social and economical instability.

Various academic writings continue to interpret the silence of the constitution about the exact formal rank of international law within the Moroccan legal order as a general reservation and not a mere omission, according to a sweepingly quoted formula of professor H.Ouazzani-Chahdi **(31).** This descriptive assertion tends, however, to obscure the crucial question of whether such as cautions or reserved policy, whose aim is to evade conflicting obligations with the so-called Islamic public order, could stand as a serious justification of non-compliance with international obligations duly contracted.

It is commonly accepted that international law leaves states at liberty to devise adequate arrangements for the integration of international treaties ipso jure in their domestic laws. Those arrangements, however, must be achieved in such a manner that international obligations incumbent upon a state are incorporated and performed in good faith. What is not debatable, on the other hand, is the duty to assure the comptability of domestic law with duly ratified international treaties **(32).**

The Moroccan practice shows that, after all, there is no irreparable disadvantage for an authoritarian state to declare international Human Rights standards automatically incorporated, that is, without need to enact cumbersome implementing legislation, insofar as Human Rights obligations are indistinctly considered as goals susceptible of selective and progressive application.

(31) H.Ouazzani-Chahdi, op. cit. at 345 and 361-364 Chouki Serghini, le Maroc et les règles internationales des Droits de l'Homme, 1994 : 285-303, at 294-295 ; and Said Ihrai, les Droits de l'Homme dans la constitution Marocaine, 1994 : 187-207, at 195, respectively in Basri, Rousset et Vedel, le Maroc et les Droits de l'Homme. Positions, réalisations et perspectives, Paris, 1994. C. Serghini, who served as Government representative for the first periodical reports before the Human Rights Committee, Laments over the ratification of the ICCPR without a reservation. He takes the view that the Government has to ; Said Ihrai, op. cit.; suggests that **"**it is the possibility to use, at any time, the saving clause on the public order and morals (article 19 of the International Covenant on Civil and Political Rights) that exlains the attitude of Morocco**"**. See also, for a more critical view Youssef Fassi-Fihri and Massoudi Layachi, le juge Morocain et les conventions internatioanles des droits, in ADFM & FES (eds.), Droits des Femmes au Maghreb. In l'Universel et le specifique, 1992 at 53-77 ; Mohamed Moaqit, op. cit.

(32) Articles 18, 26 and 27 of the Vienna Convention on the Law of Treaties. Morocco ratified the Vienna Convention on 26 September 1972 with a reservation on article 62 (2.a), published in the Bulletin Officiel N° 3239 on 27 November 1972 with a reservation on article 62 (2.a), published in the Bulletin Officiel N° 3239 on 27 November 1974. The precedence of international law is also a well established principle of several judicial and arbitrary decision at the international level. Alabama Claims Arbitration (1972), Moore 1, International Arbitration. Dantzig case, judgement of 25 May 1929, IPCJ 4 February 1932 ; Case concerning the rights of Nationals of the US in Morocco (Judgement of 27 August 1952), ICJ Reports, 1952 ; Texaco Overseas Petrolem Co and California Asiatic Oil Co v. Libya, 17, International Legal Material, 1, 1978.

4. Internal effect of Human Rights treaties and ambiguous attitudes of national judges : Case Law :

Morocco is a party to several International Human Rights and Humanitarian treaties.

4.1. International Commitments and lack of harmonisation ;

- The Four Geneva Conventions (Accession on 26 July 1956) ; the 1954 Hague Protocol for the protection of cultural property in the event of armed conflicts (Accession 30 August 1968) ; Protocol I and II Additional to the Geneva Conventions (Signature on 12 December 1977).
- The 1951 Convention relating to the Status of Refugees (Succession on 27 November 1956) and the 1967 Protocol ; The OUA 1969 Convention on the specific Aspects of Refugee Problems in Africa (Ratified on 13 May 1974).
- The Genocide Convention (Accession on 24 January 1958, Reservation : Articles VI and IX).
- The 1926 Slavery Convention, as amended by the 1953 Protocol, (Succession/Acceptation : 11 May 1959) ; The Supplementary Convention on the Abolition of Slavery, Trade and institutions and Practice Similar to Slavery (Accession : 11 May 1959 ; The

Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (19 June 1973).

- The Vienna Convention on the law of Treaties (Ratification : 26 September 1972, Interpretative Declaration : paragraph 2(a) of article 62.)
- The Convention on the law of Treaties (Ratification : 26 September 1972, Interpretative Declaration : Paragraph 2(a) of article 62).
- The Convention on the Elimination of all forms of Racial Discrimination : Ratification : 18 December 1970 ; Reservations : article 22. Reporting obligation : as to 1998.
- Convention on the Rights of the Child (Ratified on 21 June 1993, Reservation : article 14)
- Convention on the Protection of all Migrant Workers and members of their families (Ratified on 21 June 1993).
- OIT Conventions, N° : 5,11,12,13,14,15,17,18,19,22,26,27,29,30,41,42,45,52,55,81,94,98, 99,100,10, 101,106,111,116,119,122,129,136,145,146.

The case of the ICCPR in the Moroccan practice of International Law is indicative of the whole ambivalent attitude of the state and the judiciary international Human Rights instruments. In crucial matters relating to freedom of expression, religious liberties, civil equality and non-discrimination as well as to fundamental principles and procedures of criminal justice, considerations of national security or **(Islamic)** public order are persistently brandished as justifications for continuous infringement of international obligations.

The signature, subject to ratification, in 1968 of the ICCPR has given rice to a vivid exchange and commentaries between the ministry of justice and other concerned ministries.

The former pointed out two peremptory objections to ratification both stemming from the public Islamic order : the freedom of religion and the equality of men and women in marriage. Islamic law is an authoritative source giving rise to binding laws on some aspects of religious practices and civil and personal status (articles 220 to 222 of the Penal Code on proselytising, in addition to the whole Code of Personal Status). The Minister of Justice thus recommended that reservations have to be absolutely opposed to articles 18 and 23 of the ICCPR.

He pointed out also to the inconsistency of two main domestic laws relating to prison for contractual debt to the imposition of the death penalty on a person below eighteen years of age and on pregnant women **(33),** respectively with article 11 and 6(5) of the Covenant. The Minister suggested that the two latter contravening provisions should be easily amended so as to comply with the ICCPR provisions.

As has been seen, although the CCPR and other major Human rights instruments are mad an integral part of domestic law, obligations and remedies resulting form them are not yet enforced.

It has taken more than twelve years for a slow and laborious process of of harmonisation of internal law to be cautiously launched. Some procedural amendments introduced, in 1992, some blatant abuses during the incommunicado detention (garde à vue). (Law n°67-90 adopted by parliament on 25 April 1991, promulgated by dahir-decree-n°1-91110 on 1st January 1992). Local Human Rights groups and Amnesty International played a determinant role in the inception of that change. Six main provisions of the Code of criminal procedures were amended. (Article 68, 69, 76, 82, 127 and 154 providing, inter alia, for a six-day limit for offences not related to state security, availability of medical examination and notification of arrest to the family).

The first most significant general amendment, aiming obviously at compliance with Human Rights treaties is the 1992 constitutional revision that introduced for the first time a solemn recognition of universal Human Rights.

4.2. Constitutionally based inequality and discrimination religions and political justification of suppression of rights and freedom of women, minority groups and political parties ;

Article 6 of the constitution provides that “Islam is the religion of the State which guarantees to all free exercise of worship”.

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(33) Decree of 20 February on the “constraint par corps”, article 517 of the Code of Penal Procedure ; Article 21 of the Penal Code.

This provision constitutes a mitigating change of the traditional theoratic State to the extent that the “modern” State recognises the freedom of worship for all. The old status of protected religious groups (the dhimma status) that protected Judaism, as the most ancient Moroccan religion, and Christianity, is now supplanted by the protection afforded by the king in his capacity of Commander of the Faithful (article 19 of the constitution). Articles 220 to 223 of the Penal Code (section II of the chapter II). “on infractions relating to the exercise of worship **(34)**” spell out the **“modern”** regulation of any breach of the dhimma status by the protected groups.

The right to manifest one’s religion and belief illustrate the limit of religious tolerance granted by the constitutional clause on the freedom of worship set out in article 6. Logically this clause should should encompass the right to propagate one’s belief to the extent that the

recognition of a religion involves ordinarily a degree of expressing one's belief or propagating the tenets of a religion, seeking or not the convention of other peoples to one's own religion. Like other religions, Islam makes the daawa (proselytising or propagation of the tenets of Islam) a moral duty upon all its adepts, but it prohibits visible proselytising aimed at the conversion of Muslims.

The extravagant aversion towards Baha'ism and Moroccan Bahai's, held for a heretical aberration in the 1962-1963 and 1985-1987 trials, allowed the Supreme court to implicitly ascertain the illegality of the Islamic customary offence for apostasy in the Moroccan legal system **(35)**. The High court whose ruling complied thereby with the principle no crimen sin lege entrenched in article 10 of the constitution and article 3 of the Penal code as well as in article 15 of the ICCPR, abstained however from recognising the right of Bahai's to freedom of conscience **(36).** The incoherent reasoning behind the refusal to enforce article 18 of the ICCPR betrays the supreme Court's mistrus of international Human Rights norms and particularly those relating to religion. Responding to the applicants' defence the Court held :

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(34) Penal Code, Chapter II (articles 219 to 232) "on crimes and infractions breaching freedoms and rights guaranteed to citizens".

(35) Tribunal of First Instance of Nador, decided in its judgement of 14 November 1963 that the accused had committed the crime of apostasy (3 accused condemned to death penalty and 5 to life imprisonment). The judgement was subsequently dismissed as illegal by the Supreme Court, (Decision of 11 December 1963, files N° 12332 to 12335) insofar as the Moroccan Penal code does not criminalise apostasy. See also Alaoui Mohamed V. Public Prosecutor, the Supreme Court on 17 December 1987, unreported. It is significant that in the midst of the 1980's campaign against the Bahai's, My Ahmed Alaoui, an irremovable minister without portfolio and director of a semi-official newpaper, wrote a virulent attack against Bahia's (Maroc Soir, N°4386, on 26-27 May 1984, p. 1). He sustained that Bahai'sm is not a religion that merits respect but a heretical sect that proselytises visibly and actively in public places and mosques, its members undertake an action of destabililisation and subversion that treats the nation and the state religion.

(36) Alaoui Mohamed et al v. Public Prosecutor, Supreme Court, Criminal Chamber, file n°85/8789, decision on 17 December 1987. Unreported, p.8.

"The acts incriminated (by the Tribunal of Appeal) infringe on public order and thus constitute infractions legally provided for their sanction in the penal code. The invoked ICCPR provision (article 18) has not been violated and it is enforceable against any one who encroaches upon it. The point is the acts in question fell under the ambit of the applicable (domestic) penal sanction. In addition no one among the accused was prosecuted for having changed his religion."

Muslims converted to Christianity and generally Christian proselytising are severely controlled. Those who have manifested or tried to transmit their faith have been punished for the infraction of "using means of

seduction of a Muslim in order to loosen his (or her) faith or to convert him/her to another religion"**(37).**

Even Islamist groups who attempted to propagate their peculiar vision of Islam, which differed from the official state religion did not escape such a punishment, as it has been ruled by a court of first instance, in a stunning judgement later dismissed by a court of Appeal **(38)**. It would be an extremely dangerous setback if the denial of that form of jurisprudential interpretation (ljtihad) of Islam had been grounded in terms of "Conversion" (of a Muslim) to another religion", as set out in article 220 (2) of the Penal Code.

In the eleventh periodic report to the CERD, it is said that the "Liberty of conscience exists in Morocco. Law guarantees it at least to Islam and Judaism and Christianity". Elaborating on the significance the article 6, the report goes on as to argue that its purpose is "to assure the stability of the State and to preserve the population from subversion" etc. Several cases show, however, that even the limited guarantee afforded by article 6 remains meaningless in the absence of any respect for the rule of law.

In K.M v. Governor of the Province of Fes **(39),** the Supreme Court decided the annulment of an administrative measure of closing a bookshop selling imported Gospels for studens, on account of proselytising and threat to the public order and morals. Judge Maxime Azoulay held that "the Content of the Gospel of Jesus Christ (New Testament) is not susceptible to interfere with the public order and morals for it forms part of the Faculty of letters and Faculty of Sharia programmes".

The dismissal of the Governor's decision for abuse of power is based on the reasoning that displaying and selling legally imported (English) religious books comply with the law to the extent that these books were already submitted to censorship on foreign publications. The main object of Censorship on foreign publications is deemed to be the preservation of public order and morals.

Freedom of expression and the right to form parties and to make the government accountable for its actions.

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(37) Article 220 (2) of the Penal Code, in Code Penal, publications de la Revue Marociane d'Administration Local et de Developpment, N°5, 1997.

(38) Public Prosecutor v. Filali Mohamed Baba et al (Islamist group), Kenitra Court of Appeal, on 24 April 1990.

(39) Supreme Court, Decision N° 178, on 17 October 1985 reported in Revue Marocaine de Droit, 1986.

The freedom to assemble and to form political parties has also been infringed on a religious basis. The issue of how the conjunction of a politically oriented use of Islam with the unlimited powers of the king could be used to nullify the operation of both domestic and international positive laws securing Human Rights and fundamental freedoms has been brought to the front since the 1958.

The Moroccan Communist Party cases of 1959-1960 and 1969 illustrate the continuity and interplay between customary religious functions of the traditional Sultan and the prerogatives of the King commander of the faithful in modern constitutionalism. Soon after the adoption of the Royal Charter (1958) and the Code of Public Liberties, a governmental decree suspended the Communist party, founded in 1944, and an action was simultaneously instituted for its dissolution. The public action was grounded on the fact that the communist ideology used to threaten monarchies and is antithetic to Moroccan monarchical and religious institutions. The Tribunal of first instance of Casablanca before which the case was brought decided on 29 November 1959 that the statute of the Moroccan Communist Party complied with the newly promulgated Decree on Association Law of 15 November 1958. It dismissed thus the governmental action for the dissolution of the Communist Party. **In Public Prosecutor v. Moroccan Communist Party (9 February 1960)** the Public Prosecutor appealed against the Casablanca judgement before the Court of Appeal of Rabat, which decided the dissolution of the Moroccan Communist Party.

What is highly significant in that curious appeal judgement is that it was wholly based on a speech of the late King Mohamed V condemning materialist ideologies. In so doing the Court transgressed the positive law on 15 November 1958 and dismissed the applicability of the Universal Declaration of Human Rights, referred to by the Moroccan Communist Party defence, in the name of Islam and the protection of the public order. After characterising the Moroccan state as a “theocratic state in which the King, ‘lieutenant of the Prophet’, is both a temporal king and a spiritual chief of the Muslim community”, the court determined that any legal basis for such reasoning the court relied heavily on the king’s speech condemning and banning materialist and communist doctrines as contrary to Islam and the Moroccan State. It is worth noting that this application of the then customary supremacy of the King will become, two years later, an integral part of the first constitution in the form of the famous article 19, already mentioned.

The refusal to take into account the relevant provisions, particularly on freedom of opinion and the spirit of the Universal Declaration of Human Rights is based on the fact that the Declaration is not legally binding. It is mere “general proclamation of international scope based on

common humanitarian principles and not on a common system of political and social regime". It cannot, therefore, oblige states that approve it to apply it as a binding rule.

The story of the Moroccan Communist Party has been brought to the front again in 1969 when ex-members of the dissolved party created the PLS, the Party of Liberation and Socialism, which again was prohibited on the same bases**. (40)**

It is obvious that, as the King reigns and governs the inviolability of the monarchical institution and the person of the King (article 23) limits strongly freedoms of expression far beyond the generally admitted legal restraints and hampers any effective government accountability.

The case of arrest of five leaders of the Socialist Union of Popular Forces **(USFP)** including the party's First Secretary, the late Abderrahim Bouabid, illustrates the use of the absolute powers of the King to impair constitutional freedoms (article 9) as well as article 19 of the ICCPR. In Public Prosecutor V. Abderahim Bouabid et al (24 September 1981) **(41),** the five leaders was prosecuted for having released a declaration commenting on a public speech made by the King, through which he announced that he agreed to apply the OAU proposals on the Western Sahara question (Nairobi II, resolutions). The USFP declaration expressed reservations on the acceptance to hold a referendum to determine the Sahraoui population's wishes regarding independence or integration to Morocco, considering that it involves a serious threat to national territorial integrity. It called for a large public debate and possibly a popular referendum enabling each citizen to agree or not with that policy. In condemning the five leaders for breach to public order, the court held that their "unfounded" criticism is "susceptible to cause public disturbance and to provoke suspicion", because the King has explained the situation in his address to the Moroccan people. It further recalled that "The King is the supreme representative of the Nation and the sovereignty belongs to the Nation. He is the guarantor of the independence of the country and integrity of its territory, as provided for in article 19 of the constitution". The Court concluded : "In addition, the content of this discourse, addressed to the whole Nation, is not susceptible of any debate, as stipulated in article 28 of the constitution **(42).**

The constitutional immunity granted to the members of Parliament is dismissed for the same reasons.

Article 39(1) provides that : “No member of the Parliament can be prosecuted, pursued, arrested for detained or tried for opinions or vote expressed in the discharge of his duties, except when he expresses opinions questioning the monarchical system, the Islamic religion or lacking the respect due to the King”. (Italic added).

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(40) public Prosecutor v. Party of Liberation and socialism, Tribunal of 1st instance of Casablanca Judgement of 29 November 1969. For different analyses of the Moroccan Communist Party cases see C. Pallazoli, le Maroc Politique, de l’Independence à 1973, Paris 1974 ; Mustaha Sehimy, Chronique constitutionnelle, in RJPEM, n°12, 1982 at 218-223; Youssef Fassi-Fihri and Massaoudi Layachi, op. cit. at 62-65.

(41) Tribunal of First Instance of Rabat, Flangrante delicto procedure is a manoeuvre used in the present case in view of dismissing the parliamentary immunity granted to two arrested leaders of the USFP.

(42) Article 28 states : “The King can address the Nation and Parliament. The address pronounced before any of the two Chambers (of parliament) cannot be the object of any debate”. A ore liberal interpretation of this provision, based on the official French translation of the last sentence, which reads : “les messages sont lus devant l’une et l’autre Chambres et ne peuvent y faire l’objet d’aucun debat”, limits the prohibition to parliamentary debates” (underline added)

State of Siege and Exception :

Two constitutional clauses on public emergency allow for the restriction
or the suspension of the fundamental rights and freedoms for reasons of state of siege (article 18) and exception (article 35).

There is no explicit provision for the prohibition of infringement of non derogable Human Rights and the saving clause of article 35 does not afford the courts to enforce article 4 of the ICCPR.

Beginning in the early post independence years, the practice of **torture and the deprivation of liberty and security of persons** developed speedily on and after the first serious political turmoil of 1963 and 1965 in a system of government that definitely discredited the authority of the law itself. The practice o enforced disappearances that appeared in early 1960s developed swiftly as a systematic and massive phenomenon since 1965, the date of officially declared state of exception, and took a dramatic turn for the worse from March 1973 to, at least, the late 1980s. The sadly famous security and military centres where hundreds of persons were and probably still **“secretly”** dtained, such as Dar al-Maqri, (Rabat), Derb Moulay Cherif (Casablanca), Tazmammart (west Central Atlas Mountains), Kalaat M’gouna and Agdez (south Central Atlas Mountains), Laayoun police Barracks (Western Sahara date from that period **(43).**

There is no specific criminalisation of torture and forced disappearance and successive governments resisted through the past twenty years any serious amendment of the Penal Code and Code of penal procedures. It is true that articles 225-321 of the Penal Code makes it serious offences with aggravating circumstances for officials, to unlawfully arrest, kidnapping or imprison someone or taking hostage or

confine him or her against his or her will that entails penal liability. Police officers and other high magistrates benefit, however, from certain legal privileges that prevent them to be normally prosecuted.

Qualified principle of equality (Women)

The principle of equality of all citizens is expressly affirmed in political matters as well as in access to education, work and employment in public services.

The key constitutional provision on equality between men and women (article 8) excludes, however, equality on civil matters. It legitimates implicitly the Code of Personal Status, which is a codification of classic Islamic Law devised in the narrow malekite orthodox tradition, more than four year before the adoption of the first constitution **(44).** It is worth noting that the Modawana applies only to Muslim Morocccan women, while the personal status of the Jewsh Moroccan women

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(43) In recent striking developments (9 October 1998) the King ordered the Minister of the Interior and the Conseil Consultatif des Droits de l'Homme to address and definitely close the **"file"** of the past abuses of Human Rights. The Current minister of the interior, former police officer and subaltern of State in 1974 and has been minister since 1977, is directly responsible for all past abuses, including enforced disappearances and extra-judicial executions. The hypocritical statement on the fate and wherabouts of 112 cases of "disappeared" persons disclosed by the consultative Council on Human Rights, on 15 October 1998, has attracted a contrary public reaction. It has the merits, if any, of giving rise to an unprecedented public debate on crucial issues such as the impunity granted to military and security forces and high officials closely on crucial to the impunity granted to military and security forces and high officials closely linked to the King. The would be **"transition to democracy"** directed by prime Minister Abdarrahman Youssoufi, will increasingly be conteste if the so-called cleaning of the face of (official) Morocco has to be accomplished without, at least, a public acknowledgement and a full disclosure of the truth about past Human Rights abuses.

(44) Code de Statut Personnel et des Successions promulgated by Dahir of 20 November 1957.

is regulated by the Moroccan Hebraic code. Following longstanding pressure from Human Rights and women's groups the king, under the powers conferred to him by article 19 of the Constitution, convened a council of Islamic Ulemas and family law experts to revise the Code of Personnal Status (Moudawana). Overall the affair resulted in the adoption, in August 1992, of a partially the flagrant discriminatory treatment of women, leaving intact the substantive basis of the legal discrimination based on sex, on matters such as marriage and guardianship.

The reform was welcomed as a quasi revolution, for the traditionalist partisans of the status quo have long considered the Code of Personal Status, that remained unchanged for more than thirty years, as a sacred and untouchable code of laws, allegedly deriving from and applying the tenets of the Koran. The Moudawana consecrates the inferiority of women in all matters of the conclusion and dissolution marriage and tutorship. Women are legally denied their fundamental civil rights. Various views and interpretations within the framework of Islam, either as state religion and fundamentalist or progressive ideologies, attempt to alleviate the intolerable discrimination legally consecrated by

the Personal Status Code, without any serious progress until now. International law of Human Rights is rarely taken into account as an obligatory source of interpretation in that process.

So **the Committee on Economic, Social and Cultural Rights,** in its concluding observations on the Moroccan initial report, rightly pointed out the inconsistency of Moroccan laws on personal status and obligations under the ICESCR **(45).**

The Committee stated : "when a State has ratified the Covenant without reservation, it is obliged to comply with all the provisions of the Covenant. It may therefore not invoke any reasons or circumstances to justify the non-application of one or more articles of the Covenant, except in accordance with the provisions of the Covenant and the principle of general international law".

There was an increasing pressure and demands by Berber cultural movement and Human Rights groups to revise the constitution in order to officially recognise Berber as national language. Reacting to those demands and probably to reiterating criticism by the Human Rights Committee and the committee on Elimination of racial discrimination **(46)** about ethnic discrimination, the King took, in August 1994, the initiative of a superficial reform in favour of the Berber culture. He decided that three Berber dialects should be taught in primary schools and that state television is starting to transmit bulletins in these languages **(47).**

In its final comments on the Moroccan third periodic report, the Committee on Human Rights rightly raised the issue of non-compliance of domestic law with the Covenant on civil and political rights in the following terms :

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(45) The Committee on Economic, Social and Cultural Rights, Morocco, 30 May 1994, E/C.12/1994/5 at paragraph 9)

(46) The 1994 periodic report to HRC, op. cit., and the 11th report to the CERD.

(47) A it has been seen, although no explicit regulation prohibits the legislature to enact laws in matters relating to linguistic communities, religious minority groups and women, a tacit repartition of powers based on article 19 of the constitution give full power in such fundamental issues.

" The Committee notes that the constitution does not certain specific provisions as to the relationship between international treaties and domestic law. Accordingly, there is a need to better define the place of the covenant within the Moroccan legal system to ensure that domestic law is applied in conformity with the provision of the covenant". The Committee recommended, therefore, that Morocco "consolidates the process of constitutional revision in order to ensure that all the requirements of the covenant are reflected in the constitution in true compliance with the covenant"**(48).**

4.3. Deficiency of the judiciary : intrinsic flaws and new trends in the jurisprudence:

Ordinary judicial judges and to a certain extent, administrative judges are, in principle, the most important and efficacious guarantors of the rights and freedoms entrenched in the constitution and international instrument to wish Morocco is a party. The Moroccan justice system is, however, constitutionally and practically precluded from performing its role.

The status of the judiciary is secured by the constitution which establishes the principle of the independence of the judiciary (article 82) and empowers the High Council of the Magistrates to regulate the functioning of the judiciary (articles 86 and 87). At the same time, the constitution gives to the king the power to appoint judges by royal decree : "the magistrates are nominated by decree on the proposal of the superior Council of the Magistracy" (article 84). Article 85 of the constitution States that : "the magistrates are irremovable", but the Statue of the judiciary (article 57) enables the Minister of Justice to dismiss a judge for grave professional error and to transfer him for various administrative motives. Such decisions are often made without referring to the Superior Council and sometimes in contravention with its decision. As will be seen below in Judge Abdesslam Al-Ayad v. Minister of Justice and Prime Minister (1995) a unique and unprecedented judicial decision by the Administrative Tribunal of Rabat has recently denounced that practice.

Appointed by royal decree upon the recommendation of the Superior Council of the Magistracy, chaired by the King and effectively directed by the minister of justice as vise-president, the judges remain strongly under the control of the executive **(49).** Futhermore the widespred corruption within the judiciary is not a mere consequence of the inadequate salaries of the judges and the low level of income paid to judicial court staff. The executive branch has long used the financial situation of the courts and the moderate salaries of the magistrates as a subtle mode of regulation facilitating extra-judicial interference particularly through the ministry of interior.

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(48) Human Rights Committee, CCPR/C/79/Add.3, 2 November 1994, International Human Rights Reports, Vol.2, N°2, 1995 pp.439-442.

(49) Article 84 of the constitution specifies that "The Superior Council of the Magistracy is presided over by the King. Furthermore, it is composed of : the Minister of Justice, as vice president ; as vise president ; the first president of the supreme court ; the King's Attorney General at the Supreme Court ; the president of the first chamber of the Supreme Court ; two judges electred by magistrates of courts of appeal and four representatives of the first degree jurisdictions magistrates elected form among themselves". (Revised constitution of 1996).

National Courts and International Human Rights Treaties :

Although legal practitioners and lawyers have invoked main international Human Rights instruments in various cases, particularly

those involving political rights and civil liberties, very few national courts condescended to consider the matter and generally refrained from even mentioning it or explaining it or explaining its eventual irrelevance.

National courts resisted for a long time the primacy of Human Rights instruments and they have been too slow to admit the pre-eminence of Human Rights provisions over inconsistent ordinary laws. The legal consequences of such admittance would be to declare numerous outdating laws illegal and raise, in several issues, inconsistency of the constitution itself.

On the other hand, there is no specialised training in universal Human Rights for magistrates and legal practitioners. The first and foremost requisite is not only to promote reference to universal Human Rights provisions in the judicial processes but also to enable judges to rely on International Human Rights instruments and jurisprudence in their judgements and to enforce them.

National courts, including the Supreme Court and under its negative interpretations of fundamental rights and liberties wholly based on incoherent principles and sources of a so-called Islamic public order.

They remained extremely reluctant, if not openly hostile, to give domestic effect to international Human Rights norms, most of which they perceive, through unawareness or misapprehension, as an alienating external interference. In the rare cases in which courts were compelled to recognise the applicability of international treaties, they took refuge in the legislative failure to repeal domestic inconsistencies. Overall they used to refrain from giving full effective implementation of International Human Rights standards, particularly in cases perceived as involving a direct challenge to settled methods of governance and regulation of fundamental Rights and public liberties.

Administrative law and the protection of Human Rights :

The Supreme Court was established in 1958 **(50)** and was designated to become one the masterpiece of independent Morocco, according to one of the rare prestigious Ministers of justice of the country, and founder of that institution **(51).** Its unifying jurisprudence, he asserted, should reorient the bulk of laws developed throughout the colonial period (1913-1956) in conformity with national aspirations and needs.-

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(50) Dahir N°1-57.233 of 27 September 1957 relatif a la cour Supreme, Bulletin Officiel N° 2347 0 18 October 1957, p. 1365.

(51) Abdelkrim Benjelloun, in Preface to the the first Recueil des Arrets de la Cour Supreme, Volume preliminaire, 1961, University of Rabat, Rabat, Paris 1961, at p.7. He Wrote “Il n’est pas question d’ignorer l’utilite sur le plan juridique comme sur les autres plans des échanges internationaux, que

traduit la multiplicite des conventions et des lois unifiees ». « Le Maroc notamment se doit d'inserer les exigences de la vie economique moderne dans la prestigieuse civilisation de l'Islam ».

Thirty-five years later, assessing the "applicable law" and "the law effectively applied by national courts", Professor Azziman recently delivered a severe statement of the justice system functioning and predominant jurisprudence **(52)**. Noting the "unpredictable and unexpected re-appearance of the Islamic legal tradition in spheres dependent on the threshold of modern law" he states that what is disturbing in such a resurgence is that "it doesn't obey any prestablished rule". He further points out the direct responsibility of the Supreme Court in that regressive course. "A jurisprudential trend, strongly represented within the Supreme Court dictates, in the name of the Islamic legal tradition, strange deviations from the normally applicable laws to the point that these laws are ousted to the benefit of any particular rule derived from the Fiqh".

It is worth noting that the Supreme Court is the highest degree of the judiciary empowered to exercise the function of reviewing final judgements of lower Courts and certain specialised jurisdictions. The review operates through 'cassation' (request of annulment for interest of the defendants, articles 570-606 of the Code of Civil Procedure, and public action in the interest of the law, article 607-612), and through revision, (articles 611-621). The judicial review of constitutional chamber, has been extended and entrusted to a new constitutional institution, the Constitutional Council (the Constitutional Council was firstly provided for in the revised constitution of 1992. the revised constitution of 1996 : Title IV, articles 78 to 81. the "organic law" establishing the Council was adopted by parliament, Loi organique N°29-93 relative au Conseil Constitionnel, Bulletion Officiel N° 2444, on 2 March 1994, pp. 158-162. An amended loi organique has been devised so as to tally with the constitutional revision of 1996.

The two following cases illustrate the noticeable change undergone in the attitude and legal argumentation of Moroccan judges towards infringement of their proper rights and obligations.

- **Judge Abdelhamid Al-Ronda V. Minister of Justice** (Administrative Chamber of the Supreme Court, file n°58/1887, on 18 June 1960).

The plaintiff lodged an appeal to the Supreme Court against the decision of the ministry revoking him for disciplinary reasons without allowing him to be heard, as is provided for in cases of disciplinary sanctions. The high court ignored the arguments of the fired judge and determined that it had no competence to decide on the matter. It stated "considering that the request of annulment is directed not against the decision of a (mere) administrative authority, but against a decision taken

by the King in the form of a decree, the Supreme Court does not have the requisite jurisdiction to entertain a complaint against such a decision".**(53)**

(52) Omar Azziman, Rehabiliter la justice, Geopolitique, N°57, Paris, 1977, pp.64-70. Mr Azziman, currently Minister of Justice, is one of the founders and the first chairman of the independent and most influential Moroccan Human Rights group, OMDH, the Moroccan organisations for Human Rights (1987-1989), and a former Minister of Human Rights (1993-1995).

(53) In society propriete agricole Abdelaziz, (20March 1970), the Supreme Court clarified its emerging jurisprudence on the diffuclt question of the susceptibility of administrative decisions made by the King to judicial review requesting their annulment for excess of power. Unsurprisingly the high Court determined that "His Majesty exercises his constitutional powers in his quality of Commander of the Faithful, in conformity of article 19 of the constitution, and cannot therefore be considered as an ordinary administrative authority". All acts and decisions made by the King in administrative matters escape henceforth to judicial remedy for excess of power.

- **Judge Abdesslam Al-Ayadi v. Minister of Justice et al,** (Rabat Administrative Tribunal, Judgement n°13 on 19 January 1995).

This is the first and unique case brought, until now, by a judge against the minister of justice requesting annulment of an administrative decision for abuse of power.

The Minister of Justice decided to transfer judge Al-Ayadi, who had just been appointed by a royal decree president of the Rabat first instance tribunal, to the function of president of a Chamber in the tribunal of appeal of Rabat (Ministerial decision n°5/0079 of 5 May 1994). The applicant grounded his request on two main arguments : infringement of the constitutional provisions on independence of justice, on the one hand, and the lack of any statement of the reasons on which the discretionary decision was based on the other hand. The minister of justice responded that the decision was based on article 57 of the Statue of he Judiciary that enables the minister of justice to transfer judges and complies with the constitution.

In following the applicant's arguments, the administrative tribunal held that the minister of justice infringed upon the law insofar as, instead of implementing the royal decree promulgating the appointment of the applicant, he applied the statute of the judiciary, which is a lower law in the normative legal hierarchy. In doing so the administrative nullified the effect of the royal decree even before its effective enforcement. Relying on the settled administrative doctrine, the Tribunal held further that the discretionary power of the minister in applying article 57 was limited and exceptional and its legality in any event had to be supervised by the judiciary. The Court decided then to accept the request and to dismiss the decision of the minister of justice.

General principles of Law and Human Rights :

Following the French administrative jurisprudence, developed by the Conseil d'Etat, the Administrative Chamber of the Supreme Court

developed a range of general principles of law through the interpretation of legislation and the basic principles entrenched in the constitution.

According to one of its previous presidents, the late Judge Maxime Azoulay, “those principles exist even without (written) texts for they originate in the Human reason and equity. They owe their legal force to the normative power of the jurisprudence that reveals them because their source is purely jurisprudential”**(54)**. It is admitted, however, that they enjoy a minor status with regard to legislative provisions.

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(54) Maxime Azoulay, Rôle de la cour Suprême dans la protection des Libertés, Basri, Rousset, Vedel (eds). Le Maroc et les Droits de l’Homme, positions, réalisations et perspectives, Paris, 1994, at 310.

Most of the main general principles Moroccan administrative judges have ascertained during the past forty years developed along with the increasing trend of the executive branch and its agencies to encroach upon individual rights and liberties. Amongst those principles it is worth highlighting the importance given to the principle of the right of defence, the principle of non-retroactivity, the principle of the authority of res judicata and the principle of legality. The former principle being an aspect of primary importance for the latter to be effectively implemented. In fact, the legality principle generally has remained meaningless insofar as it rests as a whole on the goodwill of the State, and government bodies and public agencies have persistently declined to enforce judicial decisions.

Other very important general principles of law were not clearly and sufficiently asserted access to justice presumption of innocence, equality of arms and celerity of proceedings.

4.4. Selected cases on freedom of opinion, right to nationality and freedom of movement ;

♦ **Public Prosecutor V. Abdallah Al-Mousta’ine,** tribunal of First Instance of El-Jadida/Mazagan, Summary Jurisdiction N° 88/75, file n°88/263, on 14 January 1988. **A Child who dreamed that the King would decease was condemned for offence to the King.**

The Court, which ignored the justifications of the child, held : “the fact that the accused **‘wished’** that his Majesty the King, who’s almighty God wants us to obey and respect, is sufficient to establish the existence of the elements of the crime”. He was sentenced to 3 years imprisonment for insult to the person of the king. A.A, a Grammar school

pupil aged 17 years, was having an English course by his teacher asked students to express their feelings and memories. A.A mentioned among other remembrances that the teacher reported the matter to his superior, the Ministry of Education's regional deputy who informed the police. Although A.A denied the police assertion that the king would die this year, the Court decided that he denied only in order escaping the punishment provided by article 179 of the Penal code. It found him guilty of insulting behaviour towards the monarch.

- **Abraham Serfaty V. Minister of Interior and General Director of the National Security. (September 1991-July 1998)**

This is probably one of the most recent controversial decisions made by the
Supreme Court after illegal delays. The ambiguous and inconsistent ruling shows clearly that the honourable high Court applied a similar technique used by the executive, wrapped in a lamentable judicial camouflage of the true political considerations. The administrative deprivation of nationality was used for the first time as a method of repression, implicitly and illegally accepted by the high Court, in furtherance of various other methods of pressure and revenge. In such a context, a slow and delayed justice amounts to blatant denial and vengeance.

The question before the court was whether the decision of the Minister of the Interior was performed in full respect of the principle of legality. The review is therefore procedural in nature, but it involves violation of several fundamental rights.

Facts and Law : After 17 years of imprisonment for political reasons, Serfaty was **"extracted"** from prison on 13 September 1991, allegedly in virtue of an amnesty. He was taken to Rabat airport and put on an aircraft bound for France, in virtue of an unwritten administrative decision. In the course of the journey between the prison and the airport, an undercover security agent informed him that he had been stripped of his Moroccan Nationality and banned to France. A very known Moroccan Jew, Serfaty was born in Casablanca in 1928, he is of a Moroccan Jewish descent settled in Morocco subsequent to 15th century mass exodus of Muslims and Jews from Spain. As member of the Moroccan Communist Party youth, the engaged in social and nationalist activities against the French colonial rule. He served as a high civil servant in the Ministry of Economy of the first nationalist and democratic government. An engineer and professor at the University of Rabat until his first arrest in January 1972, he was engaged in the 1970s leftist movement. He was

again arrested in November 1974 and spent 17 years in prison until the Ministry of the interior, which has controlled security affairs since at least 1974, realised that Serfaty was of Brazillian nationality and that he had acquired Moroccan nationality by fraud !.

On 12 November 1991 a request for judicial review (recours en annulation pour exces de pouvoir), has been brought by Maitre Abderrahim Berrada, from Casablanca Bar, who has been the Serfaty's council since 1972, against the administrative decision of the Minister of the Interior. The request was notified to the Ministry on December 1991, which was bound to submit his comments otherwise the Court would proceed to a single summons before the ordinance of removal (article 336 of the Civil Code of Procedures). The Court notified 3 other extra legal summons in 1994, 1995 and 1997. the two answers of the Ministry, although inadmissible for undue delay, were generously accepted by the Supreme Court, contrary to article 355 of the Code. In Violation of the rules of procedure and the general principles of law (celerity of proceedings and equality of arms) the defendant was considered as a privileged party.

The **Supreme Court** decided that it was incompetent to rule on the matter. It held that "Absent any official documents emanating from competent administrative of judicial authorities, the expulsion remains, at the present, legally justified"! **(55)**

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(55) For a critical anlaysis of the resoning of the Supreme Court, Moroccan organisation for Human Rights : Unfair trial at the level of the Supreme Court, (to be published on November 1998).

Although the **Right to nationality** is not protected by universal Human Rights treaty law, the political and administrative decision in the Serfaty case is a flagrant violation of a customary Human Rights not to be arbitrarily deprived of one's nationality. In addition, deprivation of Moroccan nationality cannot be decided other than by judicial authority.

The Code of Moroccan Nationality provides that deprivation could only take place after full legal proceedings in which the national is offered all the usual safequards. Deprivation of nationality may be acceptable only if it is proved, before a court, that fraud or deceit has secured its acquisition and the burden of proof lies primary with the Minister of the interior who alleged that Serfaty usurped Moroccan nationality.

In addition, it is admitted as a principle of International Law that deprivation of nationality is permissible provided that such deprivation would not result in statelessness. **(56)**

♦ **The Right to liberty of circulation**

Three constitutive aspects of freedom of movement are infringed upon :

- The freedom to move within the territory of the state and to choose a residence is (house arrest for political reasons, police control of non-residents in some cities on account of combating criminality and rural exodus).
- The freedom to leave and to enter the country is denied to ex political prisoners and exiled persons.
- Freedom from expulsion and exile.

A few cases involving the widespread violation of freedom of movement have reached the Supreme Court. There is a huge number of persons deprived of passports or prevented from leaving or entering the country despite holding a passport. Often the police confiscate the passports.

Case 1 : Mohamed Echemlal V. Governor of Tangier ;

Supreme Court, Administrative Chamber, Decision N° 127, on 11 July 1985.

Case 2 : Abdallah Zaazaa V. Minister of Interior ;

Supreme Court, Adminitrative Chamber, Fille 10058/90 on 16 July 1992

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(56) Gunnar g. Schram, Article 15. in Eide et. Al.(eds.) The Universal Declaration of Human Rights, at 229-241; Rainer Hofmann, Denatioanlization and Forced Exile, Encyclopedia of Public International Law, Volume One, 1992 at 1001-1007.;J M.M.. Chan, The Right to a Nationality as Human Rights. The current trend towards Recognition. Human Rights Law Journal, vol. 12, N° 1-2, 1991 : 1-14. The Inter-American Commission on Human Rights, Situation of Human Rights in Chile , Third Report, OAS/ser.L/V/II, 40, Doc 10 of February 11, 1977 :33-34 ; and Re Amendments to the naturalization provisions of the constitution of Costa Rica, advisory Opinion of 19 January 1984, OC 4/84, reported in 5 HRLJ 161.

The two citizens applied for a passport to travel abroad. The Supreme Court found that the 1916 law regulating the issue of passports had been infringed and consequently the refusal of a passport, by a Governor acting in his discretion, was a violation of article 9 of the constitution which guarantees the freedom of movement.

The article speaks of “freedom of movement and to settle in any part of the Kingdom”. A restrictive construction of the language of this provision has long reduced the concept of movement to one of its

ordinary meaning in Arabic (Tajawul : walk, travel) on the grounds that the whole disposition guarantees only the right to move and to abode within the borders of the national territory. The Supreme Court held, however, in case 1, that “the liberty of circulation throughout the world is a natural right of the human person”. It further ruled, with regard to the regulation governing the issue of a passport, that “there is no text of law restricting the deliverance of a passport”. It stated that only the legislature could restrict the right to hold a passport, which is provided for in article 1 of the Order of 30 June 1916 **(57).**

Case 3 : Wahbi Mohamed V. Minister of Interior ; Administrative tribunal of Rabat, Judgement n°99, file G.99/163, on 13 April 1995.

As already seen injudge Abdessalam A-Ayadi V. Minister of Justice and all this is one of the most recent decisions that are indicative of a new offensive mood developed by a new generation of national judges within the newly established administrative tribunals. The court, which annulled the ministerial administrative decision not to renew a passport without any explanations, decided for the first time that a request for immediate annulment of such as blatant decided for the first time that a request for immediate annulment of such a blatant decision is admissible at any time and need no delay to challenge it before a Court.

Case 4 : Administrative House Arrest : the case of abdesslam Yassine ;

A leader of an Islamist non-recognised group has been held under house arrest since 1989 following an administrative decision of the minister of the interior. An appeal was submitted in [early] 1992 to the Supreme Court, for abuse of power. The High Court has failed after ten years to rule on the case. Justice is again delayed and denied for abvious political reasons : Abdesslam Yassine was detained in the early 1970s for having written an open letter that was very critical to the King as Commander of the Faithful.

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(57) for a traditional restrictive view, Amine Benabdallah, la deliverance du Passeport en droit marocain , note sousCSA, 11 July 1985, Mohamed Echemlal, Revue juridique, Politique et Economique du Maroc, N°20, 1988 at 29.

4.5. Summary of selected judicial and administrative decisions (Case Law) :

Supreme Court

- **Abraham Serfaty V. Minister of interior and General Director of National Security.** Supreme Court, Administrative Chamber, file N° 91/15/10211, Judgement N° 735, on 16 July 1998. Unpublished, in Arabic pp. 1-4. **Dismissed**. (in file).

- **Judicial agent of the Kingdom v. Loukili Al-Moukhtar.** Supreme Court,

Civil file N°2823/93 on 18 May 1994, published by the Rabat Bar review, Al Ishaa N°7, June 1995 pp.140-143 (Arabic). Torture, state responsibility and reparation for economic and corporal prejudice.

- **Mohamed Echemlal v. Governor of Tangier**. Supreme Court, Administrative Chamber, file N°127 on 11 July 1985, Revue de Droit Marocain N°4, September 1986, pp. 214-215. **Excess of power : Refusal to deliver or renew a passport, illegality.**

- **Abdellah Zaazaa v. Minister of interior.** Supreme Court, Administrative

Chamber, file N° 10058/90 on 16 July 1992. Al Ishaa N° 9, July 1993, pp. 148-149. **Annulment of an administrative decision of the Governor of Casablanca preventing the appellant to obtain a passport, Excess of power, no observance of article 9 of the constitution, illegality.**

- Supreme Court, Administrative Chamber, file N°31205/76, judgement N° 249 on 01 October 1976. **A judicial bilateral treaty prevails over inconsistent domestic law.** Supreme Court Series, Administrative material, 1962-1997, pp.103-105.

- **Alaoui Mohamed v. Public Prosecutor.** Supreme Court, Criminal Chamber, file N°85/8789 judgement N°8734 on 17 December 1987. **Bahai case. Article 18 of the ICCDPR is in force and applies against any infringements of its provisions but the pending case concerns proselytising, which is prohibited by the Penal Code (article 220).**

Courts of Appeal

- **Public Prosecutor v.Al Hadi Redouane et al.**

Invalidity of police report: non-observance of fundamental procedures. Role of the judge in protecting security of persons deprived of their liberty. Value of deliberate confessions. Court of Appeal of Rabat, file N° 542-551/89, criminal decision on 15 January 1992. Al Ishaa N°7, June 1992, pp. 125-132.

- **Public Prosecutor v. Majid Hussein.**

Arbitrary detention. Non observance of legal "garde à vue" proceedings. (Rabat Court of Appeal, "Correctionnel" file, N° 5019/93, decision on 03/08/1993. Review Al Ishaa, N) 10 January 1994, pp. 176-178.

- **Public Prosecutor v. Filali Baba Mohamed et al (Islamist group). Freedom to assemble, illegal association (1958 Law of Association). Proselytising (article 220 of the Penal Code).** Kenitra Court of Appeal, Correctionnel file 1981/90, N°1892, on 24/04/1990, (5 pages). In Arabic, unpublished.

Tribunals of First Instance

Freedom of expression, inviolability of the person and speeches of the King - **Public Prosecutor v. Abderrahim Bouabid et al.** (General Secretary and members of the Political Bureau of an opposing party, the Union Socialist of Forces popular). Freedom of expression and royal powers : **A party's declaration commenting on a royal decision to accept the UN/AUO resolutions on self-determination in the Western Sahara Territory. The King's addresses cannot be the object of any debate.** Tribunal of First Instance of Rabat, Correctional Chamber, files 1981/4322, 4323, 4324 ; N° 11013. Unpublished.

- **Al-Moustaâine Ablelali v. Public Prosecutor.**

Tribunal of First Instance of El-Jadida/Mazagan, Summary Jurisdiction, Flagrante delicto, N° 88/75 file 88/263, judgement on 14 January 1988. In Arabic, unpublished. **Dreaming (or wishing) that the King would die is an offence against the person of the King.**

- **Public Prosecutor v. Mohamed Lebrini and A. El –Himer** (Editor and a journalist of Al-Ittihad al-Ishtiraki newspaper). Contempt of Court. **Defamation against Councils of magistrates and tribunals of Casablanca.** Casablanca Tribunal of First Instance, case n° Na 543 M/90 (Ain-Sebaa Hay-Mohammadi), on 07/12/1990.

Article 11 of the ICCPR :

- **Alla Abdallah v. Bellat Ahmed. Imprisonment for debt. Conflict between 11 of the ICCPR and an earlier domestic law providing for prison debt (Dahir of 20 February 1961 on the contrainte par corps). Refusal to implement article 11 of the ICCPR.** Tribunal of First Instance of Rabat, provisional order n° 15, 1987, pp. 308-310.

- **A v. B. Conflict between article 11 of the ICCPR and the correspondent domestic provision on "contrainte par corps" (The 1961 dahir). Article 11 prevails over the conflicting domestic law.** Tribunal of first Instance of Rabat, civil file n°8/108/1990 on 23 April 1990. al Ishaa n°4, December 1993.

Administrative Tribunals

- **Judge Al-Ayadi Ben Abdesslam v. Minister of Justice, the Prime Minister and the Judicial Agent of the Kingdom.** Administrative Tribunal of Rabat, judgement n°13, file 127/949, on 19 January 1995. In Jalal Tahir, Casablanca, 1996 at 63-69.

- **Wahbi Mohamed v. Minister of the Interior.** Administrative Tribunal of Rabat, Decision n°99, on 13 April 1995, file G.94/163, in Al-Mouhamat, N°39, May 1996, pp. 138-140.

"An avoidable decision is one vitiated by a flagrant or extremely gross default, such as to infringing on the dispositions of the constitution. A request for annulment of such a decision is admissible at any time and need not delay filing a complaint."

"A decision impeding the renewal of a passport, without justifying the reasons, is contrary to article 9 of the constitution and constitution and constitutes therefore a excess in the exercise of the authority".

CONCLUDING REMARKS

Moroccan judges are in general, ill-equipped and largely unqualified to assume the role of domestic protector of international Human Rights guarantees. This role is constitutionally undermined by the powers given to the King in virtue of article 19, and by the pervasive interference of the executive. It is also impaired by the inherent ignorance, by most judges, of the proper purposes and objects of International Law and evolving jurisprudence of Human Rights on the other hand.

The reluctance and shortcomings of the judiciary may be explained in terms of the wholly inadequate political organisation and repartition of powers. The predominance of a conservative legal culture, the failure of the legislature to repeal outdating or incompatible laws and the interference of the executive are equally self-evident features in societies fully or partially deprived of democratic basis. The inability of the judiciary to break loose from the pervasive control of the executive as well as the traditional and poor legal culture of the magistrate in matter of International Law of Human Rights and related comparative jurisprudence constitute together an intricate cluster of restraints and limitations. This situation hampers the process for the rule of law and the

establishment of an unimpeded access to justice. This also explains the resulting indigent quality of the justice system and the marginal role played by the judiciary in the nascent movement for Human Right.

The national courts failed, until now, to contribute to the recent development of International Human Rights Culture. The predominant legal culture among them with a selective approach to the French jurisprudence. The absence of an express and comprehensive reference to universal Human Rights norms is one of the salient features of that impoverished culture.

New attempts are currently made by the recently constituted Government to submit to parliament a range of draft amendments relating particularly to the penal code, the code of criminal procedure, the law on prison and on extradition of aliens. The draft proposals prepared by the Consultative Council of Human Rights and the Ministry of justice strive to bringing them into line with International Human Rights instruments and possibly to introduce a clause on the pre-eminence treaty law in case of conflict with relevant domestic law.

A revived trend of modern young judges seem to take more seriously their inherent obligations to protect the rights and freedoms of individuals and groups and it is hoped that they will be helped to persevere in that, in full cognisance of International Law and jurisprudence of Human Rights.

In hostile political and cultural context, as it is deeply the case in Morocco, the following view of Oscar Schachter is definitely pertinent :

“The duty ‘to give effect’ to recognised Human Rights must be seen as embracing more than specific legal remedies after violation. If the obligation is taken seriously, it will require the government and their peoples to examine on a deeper level than yet been done, the may diverse barriers to the enjoyment of basic rights by all (O. Schachter, op. cit. at P.319-320)

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