

# The Impact of Religion on the Constitutional Policy in Morocco

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## ABSTRACT

Taking a middle ground between states that have opted for religious neutrality and others that adopted Islamic law or Shariah as their main source of legislation, Morocco has chosen a third constitutional path that aims to alleviate tensions with regards to the religious character of the state, yet at the same time reveals that the carefully-worded provisions that promote religion in the Moroccan constitution are not simply an expression of identity, but rather a state policy largely backed by institutional resources. this paper presents arguments that shed light on the politics of constitutional processes, offering analysis at the intersection of constitutionality, politics and religion. It also takes interest in examining the complex relations between religion and the state in the existing Moroccan constitutional arrangements, taking into account the particular historical, cultural, political and legal contexts of Morocco.

Keywords: *Constitutional Process, Religion, Monarchy, Morocco*

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## INTRODUCTION

Nearly all constitutions in the world today include a reference to religion. Out of 194 constitutions currently in force, 186 mention the term “religion”, while 114 constitutions, hence 58.7%, mention the terms “Allah/God”, “divine,” or other gods.<sup>1</sup> However, the challenge lies in developing constitutional innovations to deconstruct the relationship between the state and religion, which remains a source of many contradictions or tensions.

Regionally, the provisions that determine the Islamic character of a state appear in an obvious and discrepant way in the constitutions of most Arab and Islamic states. Their implementation often entails thorny issues in practice. These provisions often result from complicated constitutional trade-offs between political actors. Many ultimately form an unstable middle ground between blocs calling for establishing a constitutional system that is fully founded on the principles of Islam and forces that seek to maintain a secular character of the governing institutions and accept only moderate or limited commitments to Islam in the constitution and legal system.

Taking a middle ground between states that have opted for religious neutrality and others that adopted Islamic law or Shariah as their main source of legislation, Morocco has chosen a third constitutional path that aims to alleviate tensions with regards to the religious character of the state, yet at the same time reveals that the carefully-worded provisions that promote religion in the Moroccan constitution are not simply an expression of identity, but rather a state policy largely backed by institutional resources.

One of the decisive elements in the shaping of a constitution is its formative process. The monarchy, was careful to maintain its monopoly of power over the constitutional writing process and to ensure that the constitutional text closely reflected the political reality marked by its supremacy. Subsequently, the monarchy adopted what may be termed “a repetitive constitutional strategy<sup>2</sup>,” whereby each promise of a new constitution not only invoked the bold will to implement reform, but also appealed to the basic instincts of politics. Ultimately, the constitutional process became subordinate to a broader monarchical policy.

The constitution-making process, just like any other political process, is shaped by balances of power and reflects conflict over power. Consequently, the development of the Moroccan Constitution is linked

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<sup>1</sup> Asli Ü. Bali & Hanna Lerner, *Constitutional Writing, Religion and Democracy*, 1st Published, (Cambridge: Cambridge University Press, 2017), p. 6.

<sup>2</sup> Since its independence, Morocco has had six constitutions: in 1962, 1970, 1972, 1992, 1996 and 2011.

to ongoing political developments in which Islam seems to be relegated to a rather symbolic role, with a lesser role for Islamic law in public life and a ruling monarchy has been recreated and revived.

In this context, this paper shifts the focus from the legal text to the political context of the constitution and presents arguments that shed light on the politics of constitutional processes, offering analysis at the intersection of constitutionality, politics and religion. The paper also takes interest in examining the complex relations between religion and the state in the existing Moroccan constitutional arrangements, taking into account the particular historical, cultural, political and legal contexts of Morocco.

The paper tests existing hypotheses and creates new ones. It proposes an additional perspective of the theory of duality of the Moroccan constitutional structure. In addition to existing literature – which discusses the implicit constitution, as opposed to the explicit constitution,<sup>3</sup> and the top level of the constitution as opposed to the bottom level<sup>4</sup>– the paper seeks to distinguish between the political constitution and the legal constitution as two different domains through which the monarchy may activate the power of religion, which it controls.

The paper focuses on several key issues, namely: What is the place of religion in the Moroccan constitution? How does the constitution express the relationship between religion and the state? Is the state's interference, through its institutionalized system of “religious preferences,” intended to protect religion, or exploit it to serve political ends? How are the state and religion entangled? Does the constitution explain the relationship between religion and the state, or is that beyond its scope? Which one exploits the other - religion or the state? Are there legal effects to the constitutional stipulation of Morocco's Islamic character? Or is the constitution's reference to religion only a protective reference? Does silence on the issue of Islamic Shariah reflect a fear of religion or an embodiment of the civil foundations of the state? Is attributing the religious power to the monarchy purely a regulatory competence or a matter of political control over religion? Does that entail any risks of theocratization? What are the political effects of constitutionalizing religion?

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<sup>3</sup> See Michel Guibal, *La suprématie constitutionnelle au Maroc*, *Revue Juridique et Politique Indépendance et Coopération*, Number 3, ( July-Septembre 1978) ; Abdellatif Agnouch, *Contribution à l'étude des stratégies de légitimation du pouvoir autour de l'institution califienne, le Maroc des Idrissides à nos jours*, National thesis in Law, (Casablanca: Faculty of Law,1985) ; Mohamed Moatasem, *The Moroccan Constitutional Political System*, (Casablanca: Isis Publishing, 1992).

<sup>4</sup> See Rkia El Mosaddaq, *Jeu de Consensus et Développements Constitutionnel et Electoral au Maroc*, (Casablanca: Socheppress, 1995).

Systematically, in a constitutional discussions of religion and the state, one cannot assume that constitutional drafting is “above politics”. This paper adopts a sociopolitical approach that examines the processes of developing and implementing a constitution and that presents the constitutional process as a supreme policy set by the monarchy and accentuating its political concerns and capacities. The analysis will focus on the drafting process and its relationship with the outcomes, while discussing the constitutional provisions and their interpretations.

## PATTERN OF MOROCCAN CONSTITUTIONALITY: CONSTITUTION OF THE RULER AND HYBRID CONSTITUTIONAL SYSTEM

In Morocco’s pre-colonial era, Islam was the sole basis for the rule of the sultan. Following independence, and the establishment of the Moroccan Kingdom, “Morocco witnessed a remarkable symbiotic relationship between two different systems of power”<sup>5</sup>: the traditional authority of the sultan as the religious leader of the state, and the king as the head of the modern state in Morocco. The former is a function of historical development imbued with a symbolic legitimacy rooted in Islam, while the latter is a by-product of the French colonial legacy in Morocco. <sup>6</sup>

While it was not imperative that the Moroccan monarchy would remain a key political institution in the post-colonial era in the country, its conscious labeling as a symbol of authentic political identity by the elite of the Moroccan Nationalist Movement in the 1940s and 1950s gave it space to recreate itself<sup>7</sup> through constitutional mechanisms that were instilled through a centralized process.

While an agreement between the Moroccan Nationalist Movement and late King Mohammed V on the constitution-making process was delayed – and the delay continued to the time of his successor – “this lost time constituted an opportunity for King Hassan II to tip the balance of power in his favor, as he became the actual and sole holder of the authority to establish the constitution.”<sup>8</sup> This was especially true after the post-independence setting of the precedent and principle of royal appointment, whereby

<sup>5</sup> Mohamed Daadaoui, *Moroccan Monarchy and the Islamist Challenge Maintaining Makhzen Power*, 1<sup>st</sup> Published, (New York: Palgrave Macmillan, 2011), p. 41.

<sup>6</sup> Ibid, p. 47.

<sup>7</sup> David Mednicoff, "The Comparative Endurance and Legacy of Morocco’s Royal Nation", in: Milinda Banerjee, Charlotte Backerra, & Cathleen Sarti, (eds), *Transnational Histories of the ‘Royal Nation*, (Switzerland: Palgrave Macmillan, 2017), p. 110.

<sup>8</sup> دراسات، المركز اربي للأبحاث ودراسة السياسات، محمد باسك منار، "دستور سنة 2011 في المغرب: أيّ سياق؟ لأيّ مضمون؟"، سلسلة دراسات، المركز اربي للأبحاث ودراسة السياسات، محمد باسك منار، (يناير 2014)، ص 5.

the King's father appointed the first government and the Interim National Consultative Assembly, which formed the core of the first Moroccan parliament. Thus, King Hassan II appointed a committee of French legal experts to draft a constitution under his personal tutelage.

As the concept of a constitution was in itself external to the Islamic and Arab culture and was imported from Europe, following a stage of Islamization of the constitution, the first constitution of independent Morocco was influenced by the French Constitution of 1958. King Hassan II “directed the traditional monarchy towards a path of parliamentary institution building, and the 1962 constitution established a bicameral parliament”<sup>9</sup> and a parallel government. That is, King Hassan II worked to concentrate powers in his hands by investing in the national and religious authorities and adapting his rule to “a constitutional structure that is able to accommodate, through its centralized and semi-presidential nature, a strong king, similar to the French president, who rules alongside a weaker prime minister. King Hassan II and his advisors added to a recognized European constitutional structure an Islamic national structure that merged western legal political forms with reinvented national-religious norms.”<sup>10</sup>

King Hassan II decided that the model of a “rational parliamentary government”, which General Charles De Gaulle imposed in France, after decades of short-term governments and the National Assembly system, was suitable for the country, especially given Moroccan elites' lack of parliamentary experience. Consequently, the powers of the head of state were expanded, especially those relating to his right to dissolve the parliament to promote “checks and balances,” as were his prerogatives to take decisions in exceptional circumstances.<sup>11</sup>

And while the Moroccan constitution incorporates western governance structures, it retains traditional principles of the exercise of authority, mainly the principle of Shura [consultations]. King Hassan II understood Shura to denote non-binding advice, notwithstanding that democracy is synonymous to the rule of the binding majority. “The king compared the role of parliament to that of the Shura Council, which is a negotiation platform offering consultation and suggestions.”<sup>12</sup> This meant that, in line with

<sup>9</sup> مورييس دوفرجيه، المؤسسات السياسية والقانون الدستوري الأنظمة السياسية الكبرى، ترجمة جورج سعد، الطبعة الثانية، (بيروت: المؤسسة الجامعية للدراسات والنشر والتوزيع، 2014)، ص 338.

<sup>10</sup> Milinda Banerjee, p. 114.

<sup>11</sup> Thierry Le Roy, "Constitutionalism in the Maghreb between French Heritage and Islamic Concepts", in: Rainer Grote & Tilmann J. Röder, (eds), *Constitutionalism in Islamic Countries Between Upheaval and Continuity*, (New York: Oxford University Press, 2012), p. 117-118.

<sup>12</sup> Anouar Boukhars, *Politics in Morocco Executive Monarchy and Enlightened Authoritarianism*, 1<sup>st</sup> Published, (New York: Routledge, 2011), p. 44.

Islamic traditions, the parliament and elected local councils were only advisory branches of the monarchy.

Another Islamic principle that the Moroccan constitution sought to institutionalize was concept of “delegation.” The judicial exercise of power is a constitutional reformulation of the traditional practice of delegation, whereby the divinely appointed caliph instills justice, and “the practice of delegation is a key Islamic law mechanism that allows for a transition from a religious system to a political mandate system.”<sup>13</sup> Here, the powers that the king practiced under previous constitutions are delegated. That is, they are simply delegated rather than forfeited or permanently relinquished powers. The recipient of the delegated power, as per the delegation theory, therefore exercises these powers within the boundaries previously set by the delegating authority.<sup>14</sup> Alongside this horizontal and gradual delegation of powers, the King exercises another form of vertical delegation within the constitutional framework, through royal decrees (*dabirs*) that are signed in conjunction with the Prime Minister. These *dabirs*, which represent a constitutional exercise of monarchical power, are in themselves derivative of the King’s divine authority. A *dahir* always begins with a religious opening greeting, an although it takes form of a law, it is practically treated as a sacred text and is immunized from all administrative or judicial challenges. Moreover, a *dahir* is considered sources for all legislation and laws, as it establishes the spirit of these legislation and the mandate to implement them.

The Moroccan constitutional system reserves to the monarchy the sole power of arbitration, which is a religious function in Islamic jurisprudence [fiqh] under the principle that “the ruler’s judgment settles dispute.” Arbitration is also a temporal function according to which the king is an arbitrator among constitutional institutions. Even though the pre-2011 constitutions did not directly provide for this function, it could be deduced in previous constitutions from two principles that characterized the Moroccan constitutional order. The principle of unity of power—typical of Islamic political tradition and thought and the principle of the separation of powers—which has its roots in Western liberal thought. The first affirms the unity of the political power and defines the channels through which it will spread; the second, more restricted, present especially at the level of constitutional sub-system, allows for a separation of the bodies and a collaboration among the political functions, but only [...] within

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<sup>13</sup> Mohamed Daadaoui, p. 63.

<sup>14</sup> أمحمد مالكي، "قراءة في الهندسة العامة للدستور المغربي الجديد (2011)", تبين، العدد 4 (ربيع 2013)، ص 91.

significant limits<sup>15</sup> This means that the first principle complies with the monistic monarchy rule, while the second principle applies to the pluralism of other institutions. This also means that separation of powers cannot be achieved at the royal institution level but only at the level of the lower institutions as expressed by King Hassan II. With that, the king's supremacy over these institutions ultimately allows him to be the arbitrator between them and to rule them.

The normalization of political parties with the constitution of 1962 meant that these parties had to settle for the demand of constitutional reform, sometimes explicitly and other times implicitly or discreetly. Still, "the royal institution consistently sought to monopolize the constitutional initiative and it considered everything related to the constitution a private [royal] matter."<sup>16</sup> Despite the relatively fast pace of constitutional change, which was imposed by the monarchy's quest to break political deadlocks by introducing new constitutions, the transition from a repealed constitution to an alternative one has never infringed on the constitutional identity underlined in the permanent constitution, which is an identity that merges French constitutional heritage with Moroccan national values and history of the Moroccan nation.

That is, within the basic constitutional structure and established provisions in the Moroccan constitution, certain clauses are considered eternal, namely those relating to the monarchial system and to Islam. And while the constitution does not outline detailed provisions related to religion, as it does with the monarchial system, it takes an approach of sanctifying these basic elements of the country's constitutional culture by declaring them unamendable...and seeks to protect these basic values that are derived from the country's national history and contexts of constitution making."<sup>17</sup>

The unamendability of certain constitutional clauses entrenches parts of the constitution whereby there is no longer a legal option to introduce any change. Prohibiting such amendment consequently reduces the "cost" of future options, as it limits the options of redrafting a full constitution. From a patriarchal perspective, including these guarantees and enshrining them as pre-commitments limit the future ability to enact innovations or design values that may contradict these long-established ones, even if they are of the same hierarchal level.

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<sup>15</sup> Francesco Biagi, "The Separation and Distribution of Powers Under the New Moroccan Constitution", in: Rainer Grote & Tilmann J. Röder, (eds), *Constitutionalism, Human Rights, And Islam After Arab Spring*, (New York: Oxford University Press, 2016), p. 505.

<sup>16</sup> محمد باسك منار، ص 7.

<sup>17</sup> Valentina Rita Scotti, "Unamendable Constitutional Provisions and the European Common Constitutional Heritage: A Comparison Among Three Waves of Constitutionalism", in: Richard Albert and Bertil Emrah Oder, (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies*, (Switzerland: Springer, 2018), p. 386.

The transfer of unamendable provisions from one constitution to another entrenches them as part of country's constitutional heritage. Meanwhile, it also restricts the exercise of democracy, relegating it into mere necrocracy, or what Thomas Jefferson called "the rule of the dead over the living," especially at the level of the ineffectiveness and perpetuation of authoritarianism.

King Mohammed VI adopted similar constitutional arrangements to those of King Hassan II, who carefully crafted constitutional provisions to perpetuate his rule and entrench his powers and render them indisputable, as a time when he struggled in the face of a strong opposition that complicated his quest for authoritarian rule. Although his powers seemed secure, and although he generally refrained from abusing his authority as his father did, King Mohammed VI nonetheless refused to relinquish his powers. In this spirit, he framed his drafting of a new constitutional initiative as a sign of political change and interest in people's concerns, but without any official acknowledgment that these reforms were in reaction to anger in the streets that was inspired by the February 20 Movement. Consequently, the top to bottom approach to constitutional change focused on warding off the opposition rather than democratization.

It is noteworthy that the first constitution during his rule, "unlike past constitutions, was the outcome of deliberations with Moroccan advisors, but it retained its past focus on linking the contemporary power to the semi-sacred traditional situation of the monarchy."<sup>18</sup> King Mohammed VI appointed nineteen constitutional experts, most of whom were advisors or became advisors after the constitutional process, to draft a constitution that bolsters his rule without any significant democratic changes to the kingdom's political institutions.<sup>19</sup> It also appears that he had an intuitive hunch (...) that constitutional processes are most beneficial for democracy if the path was open to everyone early on.<sup>20</sup>

King Mohammed VI did not specifically respond to the demand of the elected constituent assembly. He appointed instead a consultative committee to review the constitution<sup>21</sup>, thus delaying the redemption of the "original sin" of imposing a constitution from the top at the early stages of the first constitutional drafting process during his father's rule. Perhaps this was triggered by his fear that a participatory constitutional process might turn into a democracy that undermines his hegemony. Moreover, this constitution-making process might have been viewed as democratic enough but the participation was

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<sup>18</sup> David Mednicoff, p. 121.

<sup>19</sup> Todd A. Eisenstadt, A. Carl Levan, & Tofigh Maboudi, (eds), *Constituents before Assembly Participation, Deliberation, and Representation in the Crafting of New Constitutions*, 1<sup>st</sup> Published, (New York: Cambridge University Press, 2017), p.1.

<sup>20</sup> Ibid, p. 54.

<sup>21</sup> أسندت رئاسة اللجنة إلى الفقيه والخبير الدستوري الأستاذ عبد اللطيف المنوني.

not effective throughout all its stages, whether at the level of meetings, discussions, or ratification. This participation can broadly be characterized as elitist – imposed from top to bottom – and the constitutional drafting happened behind closed doors and resulted in a document that Moroccans could only accept or refuse [but not amend]. Constitutional change, therefore, was in no way synonymous with democratization.

Drafting the constitution was not the only task entrusted to the commission of Abdelatif Menouni (head of the Consultative Commission for Constitutional Reforms - CCRC). In fact, one of its key objectives, within the framework of its performance of its primary function, was to introduce legitimacy to the new constitution drafting process by inviting and encouraging as many constitutional proposals by political, trade, and civil bodies...<sup>22</sup> The King also created a political follow-up mechanism [*mécanisme de suivi*], comprising secretaries of political parties and union central committees participating in parliament, tasked with follow-up and consultations on drafting the constitution. This mechanism was also aimed at enhancing the appearance of constitutional participation. In reality, however, it had no real influence over the constitutional process, and its coordinator was none other than the King's own advisor, Mohammed Moatassim.<sup>23</sup>

This inadequacy of the constitutional partnership revealed the limited extent of the participatory approach that was introduced as a means of legitimizing the work of the constitutional committee and soliciting political endorsement, both from the follow up mechanism as well as from abroad. “The decision-makers often discussed adopting texts that they drafted based on global benchmarks, and even requested advisory support from the Venice Commission<sup>24</sup>, although Morocco did not ask for a specific opinion regarding the constitution, unlike Tunisia.”<sup>25</sup>

Even the referendum on the new constitution, which was counting on garnering public endorsement, followed the same reasoning which governed constitutional and political life for over half a century. “In the middle of the referendum campaign, the Ministry of Endowments and Islamic Affairs imposed a unified Friday sermon on all mosques and called on believers to vote “yes” on the draft constitution, in response to the calls of “Amir al-Mu'minin” [Commander of the Faithful, that is, the King] and in

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<sup>22</sup> محمد باسك منار، ص 9-10.

<sup>23</sup> Ibid, p. 11.

<sup>24</sup> The European Commission for Democracy through Law - better known as the Venice Commission as it meets in Venice - is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice on constitution building to its member states and also helps to ensure the dissemination and consolidation of a common constitutional heritage.

<sup>25</sup> Valentina Rita Scotti, p. 382.

obedience to God's words 'O ye who believe, obey God and his Messenger and those charged with authority among you.'<sup>26</sup>

Consequently, any reference to the direct referendum powers is undermined by the notion of the constitution of *wali al-amr* (guardian of the people or holder of authority) that directly correlates to a set of traditional rights that the Sultan holds based on his religious status. In fact, this identification of the ruler with the constitution continues to prevent the constitution from being sufficiently participatory.

The religious identification of the constitution and the supremacy of the issuing authority that has the power to impose it accompanied the public debate about implementing the constitution. The slogan "democratic dictation of the constitution" was widely used by political actors and journalists. The term *tanzil* [revelation in Islam] literally means a top-down dictation consistent with the superiority of the constitution but having a religious essence because its deep connotations refer to the revelation of the Quran to the Prophet and to how its principles should be implemented on the city and its people."<sup>27</sup>

In general, while constitutions express concepts and arrangements as political compromises reflecting a balance of powers at the time of agreement<sup>28</sup>, Morocco issued a series of top-down constitutions that reflect gradual balances in tough political matters that were not negotiated as part of a participatory process.<sup>29</sup> Perhaps this top-down strategy in using constitutions was a safety valve to ward off sociopolitical pressure and was more effective in curtailing the flare-ups of enmity towards the ruling regime.<sup>30</sup> However, it linked the drafting of constitutions to the promotion of a hybrid system of governance that reflected an ambiguous relationship between institutions and authority. On the one hand, "constitutional fundamentalism" secured a re-Islamization of the old state, gave the authority's rituals an official character, and revived old traditional systems. On the other hand, constitutional modernization allowed integrating these old systems into the fabric of modern political institutions. Consequently, the elaboration of the constitution gradually evolved from codifying the authoritarian rule to disguising it with democratic features. All this happened in the framework of amplified and

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<sup>26</sup> محمد باسك منار، ص 14.

<sup>27</sup> Abdelaziz Lamghari, *Développements Constitutionnels Récents au Maroc, (juillet-décembre 2011)*, (Strasbourg: Commission Européenne Pour La démocratie Par Le Droit -Commission de Venis-, 02-02-2012), p. 2. [https://www.venice.coe.int/webforms/documents/?pdf=CDL\(2012\)002-f](https://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)002-f)

<sup>28</sup> Markus Böckenförde, Nora Hedling, & Winluck Wahiu, (eds), *A Practical Guide to Constitution Building*, (Sweden: International Institute for Democracy and Electoral Assistance, 2011), p. 2.

<sup>29</sup> David mednicoff, "The Politics of Sacred Paralysis Islam in Recent Moroccan and North African Constitutions", in: Asli Ü. Bali & Hanna Lerner, (eds), *Constitutional Writing...*, Op Cit, p. 319.

<sup>30</sup> Ibid, 335.

revised copies of the original constitution that reflect the ongoing success in dividing constitutional sustainability over stages, despite the crises, setbacks, or failures of some of these nascent constitutions.

## LEGAL CONSTITUTION: SACRED PARALYSIS OF RELIGION IN THE LEGAL SYSTEM

All Moroccan constitutions maintained the same general language regarding Islam. The preamble states that Morocco is an Islamic state, and Article 3 of the last constitution states that “Islam is the religion of the state.” This formulation is generally inaccurate, since the state is essentially a political institution, whereas the notion of religiosity applies to individuals rather than institutions. Moreover, would this formulation imply that Morocco is a theocratic state? Most likely not, as Morocco is defined as a “constitutional, democratic and social monarchy, which indicates that the foundations of the state are secular.”<sup>31</sup> However, the notion of “civil nature”- non religious or secular - applies to individuals in charge of exercising power more than it applies to the nature of the state itself. Thus, the power exercised by the civil authorities or natural persons can implement Shariah fully.<sup>32</sup>

In an attempt to clarify these ambiguities, and based on the standpoint that the religious authority binds the believer, it is necessary to question the constitution regarding the established form of protection for religion and the extent to which the Islamic authority compels the state to Islamize the law. To begin with, the existence and practice of religion not only requires legal recognition, but also active protection, especially in communities where religion is a special trait for the diverse social components and generates competing demands with legal implications<sup>33</sup>, notably the protection of religious freedom and practice. Koppelman notes that “for religion to be protected, it must be defined”.<sup>34</sup> An individual might want to define religion to find out what the protected freedoms are.<sup>35</sup> This is especially true in cases like the Moroccan constitution, where it is stated that “Islam is the religion of the state” and at the same time that “the state guarantees to all the free exercise of religious beliefs.”

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<sup>31</sup> Ann Elizabeth Mayer, "Revisiting Jefferson's Wall from a Contemporary Middle-Eastern Perspective", in: Robert Fatton, Jr. & R. K. Ramazani, (eds), *Religion, State, and Society Jefferson's Wall of Separation in Comparative Perspective*, 1<sup>st</sup> Published, (New York: Palgrave Macmillan, 2009), p. 181.

<sup>32</sup> Ferhat Horchni, Islam and the Constitutional State Are They in Contradiction?, in: Rainer Grote & Tilmann J. Röder, (eds), *Constitutionalism, human rights,...* Op Cit, p. 204.

<sup>33</sup> Francois Venter, *Constitutionalism and Religion*, (Cheltenham: Edward Elgar Publishing Limited, 2015), p. 180.

<sup>34</sup> Cited in : Frank B. Cross, *Constitutions and Religious Freedom*, 1<sup>st</sup> Published, (New York: Cambridge University Press, 2015), p. 2.

<sup>35</sup> Ibid, p. 1.

Religious freedom suggests religious diversity, which is not the case in Morocco. Even in its acknowledgment of non-Muslim components (a small percentage of Jews), the constitution describes them as “affluents” of Moroccan identity, i.e. as holders of a religious identity rather than a religious minority. Even if considered as such, these affluents need tolerance that is left to the Muslim majority’s will to coexist more than religious freedom governed by special laws enacted by the state, which is the case in “the majoritarian model of the democratic state [that] deprives religious minorities of their legal independence, and insists on subjugating all citizens to a single legal system, which often reflects the doctrinal and behavioral values of the ruling majority.”<sup>36</sup>

The broadest organization for religious freedom is a constitutional declaration that explicitly provides for freedom of belief.<sup>37</sup> Since the recognition of the right to religious freedom lies close to the core of the constitutional and political attitude of the society and the state towards religion,<sup>38</sup> the protection of religious practice indicated in the Moroccan constitution does not amount to guaranteeing freedom of belief or conscience. Restricting religious freedom in this sense corresponds to the existence of a dominant religion, and it is an objective issue in all countries of the world, where “ignoring the religion of the majority among a certain people is a form of abuse”.<sup>39</sup> Therefore, the phenomenon of religious conversion is prohibited. But, the prohibition of religious conversion does not extend to religious disaffiliation “in which the religious factor can be considered a superstructure, in comparison with an infrastructure that operates completely in its absence.”<sup>40</sup>

While in the past, it might have been common for one religious group to oppress another, a more recent phenomenon is the oppression of religious groups by non-religious autocrats.<sup>41</sup> Governments may permit the legal presence of religious groups, but they also have the power to restrict religious freedoms by banning certain religious practices.<sup>42</sup> Many restrictions on religious freedoms are implemented even on religious citizens, such as restricting the activities of non-political religious organizations and their access to worship places (in cases of *I'tikaf* [dwelling in a mosque for several days]) and prohibiting holding group prayers in public places (beaches, for instance). These are examples of restrictions imposed on the religious Justice and Spirituality Association on multiple

<sup>36</sup> لؤي صافي، العقيدة والسياسة معالم عامة نظرية للدولة الإسلامية، الطبعة الأولى، (فرجينيا: المعهد العالمي للفكر الإسلامي، 1996)، ص 172.

<sup>37</sup> أنطوني جيل، الأصول السياسية للحرية الدينية، ترجمة محمد محمود التوبة، الطبعة الأولى، (بيروت: الشبكة العربية للأبحاث والنشر، 2014)، ص 34.

<sup>38</sup> François Venter, p. 109.

<sup>39</sup> الطبعة الأولى، (لبنان: منشورات ضفاف، 2013)، إسماعيل الشطة، الإسلاميون وحكم الدولة الحديثة، ص 62.

<sup>40</sup> مارسيل غوشيه، الدين في الديمقراطية، ترجمة شفيق محسن، الطبعة الأولى، (لبنان: المنظمة العربية للترجمة، 2007)، ص 157.

<sup>41</sup> Frank B. Cross, p. 7.

<sup>42</sup> أنطوني جيل، ص 39.

occasions. Therefore, religious freedom is a governmental, organizational, and political matter that can infringe on many causes beyond the personal right to belief,<sup>43</sup> including on religious education and media, whereas “democratic rule could provide an adequate space for religious freedom.”<sup>44</sup> Yet, while democracy is critical for the protection of religious freedom, it is not the result of constitutional inspiration. Even in the absence of such inspiration, the democratic rule strongly entrenches religious freedom.<sup>45</sup>

In general, the provision in the Moroccan constitution that “the state guarantees to all the free exercise of religious beliefs,” which was coupled with the provision that “Islam is the religion of the state” as indicated above, is subject to the interpretation that it does not apply to religion in general, but strictly to Islam. Moreover, the constitution protects a certain version of Islam, which is “moderate Islam.” It bans any forms of religious extremism. This restriction also applies to political life, as parties are not allowed to be founded on a religious basis, and they cannot seek to violate Islam.

And as Islam is a religion that is not only concerned with believers’ faith, but also “with the various aspects of their personal, social or even political lives which are affected by it”<sup>46</sup>, and its effects might extend to law creation, where as “the law is described as moral, in reference to the principles espoused by individuals and governing their behavior,”<sup>47</sup> the reality of the constitutional formulation also entails the problematic glossing over of the controversy of the constitution’s position towards the Islamic Shariah. One of the key aspects to understanding the relationship between religion and the constitution is the extent to which the constitution requires the law to abide by religion, and the question here is with regards to the role of religious principles in shaping the law.<sup>48</sup> In the Islamic context, “to implement Shariah, hence to confine the sources of legislation to Shariah, creates a constitutional dilemma. That is, the dilemma of trying to restrict the powers of the ruler using limitations that are based on reason and *turath* (heritage) at the same time.”<sup>49</sup>

In this framework, Morocco settled for a moderate version of an Islamic constitution. “The constitutional clauses and related strategies worked to create a symbolic link to Islam (...) and to steer

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<sup>43</sup> Ibid, p. 32

<sup>44</sup> Frank B. Cross, p. 8.

<sup>45</sup> Ibid, p. 184.

<sup>46</sup> Francois Venter, p. 3.

<sup>47</sup> لؤي صافي، ص 159.

<sup>48</sup> Markus Böckenförde, Nora Hedling, & Winluck Wahiu p. 6

<sup>49</sup> خلدون حسن النقيب، "محنة الدستور في الوطن العربي: العلمانية والأصولية وأزمة الحرية"، في: الدستور في الوطن العربي عوامل الثبات وأسس التغيير، الطبعة الأولى، (لبنان: مركز دراسات الوحدة العربية، 2006)، ص 33.

the country away from the implementation of Shariah towards more universal legal standards.”<sup>50</sup> Although the constitution declares the Islamic nature of the state, it [the constitution], rather than the Shariah, remains the supreme source of the law. This means that “the legislation’s compliance with the Shariah is not explicitly required, but at the same time, the Shariah might inspire laws without facing any constitutional obstacles.”<sup>51</sup>

Consequently, the constitution only allows limited implementation of Shariah in the country in civil affairs. “The bill to codify Shariah stopped at the *Mudawana* [Personal Status Code, or the Family Code] and did not go beyond it, as it was incapable of deriving other Islamized laws that were needed following independence, mainly the Penal Code.”<sup>52</sup>

The obstruction of the codification of Shariah into to law was linked to “many circumstances and justifications, including the influence of foreign experts who remained present after the end of colonialism, the ideological stance towards the Shariah by certain secular elites that rose to power in Arab countries after colonialism, fear of the [Islamization] project, and concern about legal stability”.<sup>53</sup> In addition, this obstruction also possibly stemmed from a desire to avoid existential questions that might lead to unresolvable contradictions [with respect to the nature of the state].<sup>54</sup>

The launch and halt of [Shariah] codification with the Personal Status Code was not a coincidence but rather a political strategy to mobilize religion on the side of the system of rule.

The Personal Status Code was issued two years after Morocco’s independence “to respond to the demands of the Nationalist Movement and to apply one of its attractive slogans, which is restoring respect for the Islamic Shariah and its courts that were deeply marginalized and neglected by colonialism.”<sup>55</sup> This step was a major response in the pre-constitutional era. However, the spirit of this code failed to consecrate the slogan of codifying Shariah in the first constitution that was later. This raises the hypothesis that the political wager prevailed over the codification process more than the legal commitment to one of the Shariah texts.

In former colonies, colonial leaders often used religion to set legal boundaries for citizens in the areas under their control. Consequently, the colonial legacy and legal heritage of an independent state

<sup>50</sup> David Mednicoff, *The Politics of Sacred Paralysis...*, p. 326.

<sup>51</sup> Rainer Grote & Tilmann J. Röder, *Constitutionalism in Islamic Countries...*, p. 115.

<sup>52</sup> محمد جبرون، مفهوم الدولة الإسلامية أزمة الأسس وحتمية الحدائة، الطبعة الأولى، (بيروت: المركز العربي للأبحاث ودراسة السياسات، 2016)، ص 328.

<sup>53</sup> Ibid, p. 329.

<sup>54</sup> Rainer Grote & Tilmann J. Röder, Ibid.

<sup>55</sup> 168-169. علال الفاسي، مدخل في النظرية العامة لدراسة الفقه الإسلامي، ط2، (الرباط: منشورات مؤسسة علال الفاسي، 2002)، ص

consecrate the entrenchment of religion in law.<sup>56</sup> While the French Protectorate marginalized Shariah courts that implemented Islamic Shariah by removing Amazigh tribesmen from under their mandate and subjecting them to the customary law based on what was historically dubbed “the Berber Dahir,” which was betting on dividing Moroccans in the face of colonialism, the Moroccan regime tried to implement the same strategy of “divide and conquer.” To do so, the regime allied itself with the villages’ tribal system against the urban elites of the national movement, which expressed strong opposition in front of late King Mohammed V in the negotiations about the prospective system of rule on Independence Day. With respect to personal status codification, some of these urban elites even expressed “interest in introducing changes, but no follow up confrontations ever resulted. Moroccan voices calling for change were mostly affiliated with the Independence Party [Istiqlal] present in cities. The party was weakened by the alliance between the monarchy and the tribe during the national struggle and the independence period. Voices calling for change remained unheard, as the monarchy chose to retain an Islamist Family Code, in line with its personal interests,”<sup>57</sup> in a brief text that was enacted in 1957-1958. The text did not change the legal status of women, as it was broadly introduced to ratify and institutionalize the model of the extended patriarchal family, which is the foundation of the tribal system.

This legal victory was a result of any direct action by the tribes. Rather, it was the choice of a strong monarchy that preferred to maintain the status quo in the Family Code. The post-independence Family Code in Morocco was an indicated to the notable figures in rural areas that the monarchy had chosen a law that conformed to their view of the world. It also reflected the monarchy’s resolve to protect social cohesion based on kinship. By actively maintaining a Family Code that recognized patriarchal ties, the monarchy avoided disturbing the tribal order of Moroccan society and nurtured its alliance with it.<sup>58</sup> Therefore, the Family Code in independent Morocco should be interpreted as a victory of the patriarchal view of the extended family, which is perpetuated by solidarity among its members who are bound by blood ties. It should also be interpreted as a continuation of women’s subordination to men under the law. This notion of kinship was especially popular in rural areas, where the monarchy found valuable allies and strong political support ahead of and following independence.<sup>59</sup>

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<sup>56</sup> Asli Ü. Bali & Hanna Lerner, p. 8.

<sup>57</sup> Mounira m. Charrad, *States and Women’s Rights The Making of Postcolonial Tunisia, Algeria, and Morocco*, (London: University of California Press, 2001), p. 158.

<sup>58</sup> *Ibid*, p. 168.

<sup>59</sup> *Ibid*, p. 167.

This Personal Status Code, which has become enforceable since that date demonstrate that even the amendments that have been introduced by King Mohammed VI in 2004 were based on political factors, including domestic and foreign pressure, rather than a consideration of Islamic *fiqh* or its compatibility with changing circumstances.

The recent amendments to the Code in particular achieved several local and international political goals; it cemented the image of King Mohammed VI as a democratic reformist, bolstered the relationship between the monarchy and women's associations, and resolved the decade-old ongoing dispute between religious elites and leftists.<sup>60</sup>

The timing of the amendments, which was passed immediately after terrorist attacks that shook Morocco in 2003 and placed moral pressure on Islamist forces, allowed the ratification of a more liberal Family Code. "The king pressed for reform in the face of a strong Islamist opposition, which insisted that the enhanced rights of women were inconsistent with the Islamic Shariah".<sup>61</sup> The state's espousal of the Maliki jurisprudence pragmatically allowed it "to protect its legal system from the challenges posed by the advocates of implementing the Islamic Shariah"<sup>62</sup> by arguing that the practices of Muslim society could be a source of law and actually calling for granting legitimacy to existent religious practices as long as they did not contradict sacred texts<sup>63</sup>, based on the notion of public interest in Maliki jurisprudence.

The reform of the Family Code reflected a moderate image of the Moroccan monarchy to foreign countries, amid concerns about US invasion of the Middle East and North Africa (MENA) region in the context of the international war on terrorism, following the September 11, 2001 attacks. Some substantial amendments to the law took inspiration from the human rights language of the 1996 Constitution, which for the first time integrated in its preamble a commitment to "human rights as they are universally recognized."

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<sup>60</sup> Ann Marie Wainscott, *Bureaucratizing Islam Morocco and the War on Terror*, 1<sup>st</sup> Published, (New York: Cambridge University Press, 2017), p. 145.

<sup>61</sup> Ann Elizabeth Mayer, "The Respective Roles of Human Rights and Islam: An Unresolved Conundrum for Middle Eastern Constitutions", in: Said Amir Arjomand (ed), *Constitutional Politics in The Middle East, With special reference to Turkey, Iraq, Iran and Afghanistan*, (Oxford: Hart Publishing, 2008), p. 84.

<sup>62</sup> Ann Marie Wainscott, p. 73.

<sup>63</sup> *Ibid*, p. 75.

However, - in comparison -the Moroccan case represents a strikingly different trend, as it provides an illustration of how the recognition of the international human rights law in the constitution is linked to favorable human rights' trends, without provisions requiring respect for the Islamic Shariah.<sup>64</sup>

Adopting a constitutional reference for the international human rights law might be linked to a transition to policies that promote human rights and liberate them from Islamic restrictions.<sup>65</sup> Western parties would contest the implementation of Shariah by demanding abidance by international treaties and laws. Actually, the sovereign right of a state to choose its legislative system is not absolute, as it is bound by the principle of immediate submission to international law from the moment the state is created. A state cannot become a sovereign member unless it abides by international law.<sup>66</sup> Nevertheless, the reference to an external benchmark in the constitution does not mean that the international human rights law is followed to the letter in the religious arena. Although the universality of human rights has been underscored, some traditional rules of Islamic Shariah still exercise their influence.<sup>67</sup> Morocco's ratification of international treaties under previous constitutions remained linked to reservations concerning provisions that contradict the Islamic religion. Meanwhile, the 2011 constitution explicitly stipulates that international conventions do not have primacy over the internal law, except within the scope of the provisions of the constitution, the laws of the Kingdom and its established national identity, including the state religious identity.

It becomes clear, therefore, that the Islamic frame of reference in the Moroccan constitution does not have an independent presence, but it is determined according to the *fatwa* mechanism emanating from the religious power of the king. The jurisprudential role of arbitration that the king assumed in the issue of women can be activated in other controversial issues sparking societal polarization, such as abortion, capital punishment, heritage, personal freedoms, etc. In these fields, the king cannot allow any infringement on the sanctity of religion to serve the narrow political ends of the ruling elites. For that reason, he personally assumes this role rather than delegating it to the legislative or governmental apparatus, or even to the constitutional judiciary, as "it seems that the political class is unwilling, or perhaps not mature enough, to give the judges – or even constitutional judges – the power to determine

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<sup>64</sup> Ann Elizabeth Mayer, p. 83.

<sup>65</sup> Ibid, p. 84.

<sup>66</sup> إسماعيل الشطة، ص 67.

<sup>67</sup> Ann Elizabeth Mayer, Revisiting Jefferson's Wall..., p. 183.

what matters in the Shariah should be subject to dynamic interpretation and how they should be interpreted and adapted to the other sources of law and legislations.”<sup>68</sup>

The constitutional clauses related to Islam are carefully designed to “reduce potential pressure on the Islamization of the law and cope with curbing the actual effect of Shariah.”<sup>69</sup> The prevalence of Islam in the Moroccan constitution is not tied to a reference to Islamic standards (Shariah or fiqh). Islam, being the religion of the state, is initially a national frame of reference. In fact, Islam in its “moderate version” is among the unifying components of the state. Contrary to situations in which the religious legitimacy of the president lies in the supreme nature of defining the Islamic standard as a legal reference,<sup>70</sup> in Morocco’s constitutional system, the executive role of the president is inclined to arbitration. Meanwhile, his role as a higher religious authority is practiced in a strong and comprehensive manner.

The restriction of religion ability to widely shape the legal system is a “sacred one.” Only the king in his religious capacity can intervene to create space for religion in law, thus isolating legislative options that could draw on the Islamic Shariah. As a consequence, the Islamist Justice and Development party finds itself incapable, from its position as leader of the government, of translating its Islamic slogans into a legislative project that would replace its religious-moral rhetoric. At the same time, the absence of constitutional provisions that mandate the implementation of Shariah does not prevent a parliamentary majority from proposing draft laws that are inspired by Islamic Shariah, therefore the Party continues to fight its “Islamic identity” battles in parliament even if simply to salvage its public image [as an Islamist party]. In reality, this approach has been convenient escape from proposing Islamic legislation – with the exception of passing the cooperative banks law (which is an alias for Islamic financial institutions) after difficult negotiations, and without surpassing the hurdle of having to coexist with the traditional banking law, which is built on interest-yielding transactions [that are forbidden by Islam].

The Moroccan system is unique in that it is able to limit the Shariah implementation realm, as pointed out by Mohamed Mouaqit, as it works in a way that is inversely proportional to the centrality of The Command of the Faithful (Imarate al-Mu’minin). That is, while the symbolic value of Shariah is particularly strong, its implementation is less important on the political front, “as if the strength of the former is compensatory for the weakness of the latter.” Morocco is a case of excessive admiration for the monarchy instead of the Shariah. It is the strength of the king that strengthens or weakens the

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<sup>68</sup> Rainer Grote and Tilmann J. Röder, p. 117.

<sup>69</sup> David Mednicoff, p. 327.

<sup>70</sup> Baudouin Dupret, "The Relationship between Constitutions, Politics, and Islam A Comparative Analysis of the North African Countries", in: *Rainer Grote and Tilmann J. Röder, (eds), Constitutionalism,...*, Op Cit, p. 242.

Shariah's implementation depending on whether he wants to take advantage of it, or, contrarily, contain it. When it comes to nationalizing the legal system through the Islamization of its resources or when it comes to defeating leftist political forces, the direction is to pragmatically use this resource. On the other hand, when faced with the need to curb the Islamic wave, then the inclination is to restrict the implementation of Shariah through the use of the Islamic leadership card.<sup>71</sup>

## POLITICAL CONSTITUTION: CONTROLLING RELIGION AND EXCESSIVE ADMIRATION OF THE MONARCHY

The idea of religion trumping politics in the Islamic Arab world goes against historical trends, as states controlled and generally dominated the observance of religion.<sup>72</sup>

Contrary to what we saw in the previous section with respect to the relegation of religion to the private realm when it comes to the normative value of Islam, it will soon become clear that religion continues to play a unique and powerful socio-political role in shaping the legitimacy and political performance of the Moroccan regime.

In contrast to the strategy of separating religion from politics when it comes to other political actors, we find that the political standing of the monarchy is shaped by the politicization of religion rather than its inhibition. Along with his religious authority, the King of Morocco is the ruler of a state before all else, and "as[political] authority is always concentrated in the hands of individuals driven by politics and not religion, we find that religion serves politics and not the other way around."<sup>73</sup>

The 1962 Constitution, which declared the King as Amir al-Mu'minin (Commander of the Faithful), affirms the permanent authority of a monarchy that is largely accepted in the political arena in Morocco.<sup>74</sup> The moments of political crisis that erupted a few years after the declaration of this initial constitution allowed for testing the efficiency of this religious character. For example, in response to the failed coup attempt, King Hassan II rushed to remind his constituents of his Prophet lineage and his

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<sup>71</sup> Ibid, p. 243.

<sup>72</sup> William B. Quand, "Religion and Politics in the Middle East and North Africa", in: Robert Fatton, Jr. & R. K. Ramazani, (eds), *Religion, State, and Society...*, p. 155.

<sup>73</sup> Robert Fatton, Jr. & R. K. Ramazani, (eds.), *Religion State and Society...*, Op Cit, p. 10.

<sup>74</sup> Mohamed Daadaoui, p. 52.

position as Amir al-Mu'minin. "Hassan's efforts to imbue his throne with quasi-religious neo-papal legitimacy only increased after the 1971 and 1972 coup attempts."<sup>75</sup>

Following constitutions further perpetuated Article 19 that drew the structure of the King's religious authority built upon a long tradition which has been called the political theory of Sunni realism. "This provision skillfully takes up one of the core concerns of Muslims, the risk of fitnah, or disunity, in the Muslim community as a result of unchecked partisanship and fierce party competition, and transforms it into a constitutional mandate to constrain, if the need arises, political pluralism and multiparty competition in order to protect religious tranquility."<sup>76</sup> The 2011 Constitution of Morocco, which bans any kind of (party) political activity which is likely to create divisions in the community along religious fault lines or to disturb the Muslim religion and which gives the ruler the necessary powers to enforce the vision of a peaceful and tolerant Islam espoused by it, is rooted firmly in this tradition.<sup>77</sup>

The adoption in Article 19 of personalization rather than institutionalization, whereby it speaks of the King rather than the monarchy and the Commander of the Faithful rather than the Command of the Faithful, in effect merges the roles of Amir al-Mu'minin and the King, since "the Command of the Faithful with its religious burden channels all of the person of the King towards the state, thus establishing the relationship between the two institutions, or more correctly the two definitions, which is a relationship of mixing and merging in decision-making and implementation."<sup>78</sup> The proof of this is that the royal *dahirs* would be issued based on Article 19, pointing out the merger of the religious and political powers of the king. This article was even used in passing laws in the era of Mohammed VI, despite the legislative branch being specifically defined in the constitution. This was also used to establish a number of institutions, such as "The Royal Institute for Amazigh Culture, The Communications High Commission, The Justice and Reconciliation Commission, the Consultative Council for Human Rights, The Grievances Court, and the Consultative Council for Family Law Reform."<sup>79</sup> More specifically, contrary to the initiative of the Abdul-Rahman al-Yucefi cabinet in 2000, the King declared "the establishment of the Grievances Court institution based on Article 19 of the 1996 constitution, taking into account that the monarchy in its role of Command of the Faithful,

<sup>75</sup> Milinda Banerjee, Charlotte Backerra & Cathleen Sarti, p. 115.

<sup>76</sup> Rainer Grote and Tilmann J. Röder, "The Constitutional Legacy of the Arab Spring", in: Rainer Grote and Tilmann J. Röder, (eds), *Constitutionalism, Human Rights*, Op Cit, p. 914.

<sup>77</sup> Ibid, P. 916.

<sup>78</sup> أحمد الخليلي، "علاقة الدين بالدولة ومؤسسة امارة المؤمنین في المغرب"، في: الدين والدولة في الوطن العربي، الطبعة الأولى، (بيروت: مركز دراسات الوحدة العربية، الطبعة الأولى، بيروت، 2013)، ص 382.

<sup>79</sup> محمد كولفرني، "الربيع العربي والإصلاح الدستوري بالمغرب: قراءة من منظور الفاعلين"، سياسات عربية، العدد 22 (سبتمبر 2016)، ص 51.

considers these affairs to be among those that have to do with the ruler caring for his constituents, and thus there cannot be a mediator between him and them.”<sup>80</sup> Therefore, the above-mentioned supremacy of the Imarate al-Mu’minin, the Command of the Faithful, over the parliament and government allows for “concluding that the constitutional monarchy was just a cover for Imarate al-Mu’minin, not only because it is the original authority and is deeply-rooted in history and conscience, but more importantly because its jurisdiction covers all institutions created by the constitution and thus infiltrates them and supersedes them,”<sup>81</sup> since its jurisdiction is unspecified.

With the monarchy established beyond the bounds of the constitution, the institution of Imarate al-Mu’minin encompasses powers above what is merely written in the constitution. Specific symbolic events were established by King Hassan II with the goal of establishing a personal dimension for the authority enjoyed by the monarchy, whereas the King heads the annual pledge of allegiance rituals in which the political, military, and administrative elites officially renew their loyalty pledge to the throne, as well as the Hassanite religious lessons – those conducted in the presence of the King and under his supervision – during Ramadan and the sacrificial ritual in the name of the Moroccan nation on Eid al-Adha. These practices serve to emphasize the King’s lineage as a descendant from Prophet Muhammed and, more importantly, “by adopting these rituals and this symbolism, King Hassan II sought to establish a connection with the pious common Moroccans.”<sup>82</sup> In this context, the religious councils – that is the regional scholar councils – become major institutions in establishing the religious legitimacy of the monarchy. By organizing religious affairs and seasonal events, these councils put the religious crowd at the disposal of politics and strengthen the hegemony of the *makhzen* [state] over the religious rhetoric.<sup>83</sup>

Imarate al-Mu’minin, with its religious symbolism and historical legacy, has helped end sedition and maintain stability at crucial times, as well as keep away the specter of dogmatic and ideological alignments.<sup>84</sup> This was demonstrated in the two instances of mediation of the King as Amir al-Mu’minin, first by Hassan II in the case of the Personal Status Code reform in 1993 and the second by Mohammad VI in 2003 in issuing the Family Code that replaced the previous one after its amendment.

<sup>80</sup> محمد الغالي، "دستور المملكة المغربية لسنة 2011 في ضوء الربيع العربي جدلية الثابت والمتحول"، تبين، العدد 4 (ربيع 2013)، ص 115.

<sup>81</sup> عبد العزيز غوردو، الحكامة الجيدة في النظام الدستوري المغربي، الطبعة الأولى، (لندن: منشورات اي بوك، 2015)، ص 44.

<sup>82</sup> Michael Willis, *Politics and Power in the Maghreb Algeria, Tunisia and Morocco from Independence to the Arab Spring*, (New York: Oxford University Press, 2014), p. 56.

<sup>83</sup> Mohamed Daadaoui, p. 53.

<sup>84</sup> أحمد الخليلي، ص 403.

Also, the Islamic dimension has strategically “provided insulation from, and enabled the regime to justify forceful tactics against anti-state Islamist political activity which has increasingly marked Arab politics in the last decades”.<sup>85</sup> That’s because the official role of the king as Amir al-Mu’minin gave the monarchy a religious and legal authority that actually undermined the religious and opposition rhetoric of the Islamic factions, since it is much easier to levy accusations of extreme secularism or ignoring Islam against heads of states and regimes that do not possess a clear religious dimension. At the same time, it was more difficult for these accusations to stick on a descendent of the Prophet and a monarchy that often donned the tradition of religious imagery and symbolism.<sup>86</sup>

While the Leftist opposition would shame the regime for using religion in politics, it would turn to enacting Imarate al-Mu’minin in order to confront the dangers of extremism. “Ironically, secularists supported the religious legitimacy of the King as a bulwark against Islamists; in turn many Islamists saw themselves closer to the King than to secularists.”<sup>87</sup>

Competition between secularists and Islamists to have the religious authority of the monarchy on their side has allowed the regime to ward off an opposition coalition and to pressure it to fully establish democracy, and at the same time it enabled the monarchy to avoid the kinds of repressive religious policies that were adopted by Islamic regimes in other places. “In fact, one can affirm (somewhat strongly) that the king fundamentally offers Moroccans a deal: show respect for the sacred status of the monarchy and its official moderate Islam in return for life under a regime that is flexible and capable of introducing some democratic reforms,”<sup>88</sup> which in no way may change the core of the monarchy’s authority founded on the sacred religious authority of Imarate al-Mu’minin.

The changes that took place in Morocco since the start of the reign of Mohammad VI might show that the traditional practices of the political regime have lost some of their influence, while the monarchy as a modern institution has gained power and strengthened its authority without having to resort to a political gamble by activating Article 19 too often “as a reserve text to confront unpredicted developments from the constitution’s side,”<sup>89</sup> as imagined and applied occasionally by Hassan II. However, the mixing between the historical and religious powers of the king as per this article does not

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<sup>85</sup> Milinda Banerjee, Charlotte Backerra, & Cathleen Sarti, p. 119.

<sup>86</sup> Michael Willis, p. 178.

<sup>87</sup> Paola Rivetti & Rosita Di Peri, (eds), *Continuity and Change before and after the Arab Uprisings*, 1<sup>st</sup> Published, (London: Routledge, 2016), p. 24.

<sup>88</sup> Ann Elizabeth Mayer, p. 185.

<sup>89</sup> Abdeltif Menouni, “Le Recours à L’article 19: Une Nouvelle Lecture de La Constitution?”, *Revue Juridique Politique et Economique du Maroc*, Numéro 15, (1er semestre 1984), p. 4.

seem to have completely ended with the latest constitutional reforms, at least from a practical point of view. Even if it was formally shaken up, it continues objectively, so long as the new constitution is a constitution of continuity and not a rupture constitution, in maintaining the bet on its deterrence of potential challenges to the actual political authority of the king. This was demonstrated earlier with the King's declaration of his decision to revise the constitution, where "the March 9 speech confirmed Imarate al-Mu'minin as one of the vessels of reform."<sup>90</sup> Therefore, the reform drafts presented by the political parties, even when they mentioned rewriting Article 19, did not touch the role of Amir al-Mu'minin in the amendment, but rather focused on the King's constitutional role.

At first, it seems that the novel constitution distinguished "between the religious legitimacy of the king, as mentioned in Article 41, and his constitutional legitimacy as king of the country and head of the state, which is what Article 42 addresses. This situation, as intended by its phrasing and as can be concluded by any reader of the Moroccan constitution, aims to separate the religious role from the political or civil one."<sup>91</sup> However, these two articles which replaced the former Article 19 by placing the title of Amir al-Mu'minin first, give precedence to the role of Imarate al-Mu'minin over the constitutional monarch, whose scope was reduced. Also, the separation between the realms of Imarate al-Mu'minin and the head of state only came to address the confusion between the religious and civil authorities of the king, and as such did not impact his authorities in a way that embodies any separation of powers. Imarate al-Mu'minin continued to have an undefined mandate and jurisdiction, whereby the king retain absolute discretion in organizing the religious realm, which is done through *dabirs* that do not require co-signers. Imarate al-Mu'minin was even strengthened further with new religious powers through the heading of the Higher Scholar Council, a constitutional religious institution with specific jurisdiction over the issuance of fatwas, an arrangement that can foreseeably prevent religious scholars from restricting actions of the executive branch – as they had done at times throughout the history of the Moroccan Empire. Under the new arrangement, when the Higher Council issues an opinion (*fatwa*) on a legal matter, it would be required to submit the *fatwa* to the king for ratification as the head the Council.

In addition to Article 19, which addresses Imarate al-Mu'minin, "Article 41 worked to combine and frame the king's religious authorities without defining their relationship with the civil political roles that impact citizens' lives,"<sup>92</sup> which opens the door for the possibility of conflating the two roles. "Article 41 also highlights the importance of the king to the Islamic identity of Moroccans by reminding them that

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<sup>90</sup> Valentina Rita Scotti, p. 52.

<sup>91</sup> أحمد مالكي، ص 95.

<sup>92</sup> محمد الغالي، ص 116.

the monarchy in Morocco is an institution that is deeply rooted in the Islamic history of the country and closely tied to it. Thus, one cannot imagine the elimination of the monarchy or its reduction to an un-influential kind of symbolic institution like the constitutional monarchies in Europe, or even to destroy the overall Islamic character of Moroccan society.”<sup>93</sup>

The continuity of fundamentals of the constitution remains clear, as even foregoing the king’s sanctity of persona failed to result in any tangible effects. The new constitution rather reinvented this sanctity by reverting back to an old phrasing with ancient roots. Article 46 thereof specified that “the person of the King is inviolable, and respect is due Him.” implying thereby the king’s right to obedience that amplifies his re-sanctification. “In fairness, other democracies such as Denmark have made their king sacrosanct, but in those monarchies the monarch reigns but do not reign.”<sup>94</sup>

Therefore, this new phrasing may seem ordinary, but in fact it comes to support and strengthen the monarch’s supremacy as a political actor, even over the nation’s sovereign representatives at a time when the constitution claims that parliamentarianism is one of the attributes of the ruling regime in Morocco. “The restraints and intentional ambiguities of the constitution effectively deter representatives from engaging in activities or debates that might be construed as”<sup>95</sup> voting against the will of the king.”

The conclusion is that the religious legitimacy that is concentrated constitutionally in the institution of Imarate al-Mu’minin has worked for Hassan II under the pretext that, “when the monarch’s political absolutism cannot be supported by the constitution, it will be justified by divine right.”<sup>96</sup> For Mohammad VI, it has become an insurance system against political risks, whereby “As a theory of the relationship between constitutions and political risk, it may extend to a much broader range of circumstances—i.e., to situations in which constitutional actors are seeking to protect themselves against a broad range of risks, including [...] the risk of loss of political power.”<sup>97</sup>

It remains to be mentioned in the end, that Imarate al-Mu’minin, while concerned with the competing forces inside the country, may also command external influences. While “comparing the position of the Moroccan King with that of the early Islamic rulers is not a possibility in a world that has been fragmented into various nation states, because the religious authority of the king is only recognized

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<sup>93</sup> Rainer Grote and Tilmann J. Röder, p. 915.

<sup>94</sup> "ينص الفصل 46 من الدستور على أن "شخص الملك لا تنتهك حرمة، للملك واجب التوقير والاحترام".

<sup>95</sup> Ibid.

<sup>96</sup> Ibid, P. 56.

<sup>97</sup> Rosalind Dixon & Tom Ginsburg, "The forms and limits of constitutions as political insurance", *International Journal of Constitutional Law*, Volume 15, Issue 4, (October 2017), p. 7.

within Moroccan territories,”<sup>98</sup> nationalizing religion and the state’s official oversight over it within an Islamic political bureaucratic framework transcends political pragmatism and serves as an attempt to restructure the state’s relationship to Islam in a manner that sends external messages.

While the theology supported by the Moroccan state is “safe” in that it discourages adherence to Salafism, Shi’ism, or Wahhabism, it not a particularly vibrant theology. Rather, it recycles long-held Moroccan religious identities to serve the interests of the state.<sup>99</sup>

The assertion of the Sunni identity of Morocco is understood as a not-so-subtle message to Iran to refrain from spreading Shi’ism within Moroccan borders, which was a reason for expelling the Iranian Ambassador to Morocco in 2009. The state’s encouragement of Sufism, in addition to being an effort to inhibit political activity, is another effective method to combat the spread of Salafism.

Moreover, the king started, from his position as Morocco’s foreign policymaker and as Amir al-Mu’minin, to practice “spiritual diplomacy” with Africa countries, not only to preserve existing relations, but also to strengthen Morocco’s stance in the Sahrawi dispute<sup>100</sup>. In addition, the King was able, through his position as head of al-Quds Committee<sup>101</sup>, to compete with Saudi Arabia and Iran as religious authorities. The conflict between these two allows Morocco to present itself as a third religious pole. This is not to say that the king aspires to lead the Islamic world. To the contrary, he is well-aware, as above-noted, that the theory of one ruler commanding the loyalty of all Muslims, which was appropriate for the conditions at the time of the early caliphates when there was a single Muslim community, is not suitable for the modern Islamic world that is divided into national states, and accordingly there is no one broadly recognized Muslim leader, even if he was a descendant of the Prophet Mohammad (pbuh).

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<sup>98</sup> Ann Elizabeth Mayer, p. 181.

<sup>99</sup> Ann Marie Wainscott, p. 94.

<sup>100</sup> With the support of Algeria, the secessionist Polisario Front contested Morocco’s sovereignty over its southern Saharan provinces.

<sup>101</sup> The Al-Quds Committee was established on the recommendation of the Sixth Conference of Foreign Ministers of the Member Countries of the Organization of the Islamic Conference held in Jeddah in 1975. The Tenth Conference held in Fez decided to assign its presidency to the King of Morocco, Hassan II at the time, and after his death, his son, King Mohammed VI assumed its presidency.

## CONCLUSION

The repetitive constitutional strategy of the Moroccan monarchy, that is, the redrafting of the constitutional document rather than having it permanently written, has greatly served in reflecting a top-down constitutional approach for different situations and political balances in order to support the legitimacy of the political regime and its control. Meanwhile, the ruling regime still maintains some traditional authority characteristics in the constitution, whereby the constitutional laws merge nationalism, Islam and the monarchy and adopt a concept of civil state that sees it as part of a wider political notion of a monarchy combining local traditional legitimacy and features of Western democratic theory. Although the Moroccan constitution has succeeded in avoiding potential pitfalls in the way that constitutions frame religion, it does not draw clear lines between religion and the state, and does not hide the tension between the two. On the contrary, the ambiguity of the relationship between them in the constitution may reignite constitutional debates, including effort put forth in this paper.

Morocco has succeeded in merging aspects of Islam in its constitutional framework without challenging the ultimate sovereignty of the constitution itself. The constitution worked to craft legal language that maintain the symbolic power of Islam without weakening the sovereign authority of the monarchy. Religion is bound by the constitution while the monarchy is above it.

Successive Moroccan constitutions perpetuate Islam as a trademark for the monarchy. They do not just place the monarchy at the center of the political authority, but tie it to Islam as well. Despite that, the inflated Islamic role of the monarchy did not imply that the country's policies reflected a theocratic regression by the regime. The goal was to create legitimacy and submission without a costly use of violence.

This political view of the constitution drives the dominance of the political path over a legal one in the constitutional interpretation of the relationship between religion and state, and allows the constitution to draw an authority that is independent from the standard Islamic jurisprudence, thus preventing the "Shariafication" of the laws. The constitutional text on religion does not grant it legislative authority in return for protection from critique and revision.

It is true that the absence of constitutional empowerment of Islamic Shariah is due to practical challenges, but the issue remains political at its core. The constitution allows religion, through legal and judicial venues, to enter the private realm, but without explicitly recognizing religious freedoms.

Meanwhile, it seems that the biggest evidence countering the thesis that religion falls within the private sphere, is its political effect which forms the chemical makeup of the monarchy's power. Therefore, the state's ultimate wager is to control the public aspect of religion rather than its individual aspect.