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# **The Right of Individuals to Access Constitutional Justice and Its Role in Protecting Rights and Liberties in Morocco**

Abdelkarim El Abdellaoui

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## **Abstract**

This study aims to highlight the gains in the right of individuals in Morocco to access constitutional justice by pleading the unconstitutionality of a specific statute. It looks at the regulation of this right and the conditions for the acceptance of such claims in comparison with other constitutional judicial systems, specifically the French constitutional judiciary, as well as the extent to which this mechanism helps to safeguard and protect rights and liberties. I use a comparative approach to identify similarities and differences between the Moroccan constitutional judiciary and its French counterpart, as well as to draw in the Egyptian constitutional judiciary whenever possible. The study adopts a legal approach to analyse constitutional and legal texts, and court rulings relevant to claims of unconstitutionality, examining the procedures and conditions for making such claims and their limits. The study finds that there are some difficulties that may hinder individuals in their attempt to access constitutional justice, such as frivolous lawsuits aimed only at prolonging litigation, especially given the potential for the proliferation of claims. The study demonstrates that individuals' access to constitutional justice is linked to their recognition of the need to make proper use of the unconstitutionality argument, in order to avoid flooding the court with frivolous suits.

**Keywords:** Claim of Unconstitutionality; Constitutional Judiciary; Judicial Review; Rights and Freedoms; Morocco

## **Introduction**

The subject of rights and freedoms is of concern for all constitutional legislators insofar as the constitution is the supreme law and guarantor of these rights and freedoms. Constitutional justice is a crucial consideration for the effective establishment of the rule of law, and the constitutional judiciary plays an important role in protecting citizens' rights by purging the legal system of unconstitutional statutes.<sup>1</sup>

In this context, a legal claim for the unconstitutionality of laws is important because of its function: protecting the rights and freedoms of individuals from violations resulting from unconstitutional legislation. Conforming with modern trends in constitutional justice, this mechanism allows citizens to access constitutional justice by arguing the unconstitutionality of laws.<sup>2</sup> The constitutional judiciary thus becomes the most important guarantor of the fundamental rights and liberties enshrined in the constitution, either by exercising prior review of laws before they are promulgated or a post-facto review of laws already enacted pursuant to lawsuits challenging their unconstitutionality.<sup>3</sup>

While most states recognise citizens' right of recourse to the constitutional judiciary to plead the unconstitutionality of laws, the Moroccan constitution's adoption of subsequent judicial review and its extension of this right to individuals is a transformative step towards constitutional justice. It puts citizens at the heart of the process of defending their rights and cements their awareness of their rights and obligations, which has the positive consequence of further consolidating the legal security and stability of the state.<sup>4</sup> A question arises here: as a basic safeguard to ensure that statutes conform with the principles and provisions of the constitution, to what extent does the mechanism for challenging the constitutionality of law serve to protect the fundamental rights and freedoms of individuals?

This major question generates a sub-question: could procedural restrictions on the unconstitutionality mechanism hinder its positive contribution to constitutional justice, and specifically in light of Draft Law 15-86?<sup>5</sup> This draft law spurred a debate that culminated in Constitutional Court Decision 18/70,<sup>6</sup> which declared some of its provisions unconstitutional.

In order to answer these questions, we must address the unconstitutionality mechanism and the controls and procedural limits placed on it in light of Article 133 of the 2011 constitution<sup>7</sup> and other relevant contexts, specifically the French Constitutional Council following the 2008 constitutional amendments. Among other reforms, the amendments expanded the review of the constitutionality of laws through a procedure known as the 'question of constitutional priority' (question de prioritaire de constitutionnalité), adopted in Article 61-1 of the French constitution, which entered into force with the organic law of 10 December 2009.<sup>8</sup>

A comparative approach will be used here to identify similarities and differences between the Moroccan constitutional judiciary and its French counterpart and to highlight their respective strengths and weaknesses. The Egyptian constitutional judiciary will be considered as well whenever possible and as necessary for the purposes of the research. A legal approach will be used to analyse constitutional and legal texts, as well as court rulings related to the mechanism for unconstitutionality pleas, whether in terms of the procedures and conditions for raising such claims or their limits.

Before we delve into the main issue of this study and its sub-question, we should understand what is meant by the term 'constitutional justice'. Constitutional justice has become a fundamental pillar throughout the world to strengthen the judicial protection of rights and freedoms, and it is key to the emergence of the constitutional state, which guarantees individuals the right of recourse to the constitutional judiciary, to present their claim and seek a remedy for

injustice, or infringement or violation of their rights.<sup>9</sup> At a seminar organised by the National Council for Human Rights (NCHR) in Morocco on the Constitutional Court, Dominique Rousseau defined constitutional justice as ‘that which is given to persons who appoint, monitor, and punish the constitutional inadequacy of actions by the public authorities, especially laws approved by parliament’.<sup>10</sup> Michel Fromont defines it as ‘a set of techniques and institutions that monitor the government’s relationship with parliament with the aim of protecting rights and freedoms’.<sup>11</sup>

### **Context of the Affirmation of Individuals’ Access to Constitutional Justice**

The political reforms in Morocco that followed the 2011 constitution rendered it necessary to safeguard the rights of citizens by moving from the mere constitutional recognition of specific rights and freedoms to the formulation and definition of practical mechanisms and guarantees for their protection, whether through specialised institutions or the intervention of citizens themselves. The 2011 constitution provides for a set of public rights and freedoms. Chapter Two, entitled Fundamental Rights and Freedoms, contains twenty-two articles that address various types of rights and freedoms, whether civil and political or economic, social, cultural, and environmental, as well as a set of privileges for members of society and its civic bodies. Regardless of how broad the scope of these rights and freedoms is (or, as some believe, how well they are detailed), and despite being set forth in the highest law of the land (the constitution), there remains a question about the guarantees for these rights.

Before discussing these guarantees, of which legal challenges to constitutionality is one of the most important, we should perhaps briefly review the development of the Moroccan constitutional judiciary. Historically in Morocco, post-facto political review has dominated, effected through the compulsory or optional examination of the constitutionality of organic and ordinary laws, international treaties, and the internal regulations of the two chambers of parliament, as well as the validity of the election of members of parliament and referendums. In contrast, judicial review of the constitutionality of laws has been lacking, either by way of a mechanism for secondary claims or direct litigation.<sup>12</sup>

The principle of judicial review in Morocco dates back to the constitution drafted in 1908, which gave the Council of Notables the task of reviewing all acts issued by the Council of the Nation.<sup>13</sup> Nevertheless, the principle was only put into practice with the 1962 constitution, the first after Moroccan independence. That constitution created the Constitutional Chamber of the Supreme Judicial Council, giving it limited jurisdiction to review the constitutionality of laws in the form of the prior review of both organic laws and parliamentary bylaws. The scope and limits of this process was later codified in the 1970 and 1972 constitutions.

With the 1992 constitution, judicial review advanced markedly. It was delegated to the Constitutional Council, a body independent of the ordinary judicial system with the authority to undertake an optional review of ordinary laws referred to it by specific political authorities, pursuant to specific conditions. This process was later enshrined in the 1996 constitution.<sup>14</sup>

With the adoption of the 2011 constitution, the edifice of judicial review in Morocco was completed. The Constitutional Council was elevated to a Constitutional Court, and the framers of the new constitution relaxed restrictions on optional judicial review to include the review of the constitutionality of international conventions. Moreover, the constitution combines prior political review of orders for the implementation of laws with post-facto judicial review; a litigant can make an argument for the unconstitutionality of a law to be applied in a dispute if the law infringes the rights and freedoms guaranteed by the constitution. Under the organic law on the Constitutional Court, the court's jurisdiction was expanded to include the review of the constitutionality of bylaws of councils regulated by organic laws.

We can thus identify three basic stages in the evolution of Morocco's constitutional judiciary: 1) the Constitutional Chamber, operating under the three constitutions of 1962, 1970, and 1972; 2) the Constitutional Council, operating under the 1992 and 1996 constitutions; and 3) the Constitutional Court created by the 2011 constitution.<sup>15</sup> As our topic here does not permit an extensive discussion of each of these stages, our focus will be on the establishment of the Constitutional Court, through which individuals can access constitutional justice. Morocco has been influenced by the French model of constitutional justice, which privileges political review and is wary of judicial review of the constitutionality of laws in fear of legal instability.<sup>16</sup> France only granted constitutional recognition to judicial review with the constitutional amendments of 2008 and Organic Law 1523/2009, which granted the Constitutional Council the power of post-facto review of the constitutionality of laws pursuant to secondary pleadings of unconstitutionality in the framework of the so-called 'question of constitutional priority'.<sup>17</sup> This raises a question about the innovations brought about by the Constitutional Court.

### *The Constitutional Court experience*

The Moroccan experience of constitutional justice has been characterised by the predominance of prior review political review, entailing the compulsory or optional examination of the constitutionality of laws, international treaties, and the bylaws of the House of Representatives and the House of Councillors, as well as the review of the validity of the election of members of parliament and referendum processes.<sup>18</sup>

No Moroccan constitution from 1962 to 1996 allowed individuals to directly challenge the constitutionality of a particular law before the Constitutional Chamber and later the Constitutional Council, whether by way of an original action (a suit for annulment of a law) or a secondary claim (seeking to bar the application of a law). This changed with the 2011 constitution, Article 129 of which provides for the creation of a Constitutional Court, whose jurisdiction is defined by the constitution and the provisions of organic laws. The new constitution thus gave the Constitutional Court jurisdiction over matters not covered in previous constitutions, allowing it to consider every 'pleading of the unconstitutionality of a law raised during a dispute', or what is known as 'review by means of a claim'.<sup>19</sup>

The 2011 constitution upgraded the constitutional review of laws from the Constitutional Council to the Constitutional Court, which now exercises significant new competencies, some

of which are an expansion of its original competencies, such as the prior review of the constitutionality of international treaties, and some of which changed the nature of the constitutional judiciary. Whereas previously its power of review was limited to the prior political review of orders for the implementation of laws,<sup>20</sup> the 2011 constitution gave it a set of new competencies, most importantly the authority to adjudicate the constitutionality of a law after its enactment during the consideration of a dispute currently before a court if one of the litigants argues that a law applied in the dispute infringes constitutionally guaranteed rights and freedoms. In other words, if during a lawsuit, one of the parties argues that the applicable law in the subject matter at hand may infringe the rights and freedoms guaranteed by the constitution, the court must suspend consideration of the suit and wait for a ruling of the Constitutional Court, after referring the matter to it. Thus, as a mechanism for post-facto judicial review, a pleading of unconstitutionality is a procedural claim made by a litigant in a case before a competent court challenging the constitutionality of a statute related to the case being litigated, in accordance with the relevant legal procedures for each piece of legislation.<sup>21</sup>

As judicial review has proven its efficacy in other contexts, citizens' recourse to constitutional justice via a claim of unconstitutionality has become a recognised right in most countries, with most states having affirmed it and passed enacting legislation. Morocco, too, has adopted the post-facto judicial review of the constitutionality of laws by granting individuals the right to make such a claim. In my view, this constitutes a qualitative shift in the achievement of constitutional justice, putting citizens at the heart of the process of pro-actively securing their rights.<sup>22</sup>

In France, which inspired the Moroccan constitutional framers in many respects, the 2008 constitutional amendments, which entered into force in March 2010, gave the Constitutional Council new jurisdiction over litigants pleading the unconstitutionality of laws, or the so-called question of constitutional priority. The 2011 Moroccan constitution followed suit,<sup>23</sup> giving individuals before the ordinary and administrative courts the right to claim that legislative provisions that violate their constitutional rights and freedoms are unconstitutional.<sup>24</sup>

The importance of the French experience is that it took place in a more advanced political, juridical, philosophical, and regional context that includes, for example, the European Court of Human Rights.<sup>25</sup> The Moroccan constitutional framers drew lessons from the French context, thus contributing to the success of the mechanism in Morocco, though it faces many more challenges than its French counterpart.

In addition to the influence of the paradigm shift in French constitutional justice, the observer will note that in the field of the constitutional judiciary, the authors of the Moroccan constitution were greatly influenced by the Anglo-Saxon model, which relies on the principle of judicial review of the constitutionality of laws and the actions of the public authorities.

Given the administrative courts' limited capacity to protect citizens from arbitrary state action, rights advocates demanded the adoption of new constitutional mechanisms to promote and safeguard rights and freedoms. Despite the positive role of the administrative judiciary in this respect and in encouraging individuals to confront the excesses and abuses of the

administrative authorities, the practical difficulties made it necessary to establish a workable mechanism to challenge unconstitutional laws, and not merely unlawful administrative decisions.<sup>26</sup>

The introduction of a mechanism to plead the unconstitutionality of laws is in keeping with the privileged status accorded to rights and freedoms in the 2011 constitution, which has led some to regard it as the constitution of rights and liberties par excellence. The constitution not only upholds these rights and freedoms, it also puts basic guarantees in place to protect them from excesses and abuses; establishing a set of mechanisms and guarantees to enable citizens to exercise the rights enshrined in the constitution, in line with Morocco's international obligations. This brings us to the question of the limits and procedural guarantees for claims of unconstitutionality as established by the 2011 constitution.

### **The Regulations and Specificities of Pleadings of Unconstitutionality in Law 15-86**

The institution of a mechanism for arguing the unconstitutionality of laws is significant because it protects rights and freedoms against legislative excesses. After all, any legislation that does not preserve human rights and dignity is worthless.<sup>27</sup> Allowing individuals to challenge the constitutionality of a statute that is being applied in a dispute before the subject-matter courts will end the situation whereby laws evade any constitutional scrutiny, which could pose a real threat to rights and freedoms. The claim of unconstitutionality is an essential means of post-facto judicial review provided to individuals by the Moroccan constitution. What controls and general procedural limits are placed on this mechanism in light of Draft Organic Law 15-86, especially in the wake of the controversy and debate that the bill spurred between the Constitutional Court and the legislature?<sup>28</sup>

The claim of unconstitutionality is a specific one. It depends on the existence of a law or regulation that is to be applied in a dispute being considered by a subject-matter court, according to which a litigant may challenge the constitutionality of that statute, in accordance with the applicable legal procedures for each statute, if the litigant finds that the statute infringes their rights or freedoms.

The model for constitutional justice, or judicial review of the constitutionality of laws, can be traced back to the Supreme Court in the famed case of *Marbury v. Madison* of 1803, when Chief Justice John Marshall ruled to strike down a federal law as unconstitutional.<sup>29</sup>

This type of judicial review initially emerged and developed in the United States and United Kingdom before spreading to Europe with the constitution of Austria of 1920. It was then adopted by some Arab countries, led by Kuwait in the 1962 constitution, followed by the Egyptian constitution of 1971, the Qatari, Yemeni, and Sudanese constitutions, and finally the constitutions of the Arab Spring revolutions in Morocco, Tunisia, Jordan, Syria, and Algeria.

In 2008, France amended its constitution. The amendments introduced several reforms, including the extension of judicial review to the constitutionality of laws via the question of constitutional priority, adopted in Article 61-1 of the French constitution. It entered into force

with the organic law of 10 December 2009, which amended the law of 7 November 1958 governing the Constitutional Council. On 16 February 2010, a decree was issued setting forth the procedures for raising a question of constitutional priority before various courts. Under this amendment, the French Constitutional Council exercises two types of constitutional review: prior review, by which laws are referred to the council for consideration of their constitutionality before being enacted, and subsequent review, by which laws are referred to the council for consideration of their constitutionality after enactment.

Returning to the 2011 Moroccan constitution, Article 133 states, ‘The Constitutional Court is competent to consider every pleading of the unconstitutionality of a law raised during consideration of a case, if one of the parties argues that the law to be applied in the dispute infringes the rights and freedoms guaranteed by the constitution. An organic law shall define the conditions and procedures for the application of this article’.

According to the constitutional provision, then, the conditions and procedures for applying this article require the enactment of an organic law setting forth the procedures for raising claims of unconstitutionality before various types of courts and defining the stages and procedures for referral to the Constitutional Court. Who has the right to do this? And what rights and freedoms can form the basis for a pleading of unconstitutionality?

In July 2016, Organic Law 15-86 setting forth the exercise and procedures of the mechanism for the claim of unconstitutionality was brought to the House of Representatives,<sup>30</sup> which ratified the law on a first reading in August 2017, and then again in February 2018 after a second reading following the introduction of amendments proposed by the House of Councillors. It was subsequently referred to the Constitutional Court, which ruled the law unconstitutional in Decision 18/70 of 6 March 2018.<sup>31</sup>

Leaving aside the details of the decision and the articles of the law the court deemed constitutional or unconstitutional, a new bill was drafted in light of the Constitutional Court’s decision, considering both the substantive and formal conditions for a pleading of unconstitutionality. Regarding parties who have the right to plead unconstitutionality, under the third paragraph of Article 133 of the Moroccan constitution, every person who is a party to a lawsuit before a court of the kingdom has the right to argue the unconstitutionality of an existing law whose application in the dispute would prejudice one of the rights and freedoms guaranteed by the constitution.<sup>32</sup>

This means that the framers of the constitution did not give all citizens the right to argue the unconstitutionality of laws, but only litigants, specifically the plaintiff and defendant, or claimant and defendant, in civil suits and the civil official in public lawsuits. The constitution thus denies some parties the right to raise this claim, first and foremost the Public Prosecution. In contrast, the French constitution did grant the Public Prosecution this right, following a juridical and parliamentary debate spurred by the question of constitutional priority.

It should be noted here that the French Public Prosecution has never made a pleading of unconstitutionality, but has limited itself to expressing its opinion of such claims, which has considerable weight.<sup>33</sup> However, the Moroccan Constitutional Court, in Decision 18/70,

confirmed the Public Prosecution's right to plead unconstitutionality, stating that under the codes of civil and criminal procedure and other statutes, the Public Prosecution is considered a party to litigation who, with other main parties to a case, meets the conditions of standing and interest. Since the Public Prosecution is a party to public lawsuits, it is included in the expression 'plaintiff or defendant'. At the same time, although parties to the case have the option to make such a claim, ordinary judges cannot make the unconstitutionality argument of their own accord; in contrast, third parties with an interest in the claim can intervene in the constitutional suit, including before the Constitutional Court, provided that the claim has been raised by one of the parties to the suit.<sup>34</sup>

However, some people assert that the Public Prosecution has no right to make a claim of unconstitutionality, reasoning that it is not a litigant like others.<sup>35</sup> The Public Prosecution defends the laws in force. As such, it is inconceivable that it could, of its own accord, argue for the unconstitutionality of a specific law; rather, it can only express its opinion of a specific claim, either in opposition or support, in a written, reasoned brief, or leave the issue to the subject-matter judge. That is, the main role of the prosecution, according to this view, is expressing an opinion on the claim of unconstitutionality. And it must play this role with the utmost care, as the prosecution essentially defends laws that are compatible with the constitution. Like others, it is bound by Article 6, which states in its third paragraph that 'the constitutionality of legal rules, their hierarchy, and the duty to publish them shall be considered binding principles'.<sup>36</sup> In fact, it is inconceivable that the Public Prosecutor's Office could support a claim of unconstitutionality of a law on the basis of which it has initiated legal action or presented grounds for its application.<sup>37</sup>

On the other hand, the French constitution prohibits subject-matter judges from raising the issue of constitutional priority of their own accord, even if the statute clearly violates the constitution, placing the burden of making the claim on litigants alone. In doing so, it intended to deny the question of constitutional priority of the status of a public order issue. In contrast, the Egyptian constitutional judiciary considers the claim of unconstitutionality to be a matter of public order; judges must therefore raise the claim themselves during any stage of a lawsuit, even if the interested party itself waives it.<sup>38</sup>

Based on the foregoing, it can be said that the claim of unconstitutionality is a means of post-facto judicial review, undertaken after a law enters into force; it is a mechanism by which the Moroccan constitution allows individuals to challenge the unconstitutionality of a statute. In other words, this claim is available to litigants with the proper standing and interest and when the matter pertains to the violation of the rights and freedoms guaranteed by the constitution.<sup>39</sup>

In this regard, the Moroccan constitutional judiciary clarified, in Decision 18/70 issued on 6 March 2018, that the claim of unconstitutionality can be raised during the consideration of any case—that is, before Moroccan courts of all kinds and degrees, including the Military Court and the financial courts in the exercise of their jurisdiction, as well as the Constitutional Court itself during the adjudication of parliamentary electoral disputes.<sup>40</sup>

It follows that a pleading of unconstitutionality is not allowed with respect to the provisions of the organic laws of both houses of parliament, on the grounds that their constitutionality has already been determined, except in the event of a change in the circumstances of the law or of fact. The same applies to laws that have been subject to previous review, while consideration of the constitutionality of decrees does not fall within the jurisdiction of the Constitutional Court, either as part of prior or subsequent review, even if it relates to the electoral process.

The framers of the Moroccan constitution were apparently inspired by the French constitutional judiciary and followed its approach. Article 61-1 of the French constitution, amended on 23 July 2008, puts a specific restriction on the raising and acceptance of a question of constitutional priority, stating that it concerns only statutory provisions that violate the rights and freedoms guaranteed by the constitution—that is, it only covers acts issued in the form of legislation. Accordingly, the scope of the mechanism does not extend to regulations and decrees issued by the executive branch, whose unconstitutionality cannot be challenged. The situation in Egypt is somewhat better than either Morocco and France. The Egyptian Supreme Constitutional Court has made all executive regulations subject to constitutional review, the same as laws enacted by the legislature. The Egyptian constitution defines the scope of unconstitutionality pleadings as legislative statutes and regulations that are contrary to the constitution, including principles, provisions, rights, and liberties, whatever their type and nature, as long as they are set forth in the body of the constitution or its preamble. Thus, the scope of the unconstitutionality claim in Egypt is broader and more comprehensive than in either Morocco or France.<sup>41</sup>

### **Procedural Aspects of the Unconstitutionality Claim**

The mechanism for unconstitutionality pleadings falls within the sphere of legal challenges and is therefore required to follow regular court procedures. Pursuant to Draft Organic Law 15-86 and Constitutional Court Decision 18/70 on the constitutionality of the bill, the claimant arguing unconstitutionality must observe a number of formal and substantive requirements. Article 5 of the organic law sets forth formal and substantive conditions for the acceptance of the pleading,<sup>42</sup> requiring the claimant to submit the pleading of unconstitutionality in the form of a separate, reasoned, written brief attached to supporting documentation and evidence.<sup>43</sup>

The framers of the constitution required the submission of an independent, written, reasoned brief for an unconstitutionality pleading for two reasons: first, to separate the treatment of the claim from the original dispute and second, to allow the court to verify the seriousness of the claim. The claimant's precise identification of the statute in question and the ways it violates the rights and freedoms guaranteed by the constitution would allow the courts to ascertain the merit of the unconstitutionality claim.

In this context, the Egyptian legal system seems simpler and more flexible than its French and Moroccan counterparts. These latter two systems both require the claimant to set forth the reasons for the pleading of unconstitutionality to enable an assessment of its seriousness. The

Egyptian legislator is more flexible in that it does not require the claim of unconstitutionality to be submitted in a brief independent of the original claim, allowing the argument to be raised in the original case pleading itself, as one of many claims in the lawsuit. The Egyptian system also allows the claim of unconstitutionality in the minutes of the hearing, during the subject-matter judge's consideration of the original case, provided that the litigant making the claim clearly states the argument to avoid ambiguity.<sup>44</sup>

As regards a lawyer raising the claim, the Constitutional Court of Morocco, in its consideration of Draft Organic Law 15-86 on the claim of unconstitutionality, ruled that Article 5 of the bill did not contravene the constitution, provided that it was interpreted as giving the claimant the freedom to choose whether or not to rely on a lawyer to sign the pleading. Litigants' use of a lawyer in cases of unconstitutionality appears to be a key issue, at least before the Constitutional Court, due to the exchange of written briefs and oral arguments.<sup>45</sup>

As regards the payment of a special fee for the pleading, unconstitutionality claims, like annulment proceedings before the administrative courts, which are exempt from fees, can be considered to serve the public interest of purging the legal code of a law that contravenes constitutional rights.<sup>46</sup> Accordingly, such claims must also be exempted from fees.

In this regard, the NCHR, in its brief on the pleading of unconstitutionality, supported the exemption from judicial fees, basing its opinion on General Comment 32 of the Human Rights Committee of 2007 on the interpretation of Article 14 of the International Covenant on Civil and Political Rights, which states in one of its paragraphs that imposing fees on the parties *de facto* deprives them of access to justice.<sup>47</sup>

In this respect, although Article 133 of the Moroccan constitution recognised the right of all litigants to access constitutional justice, it did not adopt the mechanism of pleading unconstitutionality directly before the Constitutional Court, as there is no direct action in Morocco, unlike Egypt, Germany, Spain and other countries. If individuals have the right of access to constitutional justice, it is inconceivable that all claims of unconstitutionality would reach the Constitutional Court absent any way to filter them in order to ascertain their merit. Otherwise, this could result in a huge number of claims, which would adversely impact the Constitutional Court's other competencies. Yet, this poses a number of challenges to individuals' access to constitutional justice, some related to the nature of judicial review itself and others related to practical considerations. Opening up recourse to the Constitutional Court—though it is an important guarantor of rights and freedoms and thus a tangible advance in the consolidation of the rule of law—could end up flooding various courts if the number of lawsuits increases significantly or the claims are without merit.<sup>48</sup> The consequent proliferation of petitions and the backlog of cases referred to the Constitutional Court thus raises the problem of reconciling the protection of rights and freedoms with judicial efficiency and proceedings of reasonable duration. The experiences of some constitutional courts bear witness to this problem, especially in states that allow direct litigation or those that have expanded the scope of constitutional grievance to include even decisions issued by the executive and judicial authorities. The German Constitutional Court, for example, receives some 6,000 grievances

annually, of which only 2.4 per cent end in a positive result; that is, more than 97 per cent of these grievances are ultimately denied.<sup>49</sup>

The process of assessing merit in claims of unconstitutionality and streamlining them to ensure judicial efficiency can therefore contribute to the achievement of constitutional justice. In this regard, Draft Organic Law 15-86 on unconstitutionality claims assigned the filtering process to the Court of Cassation, giving it a dual role: it rules directly on the claims raised in case before it as well as on claims referred to it by first- or second-instance courts. In this case, it assesses the seriousness of the claim and informs the court before which the claim was raised within three months, also notifying the Constitutional Court and attaching the briefs and conclusions of the parties to the case.<sup>50</sup>

However, the Constitutional Court, in Decision 18/70 issued on 12 March 2018, ruled that tasking the newly established body of the Court of Cassation with assessing the merit of claims essentially turns it into a preliminary reviewer of constitutionality, given the difficulty of determining the formal elements of merit and because assessments of merit are linked to substance rather than form.<sup>51</sup> The court thus ruled that the filtering mechanism provided for in Article 11 of the draft organic law setting the conditions and procedures for claims of unconstitutionality was unconstitutional.<sup>52</sup>

According to Constitutional Court, if the filtering mechanism were entrusted to the Court of Cassation, it could erode the Constitutional Court's exclusive authority over post-facto review, thus depriving it of its full prerogatives by pushing it to begin considering the substance of admissible claims absent any formal review.

Based on this reasoning, the Constitutional Court concluded that balancing the right to raise a claim in a case currently before a court against the Constitutional Court's prerogative to rule on the form and substance of the constitutionality claims referred to it and the requirements of judicial efficiency, the proper administration of justice, speedy adjudication of claims, and timely decisions require the legislator to limit the scope of the conditions for filing claims that the judge must verify, such that they do not constitute a preliminary assessment of constitutionality, and to create a filtering mechanism in the Constitutional Court, with its composition and rules defined in an organic law.<sup>53</sup>

Based on these facts and considerations, and based on the premise that the Constitutional Court has general jurisdiction to hear every claim of unconstitutionality, which includes a consideration of the form and substance of claims, and since there is nothing in the constitution that prescribes carving this jurisdiction out of the Constitutional Court's comprehensive mandate or justifies its transfer to another body to assist the constitutionally specified body, the scope of the draft organic law must be limited solely to formal conditions and procedures.

The Constitutional Court implicitly concludes that the jurisdiction of the Court of Cassation extends only to: 1) examining the legality of claims, in the sense of examining the formal procedures related to the filing of the claim and its relevance to the original case; and 2) considering the centrality of prior constitutional review and the Constitutional Court's exclusive jurisdiction over post-facto review,<sup>54</sup> under the first paragraph of Article 13 of the draft organic

law, adjudication of the suit before the court is suspended pending the judge's decision to refer the claim or the Constitutional Court's decision to deny the claim.

What is new in this context is that with Decision 18/70, the Constitutional Court considered the establishment of a body in the Court of Cassation to adjudicate the seriousness of claims and the referral of the case to the Constitutional Court provided for in Article 11 of the Draft Organic Law 15-86 to be inconsistent with the constitution, insofar as it would make the Cassation Court body a passive screener of constitutionality, given the difficulty of defining the elements constitutive of seriousness and the fact that assessing merit is more about substance than form.<sup>55</sup> Thus, the rule is that the Court of Cassation should refer both the substance and form of claims to the Constitutional Court after verifying that conditions for raising the claim have been met. These do not constitute any sort of preliminary assessment of constitutionality, but are rather formal conditions such as standing, interest, the relevance of the claim to the original suit, the written brief, the payment of judicial fees, etc. Examination by the subject-matter courts does not require in-depth research or allow for a large margin of discretion; unconstitutionality is sufficient cause for the subject-matter judge to refer the claim to the Constitutional Court.<sup>56</sup>

In this context, it can be said that the requirement of a separate, reasoned brief requires the subject-matter courts to determine whether the conditions for making a claim have been met, ensuring that the statute whose constitutionality is contested is applicable in the original dispute, and then that the constitutionality of the statute has not previously been reviewed or, if it has, that circumstances have changed. Finally, the subject-matter courts may examine whether the brief contains a superficial or in-depth analysis of how the law violates a right guaranteed by the constitution or Morocco's international obligations. The courts must thus examine the outward seriousness of the claim without delving too deeply into the substance, while at the same time avoiding superficiality.

In contrast, the French constitutional judiciary makes a distinction between the role of the subject-matter judge in the lower courts and the role of the judge in the Council of State and the Court of Cassation. While the judge in the lower courts is required to verify that the claim is not devoid of merit, the highest judicial bodies—the Council of State and the Court of Cassation—must verify the seriousness of the claim.<sup>57</sup> French jurisprudence explicitly recognises that the two types of judicial bodies undertake varying degrees of analysis of the substance of the claim: while lower-court judges merely assess a minimum degree of seriousness, judges on the Council of State and the Court of Cassation examine the elements to clearly confirm the seriousness of the claim.

According to the Moroccan constitution, the subject-matter judge merely refers the matter to the Constitutional Court and suspends consideration of the dispute before it, pending adjudication of the claim, starting from the date of the judicial decision authorising the plaintiff to present their claim before the Constitutional Court.

Litigation proceedings before the Constitutional Court are public, except in cases where the court decides to hold confidential hearings due to circumstances that the court is free to assess,

either on its own initiative or in response to the request of one of the parties, in order to preserve the public nature of the proceedings, which is a principle of due process that should only be diverged from for reasons of public interest or circumstances particular to the case. In France, however, the public nature of proceedings has been extended to the entire world. Direct audio-visual recordings are made of hearings, which are held every Tuesday in a chamber of the Constitutional Council, and the recordings are posted to the council's website.<sup>58</sup> Litigation procedures before the Moroccan Constitutional Court tend to be written; briefs responding to and commenting on the pleadings presented by the parties to the case are exchanged, and the prime minister, the speaker of the House of Representatives, and the speaker of the House of Councillors may present written observations on the substance of the claim.

After the various stages of litigation are concluded, the constitutional judge rules on the claim of unconstitutionality of the statute to be applied in the case before the subject-matter judge and which infringes the rights and freedoms of the claimant. If the constitutional judge finds that the statute conforms with the constitution, they rule to deny the claim. If, in contrast, the judge finds that the statute contravenes the constitution, they rule it unconstitutional; the court before which the claim was raised, the king, the prime minister, and the heads of the House of Representatives and the House of Councillors are all notified of the decision, as are the parties to the case.

A question arises here: what is meant by the rights and freedoms that must not be infringed by any statute? When we consider that constitutional provisions in all states of the world provide for rights and freedoms in a general, concise manner, the question becomes more urgent. Do these rights and freedoms refer to the various provisions and principles contained in the preamble and the first two chapters of the constitution, which are devoted to fundamental rights and freedoms? In other words, can individuals plead unconstitutionality with regard to the curtailment of rights not explicitly provided for in the constitution? After all, the pleading must claim a harm that infringes rights expressly set forth in the body of the constitution. To answer these questions, we must clarify the list of rights provided for in the Moroccan constitution, as well as those set forth in international conventions ratified by Morocco. It will also be helpful to bring comparative constitutional law to bear, especially the French system and its approach to rights when addressing the question of constitutional priority.

The rights guaranteed in the 2011 constitution—dubbed ‘the constitution of rights’—go beyond those enumerated in Chapter Two on rights and freedoms to include the principles and rights forth in the preamble and in other chapters.<sup>59</sup> In the preamble to the constitution, we find a tacit commitment to fundamental rights based on the principles of participation and pluralism, as well as an explicit pledge that the Kingdom of Morocco—an active member of international organisations—shall comply with the principles, rights, and duties set forth in duly ratified international conventions and an affirmation of its commitment to internationally recognised human rights.<sup>60</sup> The kingdom also commits to protecting and promoting human rights and international humanitarian law systems and to contributing to their development, taking into account the universal nature and indivisibility of these rights. It also commits to giving

international conventions, as ratified by Morocco and within the framework of the provisions of the kingdom's constitution and laws and its long-standing national identity, precedence over national legislation. It further affirms its commitment to ensuring that national legislation concords with such conventions, as required by ratification.<sup>61</sup>

It should be noted that there is no dispute as to the legal value of the preamble to the constitution. It is part of the constitutional reference for rights and freedoms, and thus a claimant may challenge the constitutionality of any law that they consider to violate the principles of pluralism or equality. This preamble also allows for a claim related to the rights and freedoms contained in the international conventions ratified by Morocco, which comports with the principle of the supremacy of international treaties. The Spanish constitutional judiciary has adopted this same approach, expanding the definition of provisions guaranteeing public rights and freedoms to include international conventions, the constitution and organic laws, as well as ordinary laws, decrees, and bylaws.<sup>62</sup> The same is true of the French constitutional judiciary: the Constitutional Council has said that the list of constitutionally guaranteed rights and freedoms must be drawn from all the elements of the constitutional texts, which consists of the constitution itself, its preamble, and texts it refers to, such as the Environment Charter—issued in 2004 and incorporated into the French constitution with the constitutional amendments of 2008—and the Universal Declaration of Human and Citizen Rights.<sup>63</sup>

Returning to the Moroccan constitution, we find that its various chapters contain several other rights. Chapter One refers to principles that can be used as a reference to argue against any provisions, or interpretation of them, that violate substantive rights, including the principles of freedom of worship, equality before the law, the supremacy of constitutional rules, and the non-retroactivity of laws, as well as the freedom to establish parties and other rights.<sup>64</sup> Chapter Two sets forth other rights or affirms those referenced in the preamble, including rights that entail obligations on the authorities and rights that entail obligations to exercise care (although this is not the place to detail these rights and freedoms in full).

At this level, the claim of unconstitutionality may thus offer an opportunity to ensure that national legislation is adapted to conform with the rights and freedoms set forth in international conventions.<sup>65</sup> The NCHR considers the pleading of unconstitutionality to be broadly applicable, adopting an expansive, comprehensive definition of the phrase 'the rights and freedoms guaranteed by the constitution', one that encompasses internationally recognised rights and freedoms, including those guaranteed by international covenants and conventions ratified by Morocco.<sup>66</sup> The NCHR is to be commended for this vision, as it gives practical force to Morocco's ratification of international conventions with the goal of bringing domestic legislation in line with Morocco's international obligations.<sup>67</sup> In this context, we find that the 2011 constitution incorporated many principles from international human rights conventions into its provisions, including the Rome Statute of the International Criminal Court. For example, compare the last paragraph of Article 22 of the constitution, which states, 'The crime of genocide and other crimes against humanity, war crimes, and all gross and systematic violations of human rights are punishable by law', with Article 5 of the Rome Statute.<sup>68</sup>

Nevertheless, part of the Moroccan constitutional judiciary does not consider international conventions to take precedence over the Moroccan constitution, but rather deems them of equal standing, invoking the passage in the preamble that duly ratified international conventions take precedence over national legislation ‘within the scope of the provisions of the constitution, the laws of the kingdom, and its long-standing national identity.’ This argument holds that the phrase ‘the laws of the kingdom’ should not be understood to mean its general laws, but specifically the laws of the kingdom derived from the Islamic religion.<sup>69</sup> Since all the rights and freedoms contained in the constitution are fundamental and indivisible, it is the Constitutional Court, through the cases that will be brought before it, that will essentially define the content and limits of these rights and freedoms, especially given that they are formulated in broad terms.

## **Conclusion**

In creating a mechanism to challenge the constitutionality of law through the Constitutional Court, which it made responsible for post-facto judicial review, the Moroccan constitution adopted the approach of the French constitutional system, which followed the system of political review until 2008, when constitutional amendments were approved establishing the question of constitutional priority. Under the 2011 Moroccan constitution, the Constitutional Court has exclusive jurisdiction over the review of the constitutionality of laws, whether prior review (political review) or subsequent judicial review (a secondary claim to bar the application of a law). The constitution did not assign this jurisdiction to the courts, but entrusted it exclusively with the Constitutional Court. This was a first step towards strengthening constitutional justice and individuals’ access to it, thus safeguarding the rights and freedoms guaranteed by the constitution and protecting them from infringement. To this end, it established a legal and procedural framework regulating the mechanism, represented by Draft Organic Law 15-86, on which the Constitutional Court issued Decision 18/70, after the bill was referred to it to ensure its conformity with the provisions of the constitution.

In this sense, constitutional justice, which aims primarily at protecting the fundamental rights and freedoms of citizens, is achieved by purging the legal code of flaws, including constitutional flaws. This in turn contributes to legal security and ensures the stability of individuals’ legal status and their ability to confront statutes that threaten their interests. The mechanism to allow challenges to the constitutionality of laws may also lead to a further expansion of the scope of constitutionality to other branches of law. It will additionally promote greater convergence between international law, especially international human rights law, and constitutional law, due to the anticipated increase in efforts to align the kingdom’s constitution and laws with international conventions. In making such conventions superior to national legislation, the Moroccan constitution paved the way for an expansion of the content and scope of rights and freedoms, as well as enriching Moroccan constitutional jurisprudence.

Our review of the mechanism for unconstitutionality claims, based on the 2011 constitution, and the conditions and procedures for its operation laid out in Draft Organic Law 15-86 and Constitutional Court Decision 18/70 on the constitutionality of the bill's provisions, concluded that there are some questions about the extent to which the mechanism protects fundamental rights and freedoms and thus individuals' access to constitutional justice. The most significant issue likely to arise in Morocco is how to deal with frivolous or arbitrary claims that only aim to gain time and waste judicial resources. It is thus important to consider judicial efficiency and timeliness, especially as cases before the Constitutional Court pile up and claims potentially proliferate. The experiences of other constitutional courts are an object lesson in this regard. The Spanish Constitutional Court, for example, receives thousands of grievances annually, most of which are denied. The same is true of the German Constitutional Court and the Supreme Constitutional Court in Egypt, which allows petitioners to make claims of the unconstitutionality of not only legislative statutes, but decisions issued by the executive and judicial authorities as well.

In this context, the Constitutional Council of France, even with the filtering process conducted by the Court of Cassation and the Council of State before referring a question of constitutional priority to the Constitutional Council, issued 605 decisions in the eight years following the establishment of the unconstitutionality pleading, compared to 754 decisions in 58 years related to the political review of the constitutionality of laws.

Accordingly, the actual use of the mechanism for unconstitutionality claims as a guarantee for the preservation of rights and freedoms depends on fostering appropriate conditions for its deployment, in addition to the aforementioned conditions and procedures. Perhaps foremost among these is training judges, lawyers, and research professors to enable them to keep abreast of developments pertinent to the experiment and to study comparative judicial rulings and the interpretations of international, regional, and national courts with the aim of submitting briefs, analysing such jurisprudence, and ruling on or commenting on it. This is imperative. Moreover, the success of the experiment depends on citizens' realisation of the importance of the mechanism and the need to use it properly, in order to avoid flooding the courts with frivolous claims. This could place an additional burden on the courts, especially following Constitutional Court Decision 18/70, which recognised the court's exclusive responsibility to assess the seriousness of claims; this will inevitably affect its ability to process claims in a timely, reasonable manner.

### **About the Author**

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<sup>1</sup> Oufqeir, Fadila (2022) 'Da'wa al-Daf' bi-'Adam Dusturiyat al-Qawanin fi al-Qada' al-Dusturi al-Jaza'iri min al-Majlis al-Dusturi ila al-Mahkama al-Dusturiya' [Petitions Claiming the Unconstitutionality of Laws in Algerian Constitutional Law from the Constitutional Council to the Constitutional Court], *Majallat al-Dirasat al-Qanuniya* 8 (1), p. 141.

<sup>2</sup> Zaanoun, Abd al-Rafie (2019) 'Wuluj al-Afrad li-l-'Adala al-Dusturiya wa-Dawruh fi Himayat al-Huquq wa-l-Hurriyat bi-l-Maghrib' [Individuals' Access to Constitutional Justice and Its Role in Protecting Rights and Freedoms in Morocco], *Majallat Jil Huquq al-Insan* 36 (11).

<sup>3</sup> Kiwa, Abd al-Moneim (2016) 'al-Quyud al-Dusturiya fi Tahdid al-Qanun, al-Dawabit, al-Huquq wa-l-Hurriyat al-Asasiya fi al-Dasatir al-Haditha bi-l-Buldan al-'Arabiya' [Constitutional Restrictions in Defining Law, Regulations, and Basic Rights and Freedoms in Modern Constitutions in Arab States], in *al-Kitab al-Sanawi li-l-Munazamma al-'Arabiya li-l-Qanun al-Dusturi* [Yearbook of the Arab Organisation for Constitutional Law] (Tunisia: Arab Organisation for Constitutional Law), p. 143.

<sup>4</sup> Belfaqih, Abd al-Haq (2019) *Da'wa al-Daf' bi-'Adam Dusturiyat Nass Tashri'i Ma Bayn Ru'yat al-Musharri' al-Maghribi wa Tadakhkhul al-Qadi al-Dusturi: Dirasa Muqarina* [Petition Claiming Unconstitutionality of a Legislative Statute between the Vision of the Moroccan Legislator and the Intervention of the Constitutional Judge: A Comparative Study] (Tangiers: Sabartil Press, 2<sup>nd</sup> edition), p. 17.

<sup>5</sup> Draft Organic Law 15-86 defines the conditions and procedures for making a claim of unconstitutionality. The final version was referred to the Constitutional Court by a letter from the prime minister on 14 February 2018.

<sup>6</sup> Constitutional Court Decision 18/70 on Draft Organic Law 15-86, was issued on 6 March 2018 and published on the court's website.

<sup>7</sup> Article 133 of the Moroccan constitution states, 'The Constitutional Court shall be competent to consider all claims of the unconstitutionality of a law raised during the proceedings in a case when one party argues that the law to be applied in the dispute infringes the rights and freedoms guaranteed by the constitution. An organic law shall define the conditions and procedures for the application of this article'.

<sup>8</sup> Basic Law 1523/2019, issued on 1 December 2010, on the conditions and procedures for raising a question of constitutional priority in France.

<sup>9</sup> Salman, Abd al-Aziz (2009) *Nuzum al-Raqaba 'ala Dusturiyat al-Qawanin: Dirasa Muqarina* [Systems for Reviewing the Constitutionality of Laws: A Comparative Study] (Dar Saad Samak for Legal and Economic Publications), p. 19.

<sup>10</sup> NCHR (2012) 'Le processus de reflexion sur la cour constitutionnelle', accessed 27 October 2022, [www.cndh.org.ma](http://www.cndh.org.ma).

<sup>11</sup> Nasir, Ilham (2021) 'al-'Adala al-Dusturiya' [Constitutional Justice], in *al-Mawsu'a al-Siyasiya* [Political Encyclopaedia], accessed 27 October 2022, [www.political-encyclopedia.org](http://www.political-encyclopedia.org).

<sup>12</sup> Zaanoun, Abd al-Rafie, p. 112.

<sup>13</sup> Some constitutional jurists in Morocco believe that the precursors to the idea of the constitutional judiciary in Morocco came with the constitution drafted by Moroccan nationalists in 1908, which they demanded that Sultan Abd al-Hafiz adopt. That constitution gave the Council of Notables 'the task of reviewing laws issued by the Council of the Nation' and stated that such laws 'cannot be implemented until after ratification by the Council of Notables'.

<sup>14</sup> Al-Madur, Rashid (2016) 'Tatawwur al-Raqaba al-Dusturiya fi al-Maghrib: al-Ghurfa al-Dusturiya, al-Majlis al-Dusturi, al-Mahkama al-Dusturiya' [The Evolution of Constitutional Review in Morocco: The Constitutional Chamber, the Constitutional Council, the Constitutional Court], *Majallat Dirasat Dusturiya* 3 (6), p. 11.

<sup>15</sup> Al-Adbelaoui, Abd al-Karim (2020) *Muhadarat fi al-Qanun al-Dusturi li-Talabat al-Fasl al-Thani* [Lectures on Constitutional Law for Second-Year Students] (Meknes: University of Moulay Ismail, Interdisciplinary Faculty in Rashidiya).

<sup>16</sup> Atrakin, Mohammed (2013) *Da'wa al-Daf' bi-'Adam al-Dusturiya fi al-Tajriba al-Faransiya: al-Itar al-Qanuni wa-l-Mumarasa al-Qada'iya* [Claims of Unconstitutionality in the French Context: Legal Framework and Judicial Practice] (Casablanca: al-Najah al-Jadida Press), p. 13.

<sup>17</sup> The French constitution was amended on 23 July 2008 with Constitutional Legislation 724/2008 modernising the institutions of the Fifth Republic. The amendments gave individuals the right to file a claim with the ordinary and administrative courts arguing the unconstitutionality of legislative statutes that infringe their constitutional rights and freedoms. This right was called 'the question of constitutional priority'.

<sup>18</sup> Zaanoun, Abd al-Rafie, p. 11.

- <sup>19</sup> Bouzayan, ‘Ilyan, and Abd al-Qadir Bouras (2018) ‘Athar al-Daf’ bi-‘Adam al-Dusturiya fi Tahqiq al-Amn al-Qada’i li-Huquq al-Muwatana: Dirasa Muqarina li-Dasatir al-Duwal al-Magharibiya’ [Impact of the Claim of Unconstitutionality on the Realisation of the Judicial Security of Citizenship Rights: A Comparative Study of the Constitutions of North African States], *Majallat al-Buhuth wa-l-Dirasat* 15 (2), p. 27.
- <sup>20</sup> Al-Madur, Rashid, p. 13.
- <sup>21</sup> Belfaqih, Abd al-Haqq, p. 17.
- <sup>22</sup> Ismail, Mustafa Mahmoud (2021) ‘al-Mas’ala al-Awaliya al-Dusturiya fi al-Tashri’ al-Faransi: Dirasa Muqarina bi-l-Nizam al-Qanuni al-Misri’ [The Question of Constitutional Priority in French Legislation: A Comparative Study with the Egyptian Legal System], *al-Majalla al-Dawliya li-l-Fiqh wa-l-Qada’ wa-l-Tashri’* 2 (1), pp. 164–192.
- <sup>23</sup> Al-Nuweidi, Abd al-Aziz (2019) *al-Mahkama al-Dusturiya wa-Mas’alat al-Daf’ bi-‘Adam Dusturiyat al-Qawanin* [The Constitutional Court and Claims of the Unconstitutionality of Laws] (Casablanca: al-Najah al-Jadida Press, 1<sup>st</sup> edition), p. 29.
- <sup>24</sup> Ismail, Mustafa Mahmoud, p. 171.
- <sup>25</sup> Al-Nuweidi, Abd al-Aziz, p. 104.
- <sup>26</sup> Zaanoun, Abd al-Rafie, p. 13.
- <sup>27</sup> Belfaqih, Abd al-Haqq, p. 69.
- <sup>28</sup> Zaanoun, Abd al-Rafie, p. 15.
- <sup>29</sup> The facts of the case go back to 1800 following the presidential election, in which President John Adams, a proponent of strong federal authority, lost to Thomas Jefferson, who supported decentralisation and the powers of the states. To ensure his policies would continue after he left office, Adams signed orders appointing several judges who supported his beliefs on his final night in office. The would-be judges later petitioned the Supreme Court, headed by Chief Justice Marshall, for an order to implement their judicial commissions. The court issued a brilliant decision that recognised the judges’ right to their appointments, but denied their request to order the delivery of the commissions, reasoning that the law giving the court the authority to issue such orders was itself unconstitutional. That is, the court struck down a legislative statute in favour of the constitution when the two conflicted, thus establishing the principle of judicial review of laws and acts of Congress. The idea then spread to numerous other states.
- <sup>30</sup> The parliament is composed of two chambers, the House of Representatives and the House of Councillors.
- <sup>31</sup> Decision 18/70, issued on 12 March 2018, can be read in its entirety on the Constitutional Court’s official website, at: [www.courconstitutionelle.ma](http://www.courconstitutionelle.ma).
- <sup>32</sup> Al-Nuweidi, Abd al-Aziz, p. 104.
- <sup>33</sup> Skanfik, Friedrich (2010) ‘Hal Su’al al-Dusturiya Haqqan Awlawiya?’ [Is the Question of Constitutionality Truly a Priority?], *al-Akhbar al-Qanuniya* 26, p. 1460.
- <sup>34</sup> Al-Nuweidi, Abd al-Aziz, p. 169.
- <sup>35</sup> The Public Prosecution’s role in the civil courts is defined in articles 6–10 of the Code of Civil Procedure. For more on the role of the Public Prosecution, see Al-Nuweidi, Abd al-Aziz, p. 170.
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *Ibid.*, p. 171.
- <sup>38</sup> Ismail, Mustafa Mahmoud, p. 172.
- <sup>39</sup> Zaanoun, Abd al-Rafie, p. 14.
- <sup>40</sup> In a brief, the NCHR, which prefers a mechanism of direct referral to the Constitutional Court, proposes that the court create a committee to examine claims of unconstitutionality, headed by a member of the court appointed by the chief justice. The committee would accept or deny claims of unconstitutionality within ten days of the date of receipt of the referral order. See Al-Nuweidi, Abd al-Aziz, p. 186.
- <sup>41</sup> Al-Sharqawi, Suad (2012) *al-Qanun al-Dusturi wa-Tatawwur al-Nizam al-Siyasi al-Misri* [Constitutional Law and the Evolution of the Egyptian Political System], vol. 1 (Cairo: Dar al-Nahda al-Arabiya), p. 189.
- <sup>42</sup> See Draft Organic Law 15-86.
- <sup>43</sup> See paragraph one of Article 5 of Draft Organic Law 15-86.
- <sup>44</sup> Ismail, Mustafa Mahmoud, p. 176.
- <sup>45</sup> Al-Nuweidi, Abd al-Aziz, p. 104.
- <sup>46</sup> *Ibid.*, p. 176.
- <sup>47</sup> For the details, see the brief written by the NCHR on unconstitutionality claims, published on its official website, at [www.cndh.org.ma](http://www.cndh.org.ma).
- <sup>48</sup> Suleiman, Essam (2018) *Nadwah: al-Wuluji ila al-‘Adala al-Dusturiya: al-Rihanat al-Jadida li-l-Raqaba al-Ba’diya ‘ala Dusturiyat al-Qawanin*, [Seminar: Access to Constitutional Justice: New Stakes in Post-Facto Review of the Constitutionality of Laws], p. 182.

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- <sup>49</sup> Ousharki, Mohammed (2018) *Nadwah: al-Wuluḡ ila al-‘Adala al-Dusturiya: al-Rihanat al-Jadida li-l-Raqaba al-Ba‘diya ‘ala Dusturiyat al-Qawanin*, [Seminar: Access to Constitutional Justice: New Stakes in Post-Facto Review of the Constitutionality of Laws], p. 36.
- <sup>50</sup> Article 11 of Draft Organic Law 15-86.
- <sup>51</sup> Constitutional Court Decision 18/70, p. 10.
- <sup>52</sup> See the written decision on the Constitutional Court’s website at: [www.courconstitutionelle.ma](http://www.courconstitutionelle.ma).
- <sup>53</sup> Constitutional Court Decision 18/70, p. 10.
- <sup>54</sup> Belfaqih, Abd al-Haqq.
- <sup>55</sup> Passive review means that a decision from the Cassation Court not to refer a claim would be seen as consistent with constitutional law, which can only be determined by the Constitutional Court itself.
- <sup>56</sup> Ibid.
- <sup>57</sup> Kais, al-Sherif (2019) ‘Shart al-Jiddiya fi al-Daf’ bi-‘Adam al-Dusturiya’ [The Condition of Seriousness in a Claim of Unconstitutionality], *Majallat al-Majli al-Dusturi* 12, p. 15.
- <sup>58</sup> Al-Nuweidi, Abd al-Aziz, p. 104.
- <sup>59</sup> Ibid., p. 127.
- <sup>60</sup> Preamble to the 2011 Moroccan constitution.
- <sup>61</sup> Preamble to the 2011 Moroccan constitution.
- <sup>62</sup> Ben al-Sherif, Mustafa (2012) ‘al-Raqaba ‘ala Dusturiyat al-Qawanin: al-Raqaba al-Siyasiya wa-l-Raqaba al-Qada’iya’ [Review of the Constitutionality of Laws: Political Review and Judicial Review], *al-Majalla al-Maghribiya li-l-Siyasata al-‘Umumiya* 8, p. 77.
- <sup>63</sup> Al-Nuweidi, Abd al-Aziz, p. 128.
- <sup>64</sup> Ibid.
- <sup>65</sup> Ibid., p. 136.
- <sup>66</sup> NCHR brief.
- <sup>67</sup> We should note here the most important international human rights conventions ratified by Morocco: the International Convention on the Elimination of All Forms of Racial Discrimination, ratified on 18 December 1970; the International Covenant on Civil and Political rights, ratified on 3 May 1979; the International Covenant on Economic, Social, and Cultural Rights, ratified on 3 May 1979; and the Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 21 June 1993. To see all the international conventions ratified by Morocco, consult the website of the Ministerial Commission on Human Rights at [www.didh.gov.ma](http://www.didh.gov.ma).
- <sup>68</sup> Ousharki, Mohammed, p. 43.
- <sup>69</sup> Ibid., p. 45.