

ARTICLE

Criminal Procedure and Human Rights in Morocco: A Profound Dilemma

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Abstract

The meeting between the imperatives of criminal procedure, as legal instruments of the State, and human rights generates a confrontation at one time or another. Procedural formalities tend to protect society from the scourge of crime, while human rights imply respect for the fundamental rights and freedoms of the individual. However, implementing procedural formalities inevitably prevents the exercise of certain human rights. This article addresses this clash within the context of legal developments in Morocco since the promulgation of the 2011 Constitution. It highlights the extensive transformations in Morocco since 2011, the main objective of which was strengthening human rights and consolidating the rule of law. The most remarkable transformation undoubtedly remains the independence of the judiciary and the complete emancipation of the Public Prosecutor's Office from the Minister of Justice's power.

Keywords human rights, criminal procedures, Morocco, jurisprudence, Moroccan Constitution, legal dilemmas

INTRODUCTION

The meeting between the imperatives of criminal procedure, as legal instruments of the State, and human rights generates a duel or a confrontation at one time or another. Procedural formalities tend to protect society from the scourge of crime, while human rights imply respect for the fundamental rights and freedoms of the individual. However, implementing the said procedural formalities inevitably prevents the exercise of certain human rights. Placing a suspect in custody certainly infringes on his freedom, just as searching his home constitutes a pure violation of his privacy. There are many other examples of this dilemma. Each time a criminal procedure formality is triggered, a fundamental right of the individual is, in one way or another, violated or flouted. What should we do then? Sacrifice human rights to

protect society, or sacrifice the security and safety of citizens to defend human rights? It is perceptibly a profound dilemma¹ in need of a solution. Did Albert Camus not say in his Notebooks: “If man fails to reconcile justice and freedom, then he fails at everything”? (Camus 1962)

During the decade following the promulgation of the 2011 Constitution, the Kingdom of Morocco underwent extensive transformations, the main objective of which was strengthening human rights and consolidating the rule of law. The most remarkable transformation undoubtedly remains the independence of the judiciary and the complete emancipation of the Public Prosecutor’s Office from the Minister of Justice’s power. However, it is not the only transformation. Morocco, aware of the impact of human rights on democracy and the sovereignty of the rule of law, has strengthened the guarantees of a fair trial to restore citizens’ confidence in their justice. It has thus legislated appropriate mechanisms that draw their strength and spirit from international charters concerning human rights.²

If, in theory, the coexistence between human rights and the imperatives of procedural criminal law may seem feasible, it is different when it comes to judicial practice. The judge, faced with a specific case, must make a decision, often immediately, which will have repercussions on public order and, of course, on the defendant’s fundamental rights. To better understand the complexity and depth of the dilemma, it is necessary to assess the constraint that weighs on judges in the face of notoriously serious offences such as terrorism,³ trafficking in human beings⁴ and intentional homicides with aggravating circumstances.⁵ The judge, whether a judge from the Public Prosecutor’s Office, an investigating or a sitting judge, must complete a procedural formality, such as releasing or remanding the suspect into custody, carrying out searches, seizing material or freezing property. As we have explained above, this formality will make a serious impact on the rights of the accused and his entire life.

The study of our subject requires the determination of the principles enacted by the Constitution and the Code of Criminal Procedure, considerably limiting the power of repression of the State. Then it provides a legal analysis of Moroccan jurisprudence, which constantly tries to find the difficult, but not impossible, balance between two antagonistic interests: those related to protecting society against the risks of complex and growing criminality; and those associated with the respect of human rights, which is becoming the heart of all democracy and the aspiration of all peoples nowadays.

¹The question “Human rights in criminal law and criminal procedure: effectiveness or alibi?” has been posed by Christine Guillain and Damien Vandermeersch (2007). In their Introduction they state: “The criminal trial has always been caught in the tension between ‘crime control’ and ‘due process of law’, whether it is a matter of arbitrating necessity against certain forms of delinquency and respect for fundamental rights and freedoms or to reconcile the rights of the victim or the reasonable delay with the rights of the defence. The search for a certain balance has never been smooth and human rights have succeeded, to a certain extent, in curbing the contamination of an exorbitant procedural criminal law, thus favouring the shield function of human rights and setting themselves up as a protector of the fundamental rights of people.”

²Intervention of the President of the Public Prosecutor’s Office, Mr El Hassan Daki, during the national colloquium organized in Agadir under the theme: “The fair trial in Morocco ten years after the 2011 constitution”. Also see Le Matin (2021).

³Moroccan Penal Code, Arts 218-1 to 218-9.

⁴*Ibid.*, Arts 448-1 to 448-14.

⁵*Ibid.*, Arts 392 and 393.

THE PRINCIPLES ENACTED BY THE CONSTITUTION AND THE CODE OF CRIMINAL PROCEDURE

We will first study the principles identified by the Moroccan Constitution of 2011; second, the directions contained in the Code of Criminal Procedure will be examined (see below).

The Principles Established by the Constitution

In constitutional matters, the emergence of a block of constitutionality has made it possible to expand the body of the constitutional tenets applicable to criminal cases (Mathonnet 2003). Within the Moroccan Constitution of 2011 the following principles relating to criminal procedure appear: that of legality (criminal procedure falls within the exclusive competence of the legislator); that of the independence of the judiciary (Art. 107); that of impartial application of the law (Art. 110); that of granting judges the responsibility of protecting rights and freedoms and ensuring the legal security of individuals and groups (Art. 117); that of the presumption of innocence (Art. 119, any defendant or accused is presumed innocent until convicted by a judge court decision having acquired the force of *res judicata*); the principle of reasoning for judgments and their delivery in public hearings (Art. 125); that of fair trial; that of rendering the decision within a reasonable time; that of guaranteeing the rights of the defence (Art. 120); and that of submitting the judicial police to the authority of the Public Prosecutor and of the investigating judges with regard to the inquiries and investigations necessary for the search for offences, the arrest of offenders and the establishment of the truth (Art. 128).

In this respect, the principle of guaranteeing the rights of the defence, as enshrined in the Constitution, is not the subject of any precise definition either in the law or jurisprudence. Doctrine comes to our aid to provide us with the following description: “the set of prerogatives which guarantee the accused the possibility of effectively ensuring their defence in the criminal trial”⁶ or “the set of prerogatives granted to a person to enable him to ensure the protection of his interests throughout the trial” (Pradel 2000:322). This is a general law principle applied by trial judges and Supreme Court judges. The rights of defence mainly include the right to information about the person placed in police custody, of the reasons for his arrest and of his rights, including the right to remain silent (Art. 66, para. 2); the right to appoint a lawyer as soon as the person is placed in police custody (Art. 66, para. 6 of the Code of Criminal Procedure); the right to the assistance of a lawyer from the time of the indictment before the investigating judge (Art. 136 of the Code of Criminal Procedure); the right to information of a member of the family of the person placed in police custody and the right to an interview with a lawyer for a period of 30 minutes before the end of half of the main duration of police custody (Art. 66, paras 8 and 9); and the right to be able to defend oneself before an impartial and independent judge.

Concerning the principle of rendering a judgment within a reasonable time, which is established as a constitutional principle by the Moroccan legislator, as mentioned above, it is important to emphasize that the law does not give any

⁶See under the entry for “Défense” (Cornu 2005).

definition of it as of the principle of the rights of the defence, and does not determine the sanction in the event of a breach of this principle. Therefore, jurisprudence must determine its meaning and scope. But what about the directions contained in the Code of Criminal Procedure?

The Principles Contained in the Code of Criminal Procedure

The harmonization of Moroccan legislation, in terms of criminal procedure, with international conventions has been dictated by the considerable progress experienced by the Kingdom of Morocco in terms of human rights. Indeed, Morocco has not ceased in recent years to make continuing efforts to consolidate the rule of law and guarantee the protection of individual freedoms and the inherent rights of the human person. Morocco, like the most developed countries in the world, and in perfect harmony with recent theories in criminal matters, had to modernize its legal arsenal in terms of criminal procedure to protect both the rights of the accused, as well as those of the victim and witnesses, and to guarantee the principles of a fair trial. Law No. 22.01 on criminal procedure has enshrined countless provisions relating to the protection of human rights, and it would be pretentious to be able to examine them all under this subject. We will content ourselves with quoting a few principles that summarize Morocco's enormous progress in this area. Article 1 of the Code of Criminal Procedure sets out in clear terms the milestones of a fair criminal trial:

Any person accused or suspected of having committed an offence is presumed innocent until his guilt has been legally established by a decision having acquired the force of *res judicata*, at the end of a fair trial where all the legal guarantees are met, the doubt benefits the accused.

Reading this article means unequivocally that the legal conditions for a fair trial must be met and that Morocco is committed to respecting the rights of the accused in the context of criminal proceedings as established in the international human rights conventions. According to this article, the accused does not have to prove his innocence, and it is up to the Public Prosecutor to provide proof of his guilt. And this is where the judge must intervene to control the legality of the evidence and assess its probative value. It is indisputable to say that the accused must be declared innocent in the absence of evidence, and the judge must properly justify his guilty decision on well-established facts. In this regard, the power of conviction of trial judges does not mean that they can base the conviction of an accused simply on their factors without any need for reasons. The Court of Cassation ensures relevant control on this subject, as we will see during the analysis of Moroccan case law.

In the same way, a confession extracted by violence and coercion cannot be used as evidence. This is what emerges from reading Article 293 of the Code of Criminal Procedure, which expressly excludes the confession of the accused when it is established that it was obtained by violence or coercion. The same article provides for the punishment of the perpetrator of the said violence or intimidation.

MAIN PRINCIPLES OF MOROCCAN LEGISLATION

To better understand the impact of the current Code of Criminal Procedure on the establishment of a coherent system of human rights, we are going to cite the main principles established by the Moroccan legislator in this matter, which constitute a pure and simple manifestation of a fair trial, namely:

The criminal procedure must be fair, adversarial and ensure the balance of the different parties to the trial;

The separation between the authorities in charge of the exercise of the public inquiries and the investigating procedure of those conducting the judgment;
The presumption of innocence;

The doubt must benefit the accused;

All defendants must be aware of the evidence established against them, be able to challenge them and be assisted by a lawyer;

The judiciary must take care to guarantee the rights of victims during the procedure;

The judgment must be pronounced within a reasonable time;

Any convicted person must have the right to challenge their guilt before a court of the second degree according to the remedies determined in the law.

Indeed, Moroccan judges must respect the law and principles set out above, thus excluding any illegal evidence. Any procedural act performed outside the law or in violation of the terms it specifies must be sanctioned and excluded from the rest of the trial (irregular search, interrogation under duress, illegal or arbitrary arrest) (Dalil Essakali 2014).

The principles established by criminal procedure constitute the fundamental bases of a fair trial and the necessary or inevitable prerequisite for ensuring the protection of human rights. These principles remain dead letters without the intervention of fair and efficient justice, which brings us back to analysing a few judgments of the criminal chamber of the Court of Cassation.

MOROCCAN JURISPRUDENCE AS GUARANTOR OF THE MAIN PRINCIPLES OF CRIMINAL PROCEDURE

The role of the Court of Cassation in Morocco in matters of criminal procedure consists mainly of guaranteeing the fundamental principles which govern the conduct of a fair trial, following international treaties relating to human rights, starting with the de Universal Declaration of Human Rights on 10 December 1948; and through the International Covenant on Civil and Political Rights adopted on 16 December 1966; and arriving at the Convention against Torture and Other Cruel Treatment or Punishment; Inhuman or Degrading Acts adopted by the United Nations in 1984; and the Convention for the Protection of Persons against Enforced Disappearances of 20 December 2006. Morocco, as an active member at the international level, strives to establish a society characterized by respect for individual freedoms through criminal justice centred on the respect for human rights in

perfect harmony with the main orientations announced by His Majesty King Mohammed VI in his letter addressed to the participants in the first international congress of justice in Marrakech on 2 April 2018, and in which he recalled that the evolution of criminal justice requires the study of the possibilities allowing a harmonization between the obligation to ensure the respect of rights and freedoms and the duty to protect the values and foundations of Moroccan society (Direction Générale des Collectivités Territoriales 2018; First President of the Court of Cassation and President of the Superior Council of the Judiciary 2018). We will next analyse, first of all, the judgments of the Court of Cassation confirming the independence of the judiciary and the impartiality of judges, and then study in second place the decisions about a fair trial and the respect for the rights of defence.

JUDGMENTS ENSHRINING THE INDEPENDENCE OF THE JUDICIARY AND THE IMPARTIALITY OF JUDGES

Judgment Dated 13 February 2019; Case No. 23633/6/1/2018 (Unpublished)

This was an appeal in the interest of the law made by the Attorney General at the Court of Cassation on the instructions of the President of the Public Prosecutor's Office. It aimed to challenge a judgment of the Court of Appeal that did not comply with Article 409 of the Code of Criminal Procedure by increasing the appellant's sentence on his sole and own appeal. The thorny question that arose in the criminal chamber concerned the capacity of the President of the Public Prosecutor's Office to give instructions to the prosecutor at the Court of Cassation to exercise the appeal in the interest of the law under Article 560 of the Code of Criminal Procedure. The Minister of Justice exercised this appeal before the independence of the judiciary. The criminal chamber was then faced with two difficulties. The first stems from the text stipulating that the Minister of Justice must exercise this appeal. The second comes from Law 33-17 in the application of the Dahir dated 30 August 2017, which specifies that the Attorney General at the Court of Cassation as President of the Public Prosecutor's Office subrogates or replaces the Minister of Justice in the exercise of remedies. After extensive discussions, the criminal chamber declared admissible the appeal in the interest of the law exercised by the President of the Public Prosecutor's Office, thus confirming the independence of the Attorney General from the Minister of Justice, and along the way, consolidating the independence of the judiciary.

Judgment Dated 10 March 2021; Case No. 2675/6/1/2021 (Unpublished)

This was a procedure of legitimate suspicion exercised by the accused under Articles 270 and 271 of the Code of Criminal Procedure. This procedure was triggered when a suspicion of partiality remained towards the lower Court, and which allowed the higher Court, that is to say, the criminal division of the Court of Cassation, at the request of a party, to withdraw and to refer the case to another jurisdiction of the same nature if the said suspicion were founded. In this case, the accused requested the waiver of the criminal chamber of the Agadir Court of Appeal and the referral of the case to another jurisdiction of the same nature. He based his

request on several reasons, among which we can cite: the wealth and reputation of the plaintiff in the city where the Court of Appeal is located; the Court's refusal to allow the defence to have copies of case documents; to order an expert report and to initiate forgery proceedings. The criminal division considered that the reasons the accused gave did not support a serious suspicion towards the jurisdiction in charge of the case in question and rejected the request. If the impartiality of the judges is generally associated with neutrality, objectivity, and fairness and is undoubtedly the foundation of a fair trial, the trial parties should not raise it wrongly and without concrete basis. The suspicion must be based on solid grounds. In this judgment, the Court of Cassation confirmed that the refusal of certain requests by a party to the trial does not justify recourse to the procedure of legitimate suspicion.

JUDGMENTS CONCERNING FAIR TRIAL AND RESPECT FOR THE RIGHTS OF THE DEFENCE

Judgment Dated 27 February 2019; Case No. 1449/6/1/2019 (Unpublished)

In this case, the plaintiff appealed in Cassation against the judgment of the Agadir Court of Appeal condemning him to a two-and-a-half-year prison sentence for fraudulently accessing the automated data processing system, an offence provided for in Article 607-3 of the Moroccan Penal Code. He criticized the judgment for inflicting on him a sentence exceeding the legal maximum provided for by law. The Court of Cassation considered that the Court of Appeal had carried out a reclassification of the facts subject to the prosecution in Article 607-10 of the same Code, thus aggravating the plaintiff's situation without taking into consideration the legal guarantees which would provide him with the possibility of defending himself and being able to contest the new facts with which the Court accused him. This decision confirms the principle of respect for the rights of the defence. One cannot condemn a person for a new offence without granting him the faculty of defending himself in accordance with the law.

Judgment Dated 8 May 2012; Case No. 8602/6/1/2012 (Unpublished)

In this case, the plaintiff appealed in Cassation against the decision condemning him for the offence of issuing a cheque without having money in his bank account. He criticized the Court of Appeal for not responding to his request to submit the cheque's signature to judicial expertise. The Court of Appeal refused the said expertise by considering that it was unnecessary in this case since it was established that the drawer voluntarily delivered the cheque to the beneficiary. The Court of Cassation ruled that if the Court of Appeal has the discretionary power to assess the parties' requests and to give them the follow-up, its decision is necessary and appropriate. In return, it must provide the reasons for its decision coherently and according to the law. The Court of Cassation decided that when judicial expertise relates to a technical and scientific aspect, it must be carried out by specialized experts, and the trial judges could not refuse it based on its uselessness and without valid reasoning to guarantee respect for the rights of the defence and the conduct of a fair trial.

CONCLUSION

In conclusion, the Kingdom of Morocco has made considerable efforts at the level of legislation and jurisprudence to resolve the profound dilemma we have exposed above. This dilemma constitutes a great challenge of modern times for all the States of the world without exception, and whose solution consists of establishing a fair balance between the State's repressive power to maintain order and the respect for human rights as the ultimate aspiration of democracy.

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TRANSLATED ABSTRACTS

Abstracto

El encuentro entre los imperativos del proceso penal, como instrumentos jurídicos del Estado, y los derechos humanos genera un enfrentamiento en un momento u otro. Las formalidades procesales tienden a proteger a la sociedad del flagelo de la delincuencia, mientras que los derechos humanos implican el respeto de los derechos y libertades fundamentales de la persona. Sin embargo, la implementación de formalidades procesales impide inevitablemente el ejercicio de ciertos derechos humanos. Este artículo aborda este conflicto en el contexto de la evolución jurídica en Marruecos desde la promulgación de la Constitución de 2011. Destaca las amplias transformaciones en Marruecos desde 2011, cuyo objetivo principal fue el fortalecimiento de los derechos humanos y la consolidación del estado de derecho. La transformación más destacable sigue siendo, sin duda, la independencia del poder judicial y la completa emancipación del Ministerio Público del poder del Ministro de Justicia.

Palabras clave derechos humanos, procedimiento Criminal, Marruecos, jurisprudencia, Constitución marroquí, dilemas legales

Abstrait

La rencontre entre les impératifs de la procédure pénale, en tant qu'instruments juridiques de l'État, et les droits de l'homme génère une confrontation à un moment ou à un autre. Les formalités procédurales tendent à protéger la société du fléau de la criminalité, tandis que les droits de l'homme impliquent le respect des libertés et droits fondamentaux de l'individu. Cependant, la mise en œuvre de formalités procédurales empêche inévitablement l'exercice de certains droits de l'homme. Cet article aborde ce conflit dans le contexte des développements juridiques au Maroc depuis la promulgation de la Constitution de 2011. Il met en lumière les profondes transformations du Maroc depuis 2011, dont l'objectif principal était le renforcement des droits de l'homme et la consolidation de l'État de droit. La transformation la plus remarquable reste sans doute l'indépendance du pouvoir judiciaire et l'émancipation complète du ministère public du pouvoir du ministre de la justice.

Mots-clés droits de l'homme, procédures criminelles, Maroc, jurisprudence, Constitution marocaine, dilemmes juridiques

抽象的

作为国家法律文书的刑事诉讼的必要性与人权之间的相遇有时会产生对抗。程序手续倾向于保护社会免受犯罪的祸害，而人权意味着尊重个人的基本权利和自由。但是，履行程序手续不可避免地会妨碍某些人权的行使。本文在摩洛哥自 2011 年宪法颁布以来的法律发展背景下讨论了这一冲突。

它强调了摩洛哥自 2011 年以来发生的广泛变革，其主要目标是加强人权和巩固法治。最显著的转变无疑是司法独立和检察官办公室从司法部长的权力下完全解放出来。

关键词：人权，刑事程序，摩洛哥，法理；宪法；法律困

المخلص

يتناول هذا المقال العلاقة الجدلية القائمة بين ضرورة حماية حقوق الإنسان كما هو منصوص عليها في المواثيق والعهود الدولية التي صادقت عليها المملكة المغربية، وبين الإجراءات القانونية التي يفرضها قانون المسطرة الجنائية والبروتوكولات الأساسية بفتحتي البحث التمهيدي والتحقيقي الإحصائي، كالموضوع تحت الحراسة النظرية والاعتقال الاحتياطي وعقل الممتلكات وحجز الأدوات التي استعملت في الجريمة، والتي من شأنها بحكم طبيعتها الجزئية تقييد حريات الأفراد حتى قبل إدانتهم بحكم حائز لقوة الشيء المقضي به. ومن ثم كان لزاماً على المشرع المغربي التدخل من أجل ضبط هذه العلاقة الجدلية التي يطبعها الصراع بين حقوق الأفراد وحقوق الدولة في حماية الأمن العام. وهو ما تأتى فعله من خلال دستور 2011 الذي أقر مجموعة من المبادئ الدستورية التي تروم حماية حقوق الإنسان بكل تجلياته، والحد من السلطة الجزرية للدولة أثناء ممارستها لحقها المشرع في البحث والتحري عن الجرائم التي تنزع أمن المجتمع وطمأنينته. وعلى رأس هذه المبادئ استتقال السلطة القضائية عن السلطات التنفيذية والتشريعية، وقرينة البراءة، والمحاكمة العادلة، والتطبيق العادل للقانون والبت في القضايا داخل أجل معقول. كما أن

الاجتهاد القضائي لمحكمة النقض حرص على بث الحياة في المبادئ القانونية المذكورة وتأثيرها في الممارسة القضائية من خلال القرارات التي أصدرتها محكمة النقض، والتي أكدت بشكل جلي على حماية حقوق الدفاع وإقرار ضمانات المحكمة العادلة والزامية التطبيق السليم والعدل للإجراءات القانونية التي تهدف إلى حماية حقوق المشتبه فيهم. وعليه فإن إقرار التوازن بين حقوق الأفراد وحقوق المجتمع أضحت في عالما المعاصر من أهم المؤثرات التي تدل على تطبيق الديمقراطية في دولة ما، وأنه متى اختل هذا التوازن سقطت الدولة في الممارسات القمعية والتعسفية. وقد سعت المحكمة المغربية، عبر إقرارها للمبادئ المتعارف عليها دوليا في حماية حقوق الإنسان، إلى إيجاد حل لهذه المعادلة الصعبة التي تكمن في نفس الآن في حماية الحقوق وضمان الأمن العام.

الكلمات المفتاحية: حقوق الإنسان، الإجراءات الجنائية، المغرب، فقه دستور، معضلة قانونية

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