

2003

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Recommended Citation

Sabir, Abderrahim. "One Step Forward, Two Steps Back: Democracy and Legal Reform in Morocco." Human Rights Brief 11, no. 1 (2003): 16-18.

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One Step Forward, Two Steps Back: Democracy and Legal Reform in Morocco

by Abderrahim Sabir

MOROCCO'S TRANSITION TOWARD DEMOCRACY has not been smooth. The late King Hassan II initiated a process of political liberalization in the late 1990s and his son, King Mohamed VI, continued this legacy. Over a few short years, the country saw the release of hundreds of political prisoners, a substantial reduction in the frequency of torture and forced disappearances, and increased public exposure of past atrocities committed by state security forces. A major innovation was the September 2002 parliamentary elections, which were the first transparent and relatively free elections in the history of post-independence Morocco. Even the press, a traditionally repressed sector, experienced a gradual but steady turn towards increased freedom. Regrettably, however, Morocco seems to take two steps backward for each step taken forward.

The May 16, 2003 terrorist bombings in Casablanca instantly changed the landscape of democratic consolidation in Morocco. Within a week of the bombings, the Moroccan Parliament passed a new anti-terrorist legislation to confront the perceived national security threat. This legislation circumvents the democratic gains of the past years and endangers Morocco's growing civil society. One of the democratic gains directly affected by the passage of the anti-terrorist legislation is the new Penal Procedure Code, passed into law during a two year process of legislative reform with wide participation and extensive debate. The tension between these two pieces of legislation, both in their creation and enforcement, exemplifies the problem of democratic consolidation in Morocco.

ONE STEP FORWARD: DRAFTING THE PENAL PROCEDURE CODE

FOR YEARS, MOROCCAN HUMAN RIGHTS GROUPS and legal professionals expressed deep concern about the existing Penal Procedure Code and the lack of protection it provided. Morocco made minor adjustments to the code throughout the years, but many of these laws have been left untouched for more than two decades. Previous reforms were only responses to political upheaval, such as the attempted coup d'états in the 1970s, and did not create, on any substantial level, a real climate of freedom. Each reform relied on the monarchy's *modus operandi* of failing to define a penal system for the country. Because the monarchy never created or enforced a standard rule of law, the Moroccan people feared the unknown consequences of their actions.

The government initiated a concrete move to reform the Penal Procedure Code during an October 2001 assessment. Human rights groups, however, feared that the draft Penal Procedure Code (draft code) under consideration failed to comply with international standards. The political environment at the time offered a unique opportunity to include input and analysis from a wide range of groups and experts on the proposed reforms. A collaborative effort between the Moroccan Bar Association and the American Bar Association (ABA) resulted in five roundtable discussions about the draft code in various Moroccan cities.

The ABA facilitated the participation of a comparative criminal procedure expert and three international human rights law experts. The experts provided commentary on the draft code and worked closely with Moroccan civil society to reform its provisions and recommend changes to make it compatible with international legal principles. The five roundtables were attended by representatives of the Prime Minister's Office, the

Human Rights Consultative Council, the Commission for Legislation and Justice in the Parliament, the Moroccan Human Rights Organization, the Human Rights League, the Moroccan Prison Observatory, the Moroccan Forum for Truth and Justice, the Moroccan Association for Judicial Independence, and the two chambers of the Parliament, as well as scholars and academics from a variety of law faculties.

The roundtables provided a forum for the participants to sit down and work together. Following the roundtables, a report was submitted to legislative committees in the Parliament, outlining the participants' recommendations for amending the draft code.

PROBLEMS WITH THE DRAFT CODE

Next to the Moroccan Constitution, the Penal Procedure Code is the most important instrument used to define basic freedoms for the ordinary citizen. Penal procedure draws the line between personal freedom and government intrusion. "One can easily compare the penal procedure code," quipped an expert, "to a seismograph that registers not only earthquakes shaking everything up, but also registers the slightest movements in the earth as with the code in society." Enacting a new penal procedure code was therefore an extremely sensitive undertaking.

One of the most controversial aspects of the draft code was Article 283, which stated that "[n]o person will have the right to cite witnesses in order to provide evidence that is in addition or contradictory to the contents of the reports or records drawn up by officials or assistants, whose investigations are reliable under the law, either by challenging them, alleging falsehood, or by their annulment as a result of some breach in that respect."

Article 283 would place excessive power in the hands of the *police judiciaire*, which consists of members of the police and the gendarmerie. It would establish that a confession contained in the report of the police was final proof. No witness could be called and no other evidence introduced to challenge a confession contained in a police report. Although this would make for an expedited and inexpensive judicial proceeding, Article 283 would problematically allow the *police judiciaire* to present the court with a confession that could not be legally challenged.

The draft code was modeled after the French Code of Criminal Procedure (French code). The French code, however, does allow criminal defendants to challenge confessions in police reports. The provisions of Article 283 bore a greater resemblance to Napoleonic era code of criminal procedure, or *code d'instruction criminelle*, enacted in 1809. Article 283's provision giving excessive power to the *police judiciaire* reflects the antiquated mode of penal procedure in place today and is symptomatic of a general lack of modernization in Moroccan penal law.

A second problem posed by Article 283 was its restriction of the judge's role in penal proceedings. The article instructs the judge to read a confession in the accused's statement to the *police judiciaire* as final proof of guilt, in a process known as the *procès verbal*. Structured as such, it would not have allowed the judge to determine whether the accused had actually committed the alleged offense or whether the confession was obtained under duress or through torture. One expert explained that this provision would, in effect, reduce the function of the judge "to that of a *notaire*, a notary public, who has the parties in front of him just to make sure that everything is all right and then signs a *procès verbal* that has been prepared by the *police judiciaire*." Article 283 would shift the judge's role

of fact-finder to the police officer, improperly giving the latter the power to decide cases.

Article 283 was not the only problematic article in the proposed code reforms. Other problematic articles included Article 21(4), which stipulated that a *police judiciaire* officer “may seek the help of an interpreter if the person being interviewed speaks a language or dialect in which the *police judiciaire* officer is not proficient”; Article 5, which confirmed a statute of limitations for a wide range of crimes, including crimes against humanity; and Articles 66 and 80, which would allow speculative custody for up to 192 hours without an explicit guarantee of the right to counsel, notification of family members, or freedom from physical violence.

While the draft code posed numerous advances compared to its predecessor, it still contained controversial provisions that posed a serious threat to Morocco’s efforts to establish a law-abiding society. Fortunately, the roundtable participants were given broad discretion in developing their critique of the draft code.

INTERNATIONAL LAW ANALYSIS OF THE DRAFT CODE

Morocco signed and ratified the International Covenant on Civil and Political Rights (ICCPR) in the late 1970s, and in doing so explicitly pledged to adapt its laws to international principles. The participants analyzed the draft code through the lens of Articles 2, 4, 7, 9, and 14 of the ICCPR, as well as the Convention against Torture and other forms of Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention) and the Basic Principles for the Treatment of Prisoners.

In developing their recommendations, the participants articulated some guiding principles. First, the aim of amending the Penal Procedure Code is to enhance the credibility of the law and raise citizens’ awareness of its limits and enforcement powers. Second, Morocco has an obligation to incorporate into its Penal Procedure Code rights that are guaranteed under international human rights instruments. Finally, the law has supremacy over those who formulate and enforce it.

The participants noted in all the roundtables that Article 283 was inconsistent with Morocco’s international commitments mentioned above. First, the article did not guarantee objectivity in the investigative and inquiry processes. Second, it encouraged *police judiciaire* officials and assistants to use violence to extract confessions. Third, it precluded the judge from conducting investigations, effectively transferring trials from courts to police stations. Finally, it violated the right of the accused to a presumption of innocence.

With respect to Article 21(4), the participants unanimously found that placing the decision to provide an interpreter during interrogation within the discretion of the *police judiciaire* was inconsistent with Article 14, paragraph 3(f) of the ICCPR. The participants recommended amending this section so that *police judiciaire* officers would be required

to use a language understood by the person or provide an interpreter during interrogation.

Additionally, the participants found that Article 5, which placed a statute of limitations on crimes against humanity, conflicted with Morocco’s obligations under the ICCPR. They recommended amending this article to provide that public proceedings would not lapse under any statute of limitations for alleged crimes against humanity.

The participants similarly found inconsistencies in Articles 66 and 80 with respect to Morocco’s international obligations, particularly regarding periods of speculative custody and protection of the accused during interrogation. Based on the accepted interpretation of Article 9, paragraph 3 of the ICCPR, the participants agreed that an unjustified detention for periods upwards of 190 hours did not constitute “trial within a reasonable time.” They recommended amending the periods prescribed in Articles 66 and 80 to not more than the day following detention. The participants further recommended the notification of the accused’s family members, as well as notifying the accused of his or her right to have a lawyer present.

Ultimately, the Parliament approved seventy-five percent of the participants’ recommendations, including the elimination of draft Article 283 in its entirety and the establishment of mechanisms to prevent torture during detention. The approval of these changes was a testament to



*Picture of the roundtables held to discuss and reform Morocco’s penal procedure code.
Credit: courtesy of the author*

the democratic inroads Moroccan society had achieved. Unfortunately, the fragile nature of that democracy soon became apparent.

TWO STEPS BACK: THE 2003 ANTI-TERRORISM LAW

On May 16, five bombs exploded in the heart of Casablanca and left 32 dead and over 100 wounded. This terrorist action opened the gate for a strong revival of security force measures and draconian penal law. Since the bombings in Casablanca, human rights progress has rapidly declined in Morocco. Within months, the positive steps evidenced by the reform process of the Penal Procedure Code were almost completely rolled back. Allegations of arbitrary arrests, torture, and extra-judicial killing are becoming rampant. Many fear that the hard gains made to move the country toward democracy might be in jeopardy.

A week after the bombings, the Moroccan Parliament approved an anti-terrorism law, which concerned legislators and human rights

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activists had managed to block in the past.

The anti-terrorism law added a controversial new definition of terrorism to the Penal Code. A terrorist act is no longer the only cause for prosecution: merely commenting on the act, even by newspapers or other media, can now be considered a crime. Since the passage of the law, many journalists have been arrested under this provision and are in the process of being sentenced. The law reintroduced provisions regarding incommunicado detention, which were amended in the Penal Procedure Code. It also increased the number of days that a person could be held without charge or access to counsel. The law increases the risk that an accused in custody will be subject to torture. In addition, provisions in the law allow prosecutors unilaterally to order wiretaps without first seeking authorization from a judge or other monitoring body.

While a state may be justified in taking drastic measures to protect its citizens in a time of crisis, Morocco did not announce a state of emergency before the parliament passed the Morocco anti-terrorism law. Because it is in effect without a definite term, the anti-terrorism law can squelch democratic debate and freedom of the press during internal unrest as well as during peace. In addition, all people accused of criminal activity, whether terror-related or otherwise, are subject to decreased procedural safeguards.

CONCLUSION

EVEN BEFORE THE TERRORISM BOMBINGS of May 16th, the process of political liberalization was tainted with repression. The Moroccan government continued to crack down intermittently on human rights defenders and journalists, at times violently dispersing demonstrations and suppressing critical publications. Currently, state security forces reportedly continue engaging in torture and arbitrary detention with impunity. Prisons are severely overcrowded and substandard conditions persist. In addition, the Moroccan government has not yet provided satisfactory answers about hundreds of disappearances that occurred prior to the initiation of the reform process.

Processes such as the formal debate around the draft code, however, gave hope of a brighter future for Moroccan democracy. Regrettably, the hope for democratic Morocco has been placed in a more precarious position with the government's precipitated and authoritarian response to the terrorist attacks of May 16. Now, the very integrity of Morocco's process of democratic consolidation is being challenged. The true test for the authorities in Morocco is how to deal with this new threat to security while still promoting the path to democracy, trust in civic institutions, and the supremacy of the law. *HRB*

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