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REVIEW

Reinventing the Moroccan state and the implementation of the independent regulatory agencies (IRAs)

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SUMMARY

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I. Introduction

The widespread adoption of independent regulatory agencies (IRAs) throughout the world is part of the global spread of "regulatory capitalism"[1]. The shift of delegation of regulatory powers from the political authorities to independent (or semi-independent) regulatory agencies is no longer seen as an institutional aspect of the governance structure of modern states[2]. In Europe, the implementation of this new form of public management has been described as the "emergence of regulatory state"[3].

Morocco, which is linked to the European Union by an advanced status[4], lives in a state of economy under liberalization. The reorientation of economic policy was clearly illustrated by the vast privatization program launched in 1993. Thus, a certain number of monopoly economic activities were withdrawn wholly or in part from the fold of the public sphere, to be transferred to the private sphere governed by competition.

The theme of the regulatory state is henceforth inseparable from the neoliberal perspective, making market mechanisms the essential element of economic dynamics the state cannot be considered as the engine of development; and its bureaucratic logic is that it can only be a supervisor. The state must play the role of a "regulator", in charge of ensuring the maintenance of major economic equilibria by integrating constraints of various kinds. The evolution of the market would make this intervention indispensable: the increasing complexity of the economic circuits, the technological changes, the globalization of exchanges, but also the growing pressure of economic powers whose power is reinforced by globalization, requires the establishment of agencies capable of setting certain rules of the game, to enhance some values and to protect certain interests.[5]

Some special authorities have the responsibility such as the National Telecommunications Regulatory Agency in telecommunications, the High Authority of Audiovisual Communication in the audiovisual field.

The Competition Council has a more general and horizontal function of monitoring the proper functioning of all markets, whether by issuing opinions or by sanctioning anticompetitive practices[6].

1 Levi-Faur (2005).

2 Organization for Economic Co-operation and Development [OECD] (2016).

3 Majone (1994), p.77.

4 Iván Martín (2009).

5 Chevallier (2004).

6 El Bazzim (2019).

In the electricity sector, the World Bank, which has played an important role in the implementation of the world bank's transplanted "good practices", has put in place a policy that subordinates its loans for the development of electricity by setting up an independent regulator. This is the case in Morocco, with the National Electricity Regulatory Authority (ANRE), responsible for ensuring the proper functioning of the electricity market under construction.

However, when creating IRAs, politicians have delegated regulatory powers to agencies whose institutional design seeks to reduce political control over regulatory policy. But it is important to explain here, not why politicians delegate regulatory powers to agencies, but why they delegate to an «independent» agency[7].

Regulation also implies a different relationship to the law. it would be characterized by its approximation, adaptation to the context of the societies it claims to govern, pragmatism and flexibility.

These characteristics represent the common institutional context of what has been called the "regulatory states in the South"[8]. As a result, different factors may have shaped the independence levels of regulators in Morocco.

One of the main problems is the different degrees and levels of democracy that these countries enjoy and how this affects the practice of IRAs. In other words, under a hybrid regime that combines authoritarian practices and democratic principles, should we expect to see regulatory action similar to that of liberal democracies? What does their independence mean in this context?

Initially, the goal was to institute a state-oriented architecture geared towards the search for efficiency and modernization. To achieve this goal, the IRAs have been put in place; yet the independence of the regulatory agencies still raises questions.

2. Regulatory agencies, a reconfiguration of state architecture in Morocco

Regulations, assumed by IRAs, represent a certain change in the traditional principles governing Moroccan administrative organization. Conscious of the limits of regulation and command by means of the unilateral act, the public authorities seem to abandon clearly the traditional methods of intervention and are gradually moving towards the conscious and voluntary consecration of a certain number of processes, most of which are quite new. It is more and more a question of consultation, partnership, and contractual techniques.

7 Gilardi (2008).

8 Dubash & Morgan (2012), p. 262.

Arguably, the country faces incentives to grant formal independence to agencies in economic areas, such as financial services, since attracting large financial capital is a key mechanism to improve economic growth[9]. Delegating the enforcement of competition law to the Competition Council, for instance, represents a credible guarantee of equal treatment between national and international companies within the national market[10].

Regulation leads to a correlative adaptation of the principles of state organization. The IRAs have not only been set up to regulate the economic sectors open to competition, but also to regulate certain sensitive sectors with regard to public liberties, such as the communication sector, which seems to attest that the logic of regulation is overflowing the goes further than the field of the market. The importance of their institution in terms of traditional principles of state organization cannot be underestimated.

As such, we recognize these agencies as "new structures", with a specific status very different from "conventional administrations", or as laboratories of a new public law.

The diffusion of IRAs, in the Moroccan context, coincided with the democratization of the country, as well as privatization and major economic reforms, the emergence of the new concept of authority and the will to promote the country by King Mohammed VI. As a matter of fact, a significant correlation between the levels of countries democratization, and the levels of regulators independence, is still a subject of research.

As non-majoritarian institutions, the IRAs are managed by non-elected officials and are structurally detached from ministries. Moreover, their presidents are still appointed by the king, who enjoys broad constitutional and religious powers in Morocco. If in other models, parliament is involved in the nomination process, in Morocco, this is not always the case.

Thus, some consider that the use of the term "independent" by the constitution and the legislator to distinguish and characterize these IRAs, rather signifies a certain intention of rupture and a minimum of alterations of the classical principles.

More broadly, the credible commitment hypothesis argues that elected officials suffer a deficit in their credibility as a result of time inconsistency in politics. Hence, by granting independence to IRAs, politicians tie their hands to a predetermined course of action, despite the rise of new majority coalitions, and thus gain credibility[11]. However, the king remains the keystone of the political system

9 Stasavage (2002).

10 El Bazzim (2016).

11 Levy & Spiller (1996).

in Morocco and ensures its continuity and controls its changes[12].This hypothesis can be rejected.

The main key element shaping policies in the regulatory states of the South, like Morocco, is the pressure international actors place on developing countries through loan conditions and trade access agreements[13].

In this regard, the World Bank's conditionality policy is being advanced in favour of the restructuring of a few sectors through the adoption and transplantation of a reform model through pressure on developing countries. Among these "models" is the establishment of independent regulators - an institutional arrangement that the World Bank has considered as a central reference when assessing institutional and regulatory reforms[14].

More generally, the demands of the International Monetary Fund and the World Bank for fiscal discipline, privatization and deregulation - among other policies known as the «Washington Consensus» - in exchange for aid, grants or loans - have been well studied[15]. Therefore, "coercive isomorphism", in the words of DiMaggio and Powell[16], could explain the levels of independence that developing governments grant when creating new regulators[17].

However, the analysis of the authorities assuming the regulation indicates a profound renewal of the classical bases adequate to the administrative organization. The emergence of a new legal category within the state demonstrates how public law is a permanent construction, able to adapt to changes in institutional practice. In the Moroccan context, it is considered as a participation in the democratization of the administrative life, and this within the framework of a new phase of the evolution of the Moroccan administration, whose reform of the administration is returning to the top of the national agenda, which is reflected in reform programs focused on new values, democracy and human rights.

In the form of a reciprocal relationship, public law strives to assimilate the regulatory function, while the latter helps to achieve it. This is expressed in the requirement of independence, an essential feature of organizations in charge of a regulatory function. This requirement of independence characterizes in the first place the independent authorities.

For some authors, their function answers to distinctive principles, so that the creation of an independent administrative authority often leads to the removal

12 Melloni (2013).

13 Braithwaite (2008).

14 Brown et al. (2006).

15 Dobbin et al. (2007).

16 DiMaggio and Powell (1983).

17 Dubash & Morgan (2012).

of certain functions in certain sectors from the grip of the rulers, or even to "depoliticize" them in a way, to entrust them to so-called neutral and impartial instances, in a kind of disjunction between the state-legal entity and the state political power.

The function of the regulation imparted to the state would therefore have led to a modification of the state architecture resulting in the establishment of IRAs, which leads us to deal with this question of independence in this third part.

3. The independence of the IRAs

The administration does not need to be independent, since all its acts lead to general interest. In the regulatory system, which refers to a theory of suspicion, the regulator must necessarily be independent of the government and the operators. Indeed, these last two will always look after their particular interests (their own utility function).

The independence of regulators also refers to the principle of impartiality. The modalities of this independence present a certain heterogeneity to the extent that there is no common and universal institutional model, but a reconciliation of structures according to the legal systems. In this sense, Marie-Anne Frison-Roche believes that "independence is defined as the material and psychological condition allowing those who benefit from it to decide impartially, that is to say without having to follow orders formulated by a third, or even be influenced by it"[18]. To meet this obligation, regulators must respect certain organizational and operational conditions.

The regulators independence is a topic of intense criticism by the legal doctrine dealing with this issue. However, the Moroccan constitution of 2011 is explicit about this question and qualifies in its Title XII "Of Good governance", several institutions as "independent". In particular, Article 162 states that "The Mediator is an independent and specialized national institution" and Article 166 considers that "The Council of Competition is an independent institution". There is no doubt that this constitutional consecration further legitimizes these regulatory structures.

Part of the doctrine would have preferred the qualifier "autonomous" instead of "independent", arguing the lack of legal personality of these institutions. This assertion is unfounded to the extent that a majority of regulatory agencies now have legal personality, while still being a part of the state that cannot be reduced to its traditional conception.

18 Frison-Roche (2011).

In the present French context, some authors describe them as independent with or without legal personality, "although independent, most regulatory agencies are deprived of the moral personality, their independence to be sought not as we could sometimes imprudently write it in the granting of this personality if not in their subtraction from any hierarchical power and supervision"[19].

Of course, it is not by virtue of the principle of "no hierarchy or trusteeship" that the independence of the IRAs can be established.

Everything happens as if the unitary model was being challenged in favour of a new model, of the "Polycentric" type[20].

These structures are not subject to the hierarchical power usually and legitimately exercised. These structures are not subject to the hierarchical power usually and legitimately exercised towards government officials or government departments. Thus, they are placed outside the administrative hierarchy and are thus removed from the authority of ministers. The latter cannot subject them to any order or injunction and, consequently, no gracious appeal can be usefully made to the ministers against the decisions of the independent agencies.

The reduction or abolition of supervisory monitoring by central authorities, has allowed to the IRAs a relative freedom of action. As a result, they embody a new administrative form and independence implying the absence of any hierarchical control which sets them apart as public institutions.

In state administration, IRAs have an autonomous organization under the law. Nevertheless, this organizational aspect is not homogeneous and differs from one authority to another. Collegiality is the foundation of the organization of these regulatory entities, because it is strictly varied in terms of quantity and quality.

These agencies may thus include a number of members appointed from among the judiciary, the higher institutions and qualified experts in the sectors controlled by the regulatory bodies.

The organic independence of a regulatory authority is valid vis-à-vis the executive, the operators and the pressure and interest groups. We state that the IRAs should serve citizens with double walls, both against the pressure of interest groups and of political power. Indeed, being wary of the influence of the executive authorities and the interest groups, the constitution and the legislator wished to support the personal status of the members of the regulatory agencies, by endowing them with multiple guarantees of independence.

In its broadest sense, independence must exist with respect to the executive as well as to the parties involved. This implies the existence of protection against

19 Delaunay (2014), p. 276.

20 Chevallier (1998).

external pressures and determining whether or not there is an appearance of independence.

An examination of the composition of the IRAs, whether they act in the field of liberties or the economy, shows that most of the people in charge owe it to their expertise, to their supposed knowledge of the common questions to deal with.

The reasons for this choice lie in the fact that these members intervene in areas where there is an inadequacy of the law, its progressive development, but also often complex regulations.

Performing the regulatory functions, apart from partisan and political struggle, is the main argument that justifies the creation of IRAs. In fact, "political neutrality", "depoliticization" and "impartiality" are the reasons used to justify the creation of IRAs.

This argument has been presented, in some cases, in a concrete situation of corruption or partisan political activity, and in others as a measure to prevent such situations from occurring. For example, the independent agencies of the United States emerged because of the degree of corruption that affected the late nineteenth-century public bodies.

Mistrust regarding the traditional public administration explains the search for alternative forms of organization, far from the political struggle, but also the supposed will of remaining these bodies independent by these so-called "independent" bodies.

In addition, the liberalization of markets where privatization has affected public enterprises that provide certain services (such as telecommunications and energy), and which have generated new markets, had to be assigned to IRAs supposed to act without instructions from government authorities.

In the era of globalization, it is agreed that the regulation and control of certain activities should be attributed to "independent agencies", because the decision-making mechanisms of the political authorities are not considered appropriate for economic decision-making. In addition, some socio-economic sectors remain particularly sensitive to political changes. This is why we must ensure the proper functioning of markets beyond the vagaries of political life.

However, it is important to remain vigilant, as IRAs can become a kind of "magic formula", capable of solving the most diverse legal and political problems. Adopting a law that creates an institution labelled as "independent" is not enough to reduce the distance between what it's done and what has to be done.

It is also important to stress that the question of the legitimacy of these regulatory agencies remains unresolved.

Two lines of thought allow to provide some answers to this question. The first, using the so-called «technocratic legitimacy», argues that the activity of the authorities is legitimate, because their members are specialists in the economic

field, and they make all the decisions regarding the market, based solely on technical criteria; however, while all the decisions of these regulatory agencies are purely technical and legal, many of them have important political significance. Moreover, they are not always taken based solely on technical criteria.

The second one is to compensate for the lack of democratic legitimacy of these agencies, by strengthening the information and transparency mechanisms, in relation with the different actors of the national economy.

Legitimacy presupposes the consideration of a triple imperative in three dimensions. First, taking into account the plurality of expressions of the common good, namely the general interest. Then, the establishment of a legitimacy of proximity of the economic actors, which aims at the recognition of singularities. Finally, the legitimacy of independence and impartiality, which is based on the distance between the imperatives of the general interest and the particular interests. However, this last legitimacy can be sought only by means of legal norms, but also by a personal or collective ethics and a deontology of the members of these agencies. However, the boundaries between these various notions are permeable and evolving, as are the boundaries between the permitted, the forbidden and the tolerated.

4. The requirements of the rule of law means the IRAs also have to be accountable

Accountability is a concept that is not easy to define in a few words. Caiden holds that "to be accountable is to answer for one's responsibilities, to report, to explain, to give reasons, to respond, to assume obligations, to render a reckoning and to submit to an outside or external judgment."[21]

The first control relates to IRAs activity, is assumed by the Parliament: The establishment of communication and control mechanisms between the Parliament and the IRAs is part of a broader phenomenon, involving the upgrading of the parliamentary institution[22], which has been under way since the last constitutional reform. The IRAs are above all created by the constitution. But it is the Parliament, through its legislative work, which defines the rules of form and substance of its operation. Nevertheless, the role of the parliament seems restricted by a decision of the Constitutional Council.

By enacting measures of collaboration and control, the constitution expressly sanctioned the new evaluative mission of the public policies of the Parliament

21 Caiden (1998).

22 Bendourou (2011).

and demanded that: "all of the institutions and instances specified in Articles 161 to 170 of (this) Constitution must present a report on their activities, at least one time per year. These reports are made the object of a debate in Parliament"[23].

Thus, according to IRAs legal framework, the activity reports of every agency are presented to the Houses of Parliament.

The annual report that the IRAs would be required to prepare and deliver at each of the two meetings embodies a form of accountability that would have three aspects: first, the record of the use of the resources and the exercise of the powers; on the other hand, the presentation of the rules of ethics implemented internally; and finally, the legal corpus developed and practiced by the agencies in the performance of their missions.

But today the assessment processes by IRAs reports are qualified mostly inappropriate. Because due to the length of their reports, it's difficult to have tangible effects. It remains to invent a form of evaluation that is continuous, interacting, which may allow some kind of modification of practices or texts. The assessment will have even more impact if the regulator has the power to draw the conclusions, to institute a process of modification of the texts that corresponds to what the evaluation comes up with.

Another recommended instrument would be periodic hearings of the chairpersons of the IRAs by the relevant parliamentary commissions. Indeed, the principles of good governance, the correlation between accountability and responsibility find their way into the 2011 constitution which provides that: "The commissions concerned within each of the two Chambers can demand to hear the responsible [persons] of the administrations and of the public establishments and enterprises, in the presence of and under the responsibility of the ministers concerned."[24]

On the basis of these principles, the House of Representatives inserted in its draft rules of procedure the right of its Committee on Justice, Law and Human Rights to hear the heads of the IRAs mentioned in the Constitution, taking into account institutions and bodies for the protection of rights and freedoms, good governance, human and sustainable development and participatory democracy, mentioned in articles 161 to 170 of the constitutional text[25]. However, the

23 Morocco's Constitution of 2011, Article 160.

24 Morocco's Constitution of 2011, Article 102.

25 These IRAs are ten in number and are grouped under the constitution in into three major categories: "the instances protecting and promoting Human rights" including: the National Council for Human Rights, the Mediator, the Council of the Moroccan community abroad, and the authority charged with parity and with the struggle against all forms of discrimination.
"The Instances of Good Governance and of Regulation": The High Authority of Broadcasting, the Competition Council, The National Instance of Probity, of the Prevention and of the Struggle Against Corruption.

constitutional court stated that these agencies are considered by the organic Law as independent bodies and not as public administrations, institutions or enterprises. They are therefore not subject to the authority or the guardianship of a particular minister[26].

In addition, the legislature adopts statutes relating to their status and operation and the budget devoted to them. Thus, the decision of the Constitutional Council does not go in the direction of the reinforcement of the parliamentary control and of the principle posed by the constitution, linking the responsibility and the rendering of the accounts.

The second control of the activity of the IRAs relates to its budget: how they can use their allocated funds, administrative budgetary procedures and rules. The control is operated by the court of auditors: the legislator responsible for defining the exercice modalities of IRAs functions, intended to provide them with sufficient financial resources.

Indeed, the possibility of obtaining own resources, designated by some of the doctrine as the "most radical figure" of financial autonomy[27], caused the agencies to be granted legal personality, which help them by this legal technique, not to rely only on State budget, without going so far as to finance own resources derived from royalties collected.

Regarding the judicial oversight of the IRAs, the need to further increase the specialized knowledge and expertise of the judges, and the slowness of the judicial process, are the two major challenges that should be addressed.

5. Conclusion

The desire to create an «independent» regulatory agency with all the necessary guarantees and means is not enough, since independence is acquired, not given. In the exercise of power, the degree of independence can be measured.

From a practical point of view, it is doubtful that the Moroccan State still has a regulatory capacity. It is indeed deprived of the indispensable means of action on an economy whose equilibrium depends on much more general data, given the globalization of trade.

"The Instances of Promotion of Human and Lasting Development and of Participative Democracy": The Superior Council of Education, of Attainment of Knowledge and of Scientific Research, The Consultative Council of the Family and of Childhood and The Consultative Council of Youth and of Associative Action.

26 Decision of the Constitutional Council no. 924/13 of August 22, 2013 on the constitutionality of the rules of procedure of the House of Representatives, published in the Official Bulletin no. 6185 of September 09, 2013 (Arabic version).

27 Frison-Roche (2006).

No doubt, the market cannot be "self-regulated", especially since the state is now supplanted in its regulatory role by other regulators – at the international level (e.g.,the World Trade Organization).

On the internal level too, other actors and other forms of regulation exist, which complement, imbricate or even substitute State regulation; we find trade orders, professional associations...

State regulation contains several superimposed and nested levels, whose coherence is random; and the state is just as regulated as it is regulator.

Finally, even if the independent agencies are increasing and their regulatory function is privileged especially after the 2011 constitution, this does not mean that the architecture of the state can be conceived on this model. Not only can the formula be often unsuitable for the management of concrete activities, but the banalization and the diversification process of those agencies in progress bears witness to a rapprochement with the traditional administrative forms.

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