

# RULE OF LAW IN MOROCCO: A JOURNEY TOWARDS A BETTER JUDICIARY THROUGH THE IMPLEMENTATION OF THE 2011 CONSTITUTIONAL REFORMS

*Norman L. Greene\**

I.	OVERVIEW AND INTRODUCTION .....	458
A.	<i>Rule of Law and Judicial Reform</i> .....	458
B.	<i>What Is a Good Judicial System: Basic Principles</i> .....	459
C.	<i>The Key Elements: Independent Structure, Behavior and Education, and Access</i> .....	462

---

\* Copyright © 2012 by Norman L. Greene. The author is a United States lawyer in New York, N.Y. who has written and spoken extensively on judicial reform, including judicial independence; the design of judicial selection systems and codes; and domestic and international concepts of the rule of law. See e.g., Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 *FORDHAM URB. L.J.* 13 (2007) and his other articles referenced below, including Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 *W.VA. L. REV.* 873 (2010), and Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 *DENV. U. L. REV.* 53 (2008). He has previously written a number of articles regarding Morocco, including its judiciary, its history, and Moroccan-American affairs. His earlier article on the Moroccan judiciary was published before the adoption of the 2011 Moroccan constitutional reforms as Norman L. Greene, *Morocco: Beyond King's Speech & Constitutional Reform: An Introduction to Implementing a Vision of an Improved Judiciary in Morocco*, *MOROCCOBOARD NEWS SERVICE* (Apr. 5, 2011), available at <http://www.moroccoboard.com/viewpoint/380-norman-greene/5484-morocco-beyond-kings-speech-a-constitutional-reform> (last visited June 24, 2012). He is a graduate of Columbia College and New York University School of Law.

The author gratefully acknowledges the editorial support and assistance of Editor-in-Chief Christopher Brown, Lead Articles Editor Alicia Zweig, and editors Sharifa Hunter, Rachel Katz and Nicholas Leroy of the *ILSA Journal of International & Comparative Law* of Nova Southeastern University Shepard Broad Law Center. The author further acknowledges the inspiration and support of many people too numerous to mention who have shared and furthered his interest in Morocco and the rule of law overall.

*Note to reader:* Although in an English language journal, this article contains direct quotations from the Moroccan 2011 Constitution from its official French version, some of which are lengthy. No official English language version of the Moroccan Constitution has been located. Although full understanding of the quoted French sections is not essential for readers to understand this article, the author considered it important to present this material to all readers for reference purposes. In addition, although an English speaker may find some of the quotations in French difficult, other quotations appear so close to English as to be readily understandable. Also, the editors have elected to provide informal English translations, which may be helpful, although they cannot be viewed as authoritative, much less official. Such translations provided by the editors—some of which have been modified by the author as well—shall be referenced as “Editors’ translation.”

II.	MOROCCO: BACKGROUND .....	463
III.	THE 2011 CONSTITUTIONAL REFORMS ON THE JUDICIARY— CIRCUMSTANCES AND TIMING .....	468
IV.	JUDICIAL INDEPENDENCE AND THE CONSTITUTIONAL REFORMS .....	471
	A. <i>Constitutional Reforms Bearing on Judicial Impartiality</i> .....	471
	B. <i>Implementing Reform Through Structural Changes     in Judicial Oversight</i> .....	477
	C. <i>The Limits of Judicial Independence—A Philosophical     Perspective</i> .....	480
V.	THE NEED FOR ANTI-CORRUPTION ENFORCEMENT AS A TOOL FOR JUDICIAL REFORM.....	484
	A. <i>Corruption and the Judiciary</i> .....	485
	B. <i>Judicial Corruption in Morocco</i> .....	487
	C. <i>What to Do: Improved Regulation and Enforcement</i> .....	489
	D. <i>Education or Cultural Changes as Strategic Solutions</i> .....	493
VI.	JUDICIAL DISCIPLINE AND JUDICIAL REFORM .....	495
VII.	RESPONSIBLE FREEDOM OF THE PRESS AS AN AID TO JUDICIAL REFORM .....	499
VIII.	ENHANCING ACCESS TO JUSTICE AS A PREDICATE TO MEANINGFUL JUDICIAL REFORM.....	501
IX.	THE ROLE OF CONSTITUTIONAL REFORM IN ENHANCING PUBLIC CONFIDENCE IN THE JUDICIARY .....	507
X.	CONCLUSION .....	508

*Elevate the judiciary to the status of an independent power and reinforce the prerogatives of the Constitutional Council to enhance the primacy of the Constitution, of the rule of law and of equality before the law. . . .*<sup>1</sup> (King Mohammed VI, March 9, 2011)

---

1. His Majesty King Mohammed VI, Speech at Rabat, Morocco, MAP (Mar. 9, 2011), [http://www.map.ma/eng/sections/speeches/hm\\_the\\_king\\_adresse\\_6/view](http://www.map.ma/eng/sections/speeches/hm_the_king_adresse_6/view) (last visited Mar. 6, 2012) (noting on the official website that the King's speech received international acclaim). See, e.g., *Constitutional Reforms Announced by HM the King, "Model in the Region," Hillary Clinton, MAROC.MA*, <http://www.maroc.ma/PortailInstAn/Templates/Actualites.aspx?NRMODE=Published&NRNODEGUID=%7bD48287A2-CCBF-4020-ACBE-9D7C55551ABA%7d&NRORIGINALURL=%2fPortailInst%2fAn%2flogoevenementiel%2fReforms%2bannounced%2bby%2bHM%2bthe%2bKing%2bmake%2bMorocco%2bstronger%2ehtm&NRCACHEHINT=NoModifyGuest> (last visited Mar. 6, 2012).

In light of the fast moving changes in Morocco after the Arab Spring, the author acknowledges that pre-Arab Spring sources need to be used with caution because of the potential change in context. In

\*\*\*

*[I]t is necessary to boost the citizen's trust in the rule of law and provide legal safeguards for his judicial security. This is why we are determined to carry on with our effort to upgrade the judiciary and preserve its independence and ethical standards. The aim is not only to uphold rights and to right wrongs, but also to foster a climate of trust and legal security, which will act as a catalyst for boosting development and investment flows. I must therefore stress again the need to put the overhauling of justice on top of the reform agenda. This is why I urge the government to work out a well-defined plan to revamp the judiciary.<sup>2</sup> (King Mohammed VI, July 30, 2008)*

\*\*\*

*In general, justice in Morocco is perceived by the public to be more of a matter of access to power [rather] than the function of an independent and impartial rule of law system. The 2005 Public Perception of the Moroccan Judiciary described the system as “. . . a mix of complex, disabling and crippling proceedings that set the system against the citizen” and as “an intimidating jungle.” [T]he judiciary still suffers from persistent complaints that it is plagued with corruption, is not independent or accountable, does not have effective mechanisms for enforcement, and is encumbered by delays. The public in general lack confidence in and respect for the judicial system.<sup>3</sup> (2010 USAID-sponsored report on Morocco)*

---

addition, this article might be complemented by a close site assessment and diagnostic of conditions in the Moroccan judiciary which may be adjusted over time. Given the wide sweep of this article, ranging from judicial independence to anti-corruption to illiteracy, however, even such a review of the justice system would have its limits as a tool for assessing the problems and proposing solutions regarding judicial reform and access to justice.

2. Full Text of HM King Mohammed VI Speech on 9th Anniversary of Throne Day, MAP (July 30, 2008), <http://www.map.ma/en/print/3563> (last visited Mar. 6, 2012). See also *Morocco: Justice Lacks Independence & Public Confidence*, Wikileaks, MOROCCOBOARD.COM (Dec. 21, 2010), <http://www.moroccoboard.com/news/34/5005> (last visited Mar. 6, 2012) (“The dispatch pointed [out] that the king considers judicial reform to be a priority, and listed the need of professional training of judges in both law and ethics and concluded that without serious steps to eliminate meddling by officials in the justice system, reform would not succeed.”).

3. USAID, MOROCCO RULE OF LAW ASSESSMENT 12 (2010), available at [http://pdf.usaid.gov/pdf\\_docs/PNADT305.pdf](http://pdf.usaid.gov/pdf_docs/PNADT305.pdf) (last visited Mar. 6, 2012) [hereinafter MOROCCO RULE OF LAW ASSESSMENT]. Although this article refers to the author of the report as USAID, the author is stated in the report to be DPK Consulting, a contractor, for review by USAID. The sponsoring USAID

## I. OVERVIEW AND INTRODUCTION

## A. Rule of Law and Judicial Reform

Judicial reform has historically been an important (but not the sole) component of rule of law reform, a decades old movement affecting the developing world, emerging (or not so emerging) democracies and post-conflict nations, and equally applicable to countries commonly identified as Western, including the United States. This article addresses recent reform efforts in Morocco, particularly through the 2011 constitutional reforms,<sup>4</sup> initially proposed in outline by the King during the Arab Spring and drafted by a “blue-ribbon commission,”<sup>5</sup> to improve the Moroccan judicial system. It also reflects on key issues underlying judicial reform, particularly judicial independence (and impartiality); structural and behavior changes; anti-corruption; and access to justice.

Sophisticated rule of law analysts raise the question whether programs for improving the rule of law are effective if political will to change is lacking; the local environment is misunderstood; and resources are inadequate.<sup>6</sup> (Extensive literature on the rule of law and its definitions is

---

office is listed as Rule of Law Division, Office of Democracy and Governance, USAID (DCHA/DG/ROL).

4. Although the constitutional reform process itself is beyond the scope of this article, for further information on the consultative process leading to the reforms, see Marina Ottaway, *The New Moroccan Constitution: Real Change or More of the Same?*, CARNEGIEENDOWMENT.ORG (June 20, 2011), <http://carnegieendowment.org/2011/06/20/new-moroccanconstitution-real-change-or-more-of-same/51> (last visited Mar. 6, 2012); and Bruce Maddy-Weitzman, *Is Morocco Immune to Upheaval*, MIDDLE E. Q., at 87–93 (Winter 2012), available at <http://www.meforum.org/meq/pdfs/3114.pdf> (last visited Mar. 6, 2012). See also *id.* at 92–93 (noting the short time between dissemination of the proposed constitution on June 17, 2011, and its submission to voters for approval on July 1, 2011 for a referendum; at the referendum, 98.5% voted “yes” in favor of the constitution, representing about 73% of the eligible voters).

5. See with respect to the drafting and redrafting process of the constitution, especially non-public drafts of the constitution, Sarah Feuer, *Self-Immolations Mar Year of Reforms in Morocco*, WASH. INST. FOR NEAR E. POL. (Jan. 23, 2012), <http://www.washingtoninstitute.org/templateC05.php?CID=3445> (last visited Mar. 6, 2012) (“[D]raft constitution proposed by the blue-ribbon commission was altered by the time it reached the public. For example, the original version reduced the king’s powers more substantially, insisted on the ‘unitary’ rather than ‘Muslim’ nature of the state, and explicitly guaranteed individual liberties such as ‘freedom of conscience’—all provisions that were ultimately dropped.”); and Bruce Maddy-Weitzman, *supra* note 4 (noting difference between the constitutional drafting commission’s draft and final constitution).

6. See, e.g., Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171, 171 (2010) (“[P]ositive gains, such as improved constitutions, are often offset by implementation and enforcement failures.”). See also generally CUSTOMARY JUSTICE AND RULE OF LAW IN WAR-TORN SOCIETIES (Deborah H. Isser ed., 2011) [hereinafter CUSTOMARY JUSTICE AND RULE OF LAW]; WILLIAM

either available elsewhere or is referenced in this article). These considerations are only partly relevant to Morocco. The constitutional reform efforts in Morocco that are the subject of this article are a key indicator of political will (especially when taken together with recent or ongoing protests); and the efforts are internally generated, not externally sponsored. Also, Morocco's familiarity with its "local environment" may be presumed; and, to the extent that resources are required, the issue will depend on their availability and how Morocco prioritizes its budgets.

The article will begin with the fundamentals of a good judicial system, analyze how the constitutional reforms move Morocco closer along that path, address the complex concept of judicial independence, and consider various challenges faced by Morocco on the way to achieving judicial reform.

### *B. What Is a Good Judicial System: Basic Principles*

Consistent with established international principles, including the *Bangalore Principles of Judicial Conduct* (2002)<sup>7</sup> and the *United Nations*

---

EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2007).

Assessing the utility or efficacy of rule of law programming in general or in particular, although important, is beyond the scope of this article. *Cf.* Wade Channell, *supra* note 6 at 172 ("The need for rule of law is a foregone conclusion among development practitioners. ROL is recognized as the foundation for establishing and protecting fundamental human rights, and is increasingly understood as an essential component for long-term, stable economic growth. Yet consistent underperformance—and outright failure—of many programs calls into question whether external programs can positively influence the development of rule of law. The answer is not immediately clear.") (citation omitted).

7. See Judicial Group on Strengthening Judicial Integrity, *Bangalore Principles of Judicial Conduct*, ¶ 1.1 (2002), available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (last visited Mar. 12, 2012) [hereinafter *Bangalore Principles of Judicial Conduct*]. The *Bangalore Principles of Judicial Conduct* are intended to be adaptable to various jurisdictions and provide a "framework for regulating judicial conduct." See UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT 36 (2007), available at [http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf) (last visited Mar. 6, 2012):

The statement of principles which follows, and which is based on six fundamental and universal values, together with the statements on the application of each principle, are intended to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct, whether through a national code of conduct or other mechanism. The statements on the application of each principle have been designed not to be of so general a nature as to be of little guidance, nor so specific as to be irrelevant to the numerous and varied issues which a judge faces in his or her daily life. They may, however, need to be adapted to suit the circumstances of each jurisdiction.

*Basic Principles on the Independence of the Judiciary* (1985),<sup>8</sup> this article shall assume that a good judicial system involves an impartial, fair and timely means for resolving controversies, presided over by a stranger to the dispute (an uninvolved person),<sup>9</sup> who is educated in, working with and fairly applying commonly accepted rules of deciding disputes.<sup>10</sup> The parties are represented by lawyers (or not) to help them understand the system and present and advocate positions which may be (but need not be) beyond their understanding. Following the decision, the parties either accept the decision or if appeal is available, appeal to like impartial arbiters or a commission of arbiters, and after that decision or even a subsequent decision on appeal, they agree to accept the decision (whether it is favorable or not), and then “go about their business” (a concept often referenced as “legitimacy” since the parties accept a negative decision as “legitimate”).<sup>11</sup>

---

8. See *U.N. Basic Principles on the Independence of the Judiciary*, 1985, hereinafter, “*U.N. Basic Principles*,” cited at CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE JUDICIAL REFORM PROGRAM, COMPILATION OF INTERNATIONAL STANDARDS ON JUDICIAL REFORM AND JUDICIAL INDEPENDENCE 1–4 (CEELI 2004), available at [http://apps.americanbar.org/rol/docs/judicial\\_reform\\_compilation\\_international\\_standards\\_2004.pdf](http://apps.americanbar.org/rol/docs/judicial_reform_compilation_international_standards_2004.pdf) (last visited Aug. 25, 2012) [hereinafter COMPILATION OF INT’L STANDARDS] (Adopted by the 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 through September 6, 1985 and endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985); also cited at *U.N. Basic Principles on the Independence of the Judiciary*, OFFICE OF THE U.N. HIGH COMM’R FOR HUM. RTS., available at <http://www2.ohchr.org/english/law/indjudiciary.htm> (last visited Aug. 25, 2012). See also *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.5.1.

9. See *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.5.1 (noting that a judge shall disqualify himself where he has personal knowledge of evidentiary facts).

10. This article assumes that the substantive law complies with modern rule of law values and is not discriminatory, unreasonable, confiscatory or otherwise facially unjust. Whether one can have a good judicial system in a legal system infused with substantive injustice is beyond the scope of this article. See, e.g., Norman L. Greene et al., *A Perspective on Nazis in the Courtroom, Lessons From the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1122 (1996) [hereinafter *A Perspective on Nazis in the Courtroom*]; Norman L. Greene et al., *Executioners, Jailers, Slave-trappers, and the Law: What Role Should Morality Play in Judging?*, 19 CARDOZO L. REV. 963 (1997) [hereinafter *Executioners, Jailers, Slave-trappers, and the Law*].

11. See generally COMPILATION OF INT’L STANDARDS, *supra* note 8; *U.N. Basic Principles*, *supra* note 8. In a democratic system, such as in the United States, judicial decision-making is subject to limits from other branches of government. Precedents established in certain decisions interpreting legislation may be neutralized through the passage of new legislation or amendment of the legislation interpreted, and precedents established in constitutional matters may be changed through constitutional amendment, although the process for change may be slow or difficult. Whether a “democratic system” can be theorized with one or more of the elements missing or modified, and whether such a system may be deemed “democratic,” is beyond the scope of this article.

The focus here will be on so-called “formal” justice systems, and the article takes no position on a good justice (judicial) system in a context in which no “formal” system is practicable. Customary, informal, non-traditional or non-state justice systems<sup>12</sup> play a valuable role in many societies and need to be fully understood since such systems may be the best that may be achieved because of lack of capacity (including infrastructure and other resources); lack of political or cultural will; or the legitimacy accorded to it by the population.<sup>13</sup>

The use of the abstraction “judicial system” should not obscure its specific elements. In addition to physical structures, technology and records, these include businesses and individuals who have suffered losses and need redress. The justice system can be personal, powerful, and integrally involved with people’s lives, their liberty, their property and their family; and sometimes it is even literally or figuratively “violent.”<sup>14</sup> Yet when working well, it can be an engine for economic stability, growth, development, and, of course, justice.

---

12. The best term for describing non-formal systems is the subject of debate, and each term used alone has been the subject of criticism. See CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6, at 9.

13. See, e.g., Thomas Barfield et al., *The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan*, U.S. INST. OF PEACE, at 22 (2006), available at [http://www.usip.org/files/file/clash\\_two\\_goods.pdf](http://www.usip.org/files/file/clash_two_goods.pdf) (last visited Mar. 6, 2012) (“There is an inherent tension between the goals of state-building according to international norms on one hand, and respect for local customs and practices combined with practical requirements of sustainable development.”); CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6, at 159, 185. See also Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?*, 86 DENV. U. L. REV. 53, 80–81 (2008) [hereinafter *Perspectives from the Rule of Law*]. Informal justice systems sometimes provide access to justice in ways not possible through traditional justice systems because they do not require transportation to distant courts and provide more rapid resolution at a lower cost. Some countries may not have the capacity to establish a formal justice system or the time to do so, and the informal system sometimes provides a means to fill what would otherwise be a justice sector vacuum where there is no functioning dispute resolution process at all. See generally CUSTOMARY JUSTICE AND RULE OF LAW, *supra* note 6.

14. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3687&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3687&context=fss_papers) (last visited Mar. 6, 2012):

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.

*C. The Key Elements: Independent Structure, Behavior and Education, and Access*

Improving the judicial system is partly a structural problem of creating an independent judiciary as a separate branch of government, partly one of civic education about what the courts are and what they are supposed to do, partly one of establishing good governance or rules, and partly one of addressing access to the system.

The issue of separateness is easy. If the judiciary just does the bidding of the legislative branch or the executive branch, why have it? It would only be redundant of the other branches of government and an expensive and useless redundancy at that. Civic education on the role of the courts is essential to stress the importance of impartial decision-making to enhance the legitimacy of the courts, to adjust citizen expectations (so citizens seek and accept impartiality rather than victory at any cost), and to ensure that the judges understand their role as impartial arbiters.

As for the issue of governance (rules and structure), there are many sub-issues. Which should be the rules governing the system? Are the rules fair? Are they fairly applied by the impartial stranger? What makes and keeps the stranger impartial and what does not? What should be done if the stranger is not (or does not appear to be) impartial, and who makes that final decision? What shall the code of ethics for professional conduct say? How will breaches be detected? How will the code be enforced?

In the area of rules, progress appears to be measurable, sometimes by the mere passage of rules, some of which are already “international standards.” But rules (even constitutional ones) are also subject to the observation that they are only “top-down” reforms when more is needed or just insufficient “constitutional engineering” (in essence, “word games”).<sup>15</sup> Therefore, even when rules are in place (such as the constitutional reforms in Morocco), the question of implementing the rules or enforcement—moving from “paper rules” to actual change—remains.

Setting up a fair and impartial judicial system is of limited utility, however, unless there is access to justice so that citizens may use the system. Relevant questions bearing on access include, for example, a mix of educational, structural and resource issues. Among other things, these questions include: do citizens know their rights so they know when they can and should take their cases to court or otherwise assert their rights (a matter

---

15. *But see* John Mukum Mbaku, *Constitutional Engineering and the Transition to Democracy in Post-Cold War Africa*, INDEPENDENT REVIEW, at 501, 502 (Vol. II, No. 4, Spring 1998), available at [http://www.independent.org/pdf/tir/tir\\_02\\_4\\_mbaku.pdf](http://www.independent.org/pdf/tir/tir_02_4_mbaku.pdf) (last visited Mar. 17, 2012) (“[A] constitution is the critical factor in any properly effected transition to more effective governance structures.”).

of particular concern where there is lack of literacy); how and in what types of cases should legal services be expanded to make representation more available where litigants are unable to afford it; is the court system adequately funded so that it can handle its business efficiently and are there sufficient and well-qualified judges to handle the cases; are there inordinate court delays which prevent people from obtaining access; and are the courts geographically accessible.<sup>16</sup>

This article will focus on progress to date in Morocco, principally on its 2011 constitutional reforms, a number of which fully comply with international best practices; identify some of the work remaining to be done; provide context and perspective; and suggest some possible priorities and approaches. Some of these suggestions will not involve more rules (or enforcement of rules), but rather, educational or socio-economic change, and as such, will have longer time horizons for achievement.

## II. MOROCCO: BACKGROUND

Before analyzing the Moroccan judiciary, particularly in light of the constitutional reforms, a brief sketch of Morocco is needed to understand the context. What and where, in short, is Morocco?

A country with a diverse legal and cultural history, Morocco has a population over 32 million and is located in close proximity to Spain on the north (Tangier in Morocco is about twenty miles south of the Spanish border) in the northwestern part of North Africa, bordering Algeria to the east, with coasts on the Atlantic Ocean and Mediterranean Sea.<sup>17</sup> Islam is the state religion (and that of the vast majority of the population), but freedom of religion is constitutionally guaranteed.<sup>18</sup> Morocco has a constitutional, parliamentary, and hereditary monarchy<sup>19</sup> and is a pluralistic,

---

16. For an excellent discussion of access to justice and its various elements, see Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 *FORDHAM URB. L.J.* 3 (2010). The question of access to justice is more than that of access to legal services. Moreover, legal services are not interchangeable and are subject to variation in quality, including the extent of effort devoted to the matter and overall competence.

17. Morocco is often referred to as being strategically located because of its geographic positioning. See *Morocco's Economic Strengths Highlighted in Washington*, MOROCCO WORLD NEWS (Oct. 11, 2011), <http://moroccoworldnews.com/2011/10/moroccos-economic-strengths-highlighted-in-washington/11423> (last visited Mar. 6, 2012) [hereinafter *Morocco's Economic Strengths*] (referencing event at American University sponsored by the Washington Moroccan American Club).

18. See MOROCCO CONST. art. 3 (2011) ("L'Islam est la religion de l'Etat, qui garantit à tous le libre exercice des cultes."). [Editors' translation: "Islam is the State religion, which guarantees everyone the freedom to worship"].

19. See MOROCCO CONST. art. 1:

multilingual society, with many cultural strains, including with French, Arabic, Berber (Amazigh), Andalusian, sub-Saharan, and Jewish roots, with Jews at one time comprising hundreds of thousands in Morocco.<sup>20</sup>

The diversity of Morocco's culture is expressly recognized in its constitution,<sup>21</sup> which, among other things, acknowledges Arabic and Berber (*l'amazighe*) as the country's two official languages, although French is widely spoken, taught in schools and used in commerce and government;

---

Le Maroc est une monarchie constitutionnelle, démocratique, parlementaire et sociale. Le régime constitutionnel du Royaume est fondé sur la séparation, l'équilibre et la collaboration des pouvoirs, ainsi que sur la démocratie citoyenne et participative, et les principes de bonne gouvernance et de la corrélation entre la responsabilité et la reddition des comptes. [Editor's translation: *Morocco is a constitutional, democratic, parliamentary and social monarchy. The constitutional system of the Kingdom is based on the separation, balance and collaboration of powers, as well as citizenship and participatory democracy, the principles of good governance and the correlation [or balance] between responsibility and accountability.*]

See also *id.* art. 42 (hereditary monarchy).

20. Among other recent celebrations of Moroccan history and culture was a symposium in New York on 2000 years of Jewish life in Morocco, including various discussions and events, such as a museum exhibit in New York. The event was presented by the American Sephardi Federation under the patronage of the Kingdom of Morocco. See Norman L. Greene, *Journey into Morocco's Past Through the New York Center for Jewish History*, MOROCCOBOARD NEWS SERVICE (Jan. 2, 2011), <http://www.moroccoboard.com/news/5012-journey-into-moroccan-history-a-visit-to-the-jews-of-morocco-exhibition-at-nys-center-for-jewish-history> (last visited Mar. 6, 2012) (reviewing museum exhibit and citing extensive sources on Jewish life in Morocco); and American Sephardi Federation, *International Symposium, 2,000 Years of Jewish Life in Morocco: An Epic Journey*, available at <http://www.americansephardifederation.org/morocco-symposium.html> (last visited May 30, 2012) (describing symposium, with audio recordings of sessions). See also Jessica Marglin, *Modernizing Moroccan Jews: The AIU Alumni Association in Tangier, 1893-1913*, THE JEWISH QUARTERLY REVIEW, Vol. 101, No. 4 (Fall 2011) 574–603 (Jessica Marglin, the author of the article, was a participant in the symposium).

21. See MOROCCO CONST. pmb1.:

Etat musulman souverain, attaché à son unité nationale et à son intégrité territoriale, le Royaume du Maroc entend préserver, dans sa plénitude et sa diversité, son identité nationale une et indivisible. Son unité, forgée par la convergence de ses composantes arabo-islamique, amazighe et saharo-hassanie, s'est nourrie et enrichie de ses affluents africain, andalou, hébraïque et méditerranéen. [Editors' translation: *A sovereign Muslim state, committed to national unity and territorial integrity, the Kingdom of Morocco intends to preserve, in its fullness and diversity, its national identity, one and indivisible. Its unity, forged by the convergence of its Arab-Islamic, Amazigh [Berber] and sub-Saharan components is nourished and enriched by its African, Andalusian, Jewish and Mediterranean tributaries.*]

and Spanish is widely used in the northern parts of the country.<sup>22</sup> Morocco's specific form of spoken Arabic is known as Darija. Morocco's cultural history is also reflected, among other things, in its celebrated architecture and interior designs<sup>23</sup> and skilled weaving of prized carpets.<sup>24</sup>

---

22. See MOROCCO CONST. art. 5 ("*L'arabe demeure la langue officielle de l'Etat. . . De même, l'amazighe constitue une langue officielle de l'Etat, en tant que patrimoine commun à tous les Marocains sans exception.*"). [Editors' translation: "*Arabic remains the official language of the State. . . Similarly, the Amazigh language is an official State language, as a common heritage to all Moroccans without exception.*"].

Cf. U.S. DEPT. OF STATE, BACKGROUND NOTE: MOROCCO 1 (Apr. 20, 2011), available at <http://www.state.gov/r/pa/ei/bgn/5431.htm> (last visited Mar. 12, 2012), issued before the 2011 Moroccan Constitution and mentioning Arabic alone as Morocco's official language:

Arabic is Morocco's official language, but French is widely taught and serves as the primary language of commerce and government. Moroccan colloquial Arabic, Darija, is composed of a unique combination of Arabic, Berber, and French dialects. Along with Arabic, about 10 million Moroccans, predominantly in rural areas, also speak one of the three Moroccan Berber dialects (Tarifit, Tachelhit, and Tamazight). Spanish is also used in the northern part of the country. English is increasingly becoming the foreign language of choice among educated youth and is offered in many public schools from the fourth year on.

23. The Metropolitan Museum of Art in 2011, as part of its re-modeling of its Islamic Galleries, centrally featured Moroccan art and architecture. See Randy Kennedy, *History's Hands*, N.Y. TIMES, Mar. 17, 2011, at AR1:

Almost 30 years later the museum was embarking on the most ambitious rethinking and rebuilding of its Islamic art galleries in its history, a \$50 million endeavor. At the heart of those galleries, which will open in the fall [of 2011] after being closed six years, it dreamed of showcasing the defining feature of Moroccan and southern Spanish Islamic architecture: a medieval Maghrebi-Andalusian-style courtyard, which would function in much the same way such courtyards still do in the traditional houses and mosques of Marrakesh or Casablanca, as their physical and spiritual center.

The Andalusian courtyard was designed and built by Arabesque, Inc., whose president and CEO, Adil Naji, is quoted extensively in the article. See also <http://www.moresque.com/ceo.htm> (last visited Mar. 21, 2012).

24. Ronnie Reich, "*Untangling Threads: Female Artisans in Morocco's Rug Industry*" review: *Exhibit Highlights the Hidden World of Morocco's Female Rug Weavers*, STAR LEDGER, Dec. 13, 2010, available at [http://www.nj.com/entertainment/arts/index.ssf/2010/12/untangling\\_threads\\_female\\_arti.html](http://www.nj.com/entertainment/arts/index.ssf/2010/12/untangling_threads_female_arti.html) (last visited Mar. 12, 2012) (describing rug weaving industry, including work of Kantara Rugs ([www.kantararugs.com](http://www.kantararugs.com)): "[I]ntricately woven rugs — full of jewel-toned zigzags and diamond patterns — cover the ground. These carpets have been at the center of life in Moroccan villages for thousands of years. But it isn't only their aesthetic or practical value that makes them such a unique part of their society. In a country where men preside over leatherwork, metalwork, sewing, knitting, embroidery and almost all artisan crafts, weaving is a woman's world."); Alia Kate, *Untangling Threads: Women Artisans in Morocco's Rug Weaving Industry*, MOROCCOBOARD NEWS SERVICE, Nov. 4, 2010, available at <http://www.moroccoboard.com/viewpoint/64-author/4898-untangling-threads-women-artisans-in-moroccos-rug-weaving-industry> (the author, Alia Kate, is the founder of Kantara Rugs) (last visited Mar. 21, 2012).

Morocco has long been a subject of intense interest for scholars of many disciplines, including novelists,<sup>25</sup> travel writers,<sup>26</sup> anthropologists and more.<sup>27</sup>

Principal sources of revenue in Morocco include tourism and remittances from Moroccans living abroad,<sup>28</sup> who, as a group, maintain Moroccan citizenship rights.<sup>29</sup> Morocco also has extensive agricultural and fishing industries<sup>30</sup> and holds 85% of the world's wealth in phosphates, a primary ingredient in fertilizers with many other industrial, agricultural and consumer uses.<sup>31</sup> Morocco has numerous trade agreements with various countries, including a fair trade agreement with the United States.<sup>32</sup> There is an ongoing effort to promote entrepreneurship in Morocco along with the rest of the Maghreb through, among others, the North African Partnership for Economic Opportunity.<sup>33</sup>

---

25. See e.g., PAUL BOWLES, *THE SHELTERING SKY* (1949); LAILA LALAMI, *SECRET SON* (2009).

26. See EDITH WHARTON, *IN MOROCCO* (1920) (often an orientalist period piece, written by a famed American writer about her travels in Morocco). Significantly, the book is dedicated by the author to then French Resident General in Morocco Hubert Lyautey "to whose kindness the journey I had so long dreamed of surpassed what I had dreamed." *Id.* at 9.

27. See generally the special edition of Susan Slyomovics, *Clifford Geertz in Morocco*, 16 J. N. AFR. STUD. (2009); RACHEL NEWCOMB, *WOMEN OF FES: AMBIGUITIES OF URBAN LIFE IN MOROCCO* (2009) (including excellent bibliography of anthropologists and others writing on Morocco). See also *id.* at 192:

Morocco is a country of multiple contexts, often extremes – between rural and urban, poor and wealthy, religious and secular, provincial and cosmopolitan, Berber and Arab – and there are just as many identities between those ranges. . . .

28. Paul Silverstein, *Weighing Morocco's New Constitution*, MIDDLE E. RES. AND INFO. PROJ. (July 5, 2011), <http://www.merip.org/mero/mero070511> (last visited Mar. 10, 2012).

29. See MOROCCO CONST. art. 17 ("Les Marocains résidant à l'étranger jouissent des droits de pleine citoyenneté, y compris le droit d'être électeurs et éligibles.") [Editors' translation: "Moroccans residing abroad enjoy full citizenship rights, including the right and eligibility to vote."]

30. *Agriculture and Fishery*, MOROKKO-INFO, <http://www.marokko-info.nl/english/agriculture-and-fishery/> (last visited Mar. 6, 2012).

31. Brendan Borrell & Daniel Grushkin, *Morocco Plans 800 Acre Resort Hotel Funded by Fertilizer Cash*, BLOOMBERG (Nov. 5, 2010), <http://www.bloomberg.com/news/2010-11-05/morocco-plans-800-acre-resort-hotel-funded-by-fertilizer-cash.html> (last visited Mar. 11, 2011).

32. See *Morocco's Economic Strengths*, *supra* note 17. See also Morocco, PEACE CORPS, <http://www.peacecorps.gov/index.cfm?shell=learn.wherepc.northafr&cntry=morocco> (last visited Mar. 6, 2012).

33. See Jose W. Fernandez, *Cultivating Arab Spring Entrepreneurs: The U.S. Culture of Private Innovation is a Vital, Easy Export to Sell*, WALL ST. J., Feb. 3, 2012, at A15 (referencing North African Partnership for Economic Opportunity, including a major entrepreneurship conference in Morocco in January 2012).

Moroccans living abroad have formed diverse civil society and news organizations<sup>34</sup> for education and information regarding Morocco as well as many activities to preserve their cultural heritage. Morocco has specifically sought to strengthen the ties between Moroccans and Moroccans living abroad through, among other things, the creation of the Ministry of the Moroccan Community Abroad (CCME<sup>35</sup>); and the Ministry is recognized in the Moroccan Constitution.<sup>36</sup>

Without attempting to be inclusive, current challenges in Morocco include on the legal side, implementing the 2011 constitutional reforms and the advances in women's rights established in the 2004 Moudawana revisions to Morocco's personal status code, and improving access to justice; and on the socio-economic side, eradicating poverty, unemployment (particularly youth, including among the best educated, some of whom have

---

34. Such news organizations include MoroccoBoard News Service and Morocco World News. *See, e.g.*, <http://www.moroccoboard.com/> and <http://moroccoworldnews.com/> (last visited May 30, 2012). For civil society organizations, *see* <http://www.washingtonmoroccanclub.org/>, <http://www.amp-usa.org/> and more (last visited May 30, 2012). Other organizations providing intercultural exchange include Friends of Morocco. *See Friends of Morocco: Who We Are*, available at <http://friendsofmorocco.org/who.html> ("Friends of Morocco is a[n] organization of Americans, mostly returned Peace Corps volunteers, with experience in Morocco and Moroccans in America united with an interest in promoting educational, cultural, charitable, social, literary and scientific exchange between Morocco and the United States of America.") (last visited May, 29, 2012).

35. *See generally* COUNCIL FOR THE MOROCCAN COMMUNITY ABROAD, <http://www.ccme.org.ma/en/> (last visited Mar. 6, 2012).

36. *See* MOROCCO CONST. art. 163:

Le Conseil de la communauté marocaine à l'étranger est chargé notamment d'émettre des avis sur les orientations des politiques publiques permettant d'assurer aux Marocains résidant à l'étranger le maintien de liens étroits avec leur identité marocaine, les mesures ayant pour but de garantir leurs droits et préserver leurs intérêts, ainsi qu'à contribuer au développement humain et durable de leur pays d'origine et à son progrès. [Editors' translation: The Council of the Moroccan community abroad is particularly responsible for issuing opinions on the direction of public policies to ensure that Moroccans residing abroad maintain close ties with their Moroccan identity, which measures are aimed to guarantee their rights and safeguard their interests, and contribute to sustainable human development and progress of their country of origin.]

Connections to Morocco have also been furthered among Americans and Moroccan-Americans in various ways including cultural exchanges, such as the Fulbright program and Peace Corps and technical legal assistance programs. *See, e.g.*, FRIENDS OF MOROCCO, *History of the Start of Peace Corps in Morocco*, <http://friendsofmorocco.org/starthistory.htm> (last visited Mar. 6, 2012).

For recent observations on Moroccan history, both political and social, including support for the propositions in the text, *see generally* Léon Buskens, *Sharia and National Law in Morocco*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 89, 89–138 (Jan Michiel Otto ed., 2010) [hereinafter sometimes referred to as *Sharia and National Law in Morocco*]; Silverstein, *supra* note 28.

engaged in dramatic and violent protests),<sup>37</sup> illiteracy, and corruption, many of which were the subject of the Arab Spring and ongoing protests and the ensuing constitutional reforms. Following the approval of the constitutional reforms, parliamentary elections were held on November 25, 2011.

Established as a French protectorate in 1912, Morocco secured full independence from France in 1956. Mohammed V served as its first King after independence, followed by his son Hassan II, in 1961, and then by his son Mohammed VI, in 1999, who is serving presently.<sup>38</sup>

### III. THE 2011 CONSTITUTIONAL REFORMS ON THE JUDICIARY— CIRCUMSTANCES AND TIMING

*Taken together with the King's speeches, the 2011 Moroccan Constitution demonstrates a will to reform, and the government may be held accountable to its own words.*

The constitutional reforms were adopted by a referendum held in Morocco on July 1, 2011, following their presentation on June 17, 2011. The referendum followed a long history of stated commitment to judicial reform in Morocco, particularly as set forth in several major speeches by King Mohammed VI. In a speech on March 9, 2011 (which is partly quoted above), the King stressed the importance of an independent judiciary to enhance the rule of law and equality before the law.<sup>39</sup> The timing of the speech was perfect—in the midst of the Moroccan manifestation of the

---

37. See Paul Schemm, *5 Unemployed Moroccans Set Selves on Fire*, ASSOCIATED PRESS, ABC NEWS (Jan. 19, 2012), available at <http://abcnews.go.com/m/story?id=15392114> (last visited Mar. 7, 2012); Feuer, *supra* note 5; RACHEL NEWCOMB, *supra* note 27, p. 48 (“The future is often bleak for young men, even for university graduates who find they still need connections to get a job.”). See also MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 23 (noting “Many young people lack education or job opportunities, putting them at-risk for crime and possible involvement in religious extremism, similar to the recent experience of other Islamic countries.”). See also World Bank, *Morocco at a Glance*, Feb. 25, 2011, available at [http://devdata.worldbank.org/AAG/mar\\_aag.pdf](http://devdata.worldbank.org/AAG/mar_aag.pdf) (last visited Mar. 6, 2012); World Bank, *Morocco: Country Brief*, Nov. 2011, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/MOROCCOEXTN/0,,contentMDK:20149674~menuPK:294547~pagePK:141137~piPK:141127~theSitePK:294540~isCURL:Y,00.html> (last visited Mar. 12, 2012) (“Unemployment, especially among the youth, remains a critical concern. Urban unemployment increased to 13.5% in the second quarter 2011 from 12.7% a year earlier. In particular, youth joblessness in the urban areas deteriorated by almost 2.5 percentage points to reach 33.4% while that of the educated jobless increased by 1 percentage point to 18.2%.”).

38. The French protectorate encompassed most but not all of Morocco. See Buskens, *supra* note 36, at 95. (“The Spanish gained control of the Northern part and an enclave in the South; the rest of the country was placed under the authority of France, with the city of Tangier functioning as an international zone under the joint administration of several foreign nations.”)

39. See His Majesty King Mohammed VI, Speech at Rabat, *supra* note 1.

Arab Spring, known as the February 20 protests, which were limited in scope and intensity compared to the region for reasons fully explored elsewhere.<sup>40</sup> Although the constitutional reforms are widely attributed to have softened the protests, it is unclear and perhaps controversial to what extent the reforms satisfied the protesters' various demands.<sup>41</sup>

Yet judicial reform was on the Moroccan agenda even before that time. In a 2008 Throne Day speech, the King underscored the importance of upgrading and revamping the judiciary to foster economic development in Morocco and made important observations on judicial reform between the two speeches as well, particularly in a speech on judicial reform in August 2009.<sup>42</sup> There he observed, among other things:

---

40. Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20 ILSA Q. 22–24 (2011) [hereinafter *Access to Justice*] (citing many sources, including on Morocco and the Arab Spring). See also Feuer, *supra* note 5:

A group of Moroccan youths calling themselves the “February 20 Movement for Change” organized nationwide protests demanding an end to corruption, greater limits on the king’s power, and more government attention to poverty and unemployment. Like its counterparts elsewhere, the movement remained largely leaderless and attracted a broad swath of the Moroccan population. At the same time, however, it retained a firm commitment to the monarchy, allowing the Moroccan regime to avoid the crisis of legitimacy that accompanied uprisings in other Arab states.

More intense demonstrations and dramatic outcomes, however, need not result in more democratic outcomes. See David D. Kirkpatrick, *Revolt Leaders Cite Failure to Uproot Old Order in Egypt*, N.Y. TIMES (June 14 2012), available at <http://www.nytimes.com/2012/06/15/world/middleeast/egyptian-revolts-leaders-count-their-mistakes.html?hp> (last visited June 15, 2012) (“They toppled a pharaoh, but now the small circle of liberals, leftists and Islamists who orchestrated Egypt’s revolution say they realize they failed to uproot the networks of power that Hosni Mubarak nurtured for nearly three decades.”)

41. Maati Monjib, *The “Democratization” Process in Morocco: Progress, Obstacles, and the Impact of the Islamist-Secularist Divide*, at 10 (Saban Ctr. for Middle E. Pol. at the Brookings Inst., Working Paper, No. 5, Aug. 2011):

Furthermore, the draft Constitution presented by the king in his June 17, 2011 speech disappointed many of those who had initiated the youth movement. The new Constitution, despite the progress it represents, leaves a bulk of power in the hands of the monarch. The youth activists had fought, with the support of small leftist parties like the Socialist Unified Party (PSU), for a true constitutional monarchy where the king would have a role, but not govern.

See also, Paul Schemm, *Morocco’s King Lays Out Constitutional Reforms*, ARAB AWAKENING, June 17, 2011, available at <http://arabawakenings.thestar.com/article/1011068-morocco-s-king-lays-out-constitutional-reforms> (last visited April 12, 2012).

42. MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at iii. With respect to the same August 2009 speech by the King, see also *id.* at 7:

The judiciary is not only an essential prerequisite to ensure citizens are equal before the law, but it is also a mainstay of justice and of social stability. In fact, the legitimacy of the state itself and the inviolability of its institutions derive their strength from the power of justice, which is the cornerstone of governance systems. . . . We seek to make justice more trustworthy, credible, effective and equitable, because it serves as a strong shield to protect the rule of law. It is a pillar of judicial security and good governance, and acts as a booster for development.<sup>43</sup>

The author's prior article on this subject—preceding the constitutional reforms, but focusing on the King's speeches presaging those reforms, observed, “[a] first order question is how to get from A (the King's words [relating to judicial reform] to B (an improved judiciary).”<sup>44</sup> Now that the *de jure* constitutional reforms are here and approved, the first order question changes to “how to get from the constitutional reforms to judicial reforms,” or, as otherwise stated, “how to get from *de jure* (constitutional) reform to *de facto* (actual) reform?”

This article will address the key elements of judicial reform, beginning with judicial independence, in the Moroccan context.

---

In a speech in August 2009 (marking the 56th anniversary of the 1953 Revolution), King Mohammed VI laid out a six-part strategy for judicial reform, focusing on strengthening guarantees of judicial independence, modernizing the regulatory framework, overhauling structure and staffing, increasing efficiency, enforcing rules to prevent corruption and abuse of office, and ensuring optimal implementation of reforms.

The USAID-sponsored publication further observed that the 2009 speech “was unprecedented because it was solely dedicated to judicial reform.” *Id.* at 1. See also with respect to the 2009 speech, Siham Ali, *King Mohammed VI Calls for Overhaul of Judicial System*, MAGHAREBIA.COM, (Aug. 24, 2009), [http://www.magharebia.com/cocoon/awi/xhtml/en\\_GB/features/awi/features/2009/08/24/feature-01](http://www.magharebia.com/cocoon/awi/xhtml/en_GB/features/awi/features/2009/08/24/feature-01) (last visited Mar. 6, 2012).

See also Aziz Mekouar, *Judicial Reform in Morocco*, N.Y. TIMES (Sept. 3, 2009), available at <http://query.nytimes.com/gst/fullpage.html?res=9D06E6DE173FF930A3575AC0A96F9C8B63> (last visited Mar. 7, 2012) (King “called for a six-pronged approach to reforming the judiciary, including ethics training, reinforcing current safeguards, upgrading the quality of court officials and greater transparency of procedures.”) (The letter-writer, Hon. Aziz Mekouar, was then Ambassador to the United States from Morocco; he retired from his post in 2011 after long service.)

43. See *Full Text of HM the King's Speech on 56th Anniversary of the Revolution of the King and the People*, MAP (Dec. 30, 2010), <http://www.map.ma/en/discours-messages-sm-le-roi/full-text-hm-kings-speech-56th-anniversary-revolution-king-and-people> (last visited Mar. 18, 2012).

44. Norman L. Greene, *Morocco: Beyond King's Speech & Constitutional Reform: An Introduction to Implementing a Vision of an Improved Judiciary in Morocco*, MOROCCOBOARD NEWS SERVICE (Apr. 5, 2011), available at <http://www.moroccoboard.com/viewpoint/380-norman-greene/5484-morocco-beyond-kings-speech-a-constitutional-reform> (last visited June 24, 2012).

#### IV. JUDICIAL INDEPENDENCE AND THE CONSTITUTIONAL REFORMS

*What precisely needs to be done to secure judicial independence? Establish a system which structurally and through a course of incentives leads the judge to act impartially.*

##### A. Constitutional Reforms Bearing on Judicial Impartiality

Judicial independence is not an end in itself but rather is a means for achieving fair and impartial courts: in short, judicial impartiality.<sup>45</sup> It has both structural as well as behavioral aspects, and Morocco's 2011 constitutional reforms address both. The commitment to judicial independence is not limited to Morocco within the region; "[i]n recent years, Arab states have endorsed the idea of judicial independence in accordance with international standards; they have also proclaimed their acceptance of the principle of separation of powers."<sup>46</sup>

Structural independence considers the judiciary's relationship to other branches of government and is sometimes related to the phrase "separation of powers." It asks whether government, as constitutionally organized, lends itself to an independent judiciary, separate from the other branches of government.<sup>47</sup> In Morocco, under Article 107 of the Constitution, separation of powers is guaranteed, and thus the Constitution specifically addresses structural judicial independence: "*Le pouvoir judiciaire est indépendant du pouvoir législatif et du pouvoir exécutif. Le Roi est le garant de l'indépendance du pouvoir judiciaire.*"<sup>48</sup>

---

45. See *Judicial Reform in Developing Countries and the Role of the World Bank*, in THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES 147, 159 (Ibrahim F.I. Shihata et al. eds., 1993) ("While the independence of the judiciary is an important element of a judicial reform program, it should be recalled, however, that such independence is not an end in itself. Rather, it is a means to achieve the goal of the impartiality of the judge and the fairness of judicial procedures.").

46. Adel Omar Sherif & Nathan J. Brown, *Judicial Independence in the Arab World: A Study Presented to the Program of Arab Governance of the United Nations Development Program*, UNITED NATIONS DEVELOPMENT PROGRAM 6 (2002), available at <http://www.pogar.org/publications/judiciary/sherif/jud-independence.pdf> (last visited Mar. 7, 2012) (The authors reference Article 82 of Morocco's 1996 Constitution as embracing judicial independence). See also Alwaleed bin Talal, *The Lesson of the Arab Spring*, WALL ST. J., Feb 6, 2012, at A13 (reflecting on the Arab Spring and on "judicial institutions whose independence and integrity are vital to the safeguarding of rights" and observing that "[d]emocracy entails far more than elections and votes.").

47. KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 107 (Brookings Inst. 2006).

48. MOROCCO CONST. art. 107. (Editors' translation: *The judiciary is independent of the legislative and executive branches. The King is the guarantor of the independence of the judiciary.*).

The provision is strengthened from Article 82 of the Constitution of 1996 which covers the same subject matter.<sup>49</sup> Although the first sentence in both expresses a similar concept (except article 82 in the 1996 Constitution references “*L’autorite judiciaire*,” not “*Le pouvoir judiciaire*” as does Article 107 in the 2011 Constitution), the 2011 Constitution adds the second sentence specifying the King’s direct role in ensuring judicial independence. The use of the same word (*pouvoir*, 2011) rather than a different word (*L’autorite*, 1996) to describe the judiciary as to describe the legislative and executive branches also tends to suggest the equality of the judicial branch with the others.

Behavioral independence, however, relates to not just whether judges are “dispassionate and free from bias, but [whether they are] willing to take difficult positions, to resist corruption, and to make truly independent decisions.”<sup>50</sup> “Part of behavioral independence resides in the judge as a person” and depends on the judge’s place in society and education.<sup>51</sup> Nor is behavioral independence an unalloyed virtue, since there is no social benefit in judges acting regardless of law and issuing mischievous, if not pernicious, decisions.<sup>52</sup>

Those using the phrase “judicial independence” need to be precise as to its meaning and limits. “To say that [behavioral] judicial independence is desirable or undesirable is to say little unless there is agreement on what judicial independence means.”<sup>53</sup> However, “[j]udicial independence certainly means that judges are not coerced to decide cases,”<sup>54</sup> let alone

49. MOROCCO CONST. art. 82 (1996) (“ARTICLE 82 (“L’*autorité judiciaire* est indépendante du pouvoir législatif et du pouvoir exécutif.”), available at <http://www.maroc.ma/NR/rdonlyres/B6B37F23-9F5D-4B46-B679-B43DDA6DD125/0/Constitution.pdf> (last visited Mar. 7, 2012).

50. DAM, *supra* note 47, at 107.

51. *Id.* at 112 (“Part of behavioral independence resides in the judge as a person: is a judge able to be dispassionate and free from bias, able to resist political pressures and the temptations of corruption, and so forth?”), 115 (“The place in society that a judge enjoys, and feels he has, depends very much on the quality of judges and how the public views them.”).

52. See Norman L. Greene, *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 COURT REVIEW 80, 98–99 (2007) [hereinafter *Appointive Selection of Judges*] (Court Review is a publication of the American Judges Association).

53. *Id.* at 98.

54. *Id.* In the Moroccan context, see Aida Alami, *Trial Puts Morocco’s New Charter Under Spotlight*, N.Y. TIMES (Jan. 18, 2012), available at [http://www.nytimes.com/2012/01/19/world/africa/trial-puts-moroccos-new-charter-under-spotlight.html?pagewanted=1&\\_r=1&ref=middleeast](http://www.nytimes.com/2012/01/19/world/africa/trial-puts-moroccos-new-charter-under-spotlight.html?pagewanted=1&_r=1&ref=middleeast) (last visited Mar. 7, 2012) (quoting Moroccan businessman who attended recent trial: “I voted yes at the referendum for this new Constitution,” he said during an interview this month in his office. But ‘an independent justice is not one that gets orders on the phone.’”). For further discussion of so-called telephone justice, see *infra*.

induced to decide them by corrupt means. Such coercion and inducement, according to published reports (some of which are quoted above), are too much a part of Moroccan judicial life. “The impact of the executive’s authority over the administration of justice [in Morocco] is not always obvious in daily life. When the justice system has to deal with an affair involving the illegal fortunes of leading members of society, however, it rapidly becomes visible.”<sup>55</sup>

Article 109 of the Moroccan Constitution expressly prohibits conduct tending to corrupt the judiciary or impair judicial impartiality, noting as follows:

Est proscrite toute intervention dans les affaires soumises à la justice. Dans sa fonction judiciaire, le juge ne saurait recevoir d’injonction ou instruction, ni être soumis à une quelconque pression. Chaque fois qu’il estime que son indépendance est menacée, le juge doit en saisir le Conseil Supérieur du Pouvoir Judiciaire. Tout manquement de la part du juge à ses devoirs d’indépendance et d’impartialité, constitue une faute professionnelle grave, sans préjudice des conséquences judiciaires éventuelles. La loi sanctionne toute personne qui tente d’influencer le juge de manière illicite.<sup>56</sup> [Editors’ translation in footnote]

Specifically, Article 109 bars unlawfully attempting to influence the judge (*La loi sanctionne toute personne qui tente d’influencer le juge de manière illicite*); a judge who considers his judicial independence threatened must so inform the Supreme Judicial Council (*Chaque fois qu’il estime que son indépendance est menacée, le juge doit en saisir le Conseil Supérieur*

---

55. Transparency Maroc, Casablanca, *Royal Power and Judicial Independence in Morocco*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 233 (Transparency Int’l 2007), available at [http://www.transparency.org/publications/gcr/gcr\\_2007#download](http://www.transparency.org/publications/gcr/gcr_2007#download) (last visited Mar. 12, 2012). The voluminous Transparency International, GLOBAL CORRUPTION REPORT 2007, which contains contributions from various authors on many countries (including Morocco), provides an interesting overview on international judicial reform from many perspectives.

The quote in the text from the GLOBAL CORRUPTION REPORT 2007 also recognizes the notion that judicial independence is not an “all or nothing” proposition: e.g., courts may function independently in some cases, such as routine commercial or family law cases, but not in other cases, such as political ones.

56. See MOROCCO CONST. art. 109. [Editors’ translation: *Any intervention in cases brought to justice is prohibited. In his judicial function, the judge should not receive orders or instructions or be subjected to any pressure. Whenever he considers that his independence is threatened, the judge must advise the Supreme Judicial Council. Any failure by the judge in his duties of independence and impartiality is serious professional misconduct, without prejudice to possible legal consequences. The law prohibits anyone from improperly attempting to influence the judge.*]

*du Pouvoir Judiciaire*); and a judge who compromises the judge's independence and impartiality is subject to professional and potential legal sanctions (*Tout manquement de la part du juge à ses devoirs d'indépendance et d'impartialité, constitue une faute professionnelle grave, sans préjudice des conséquences judiciaires éventuelles*). As the King has elaborated, "[t]o preserve the inviolability of the judiciary, the draft [and now final] Constitution criminalizes any interference, corruption or influence peddling with regard to the judiciary."<sup>57</sup> Similarly, Article 110 of the Moroccan Constitution requires judicial impartiality (*de l'application impartiale de la loi*), as follows:

Les magistrats du siège ne sont astreints qu'à la seule application du droit. Les décisions de justice sont rendues sur le seul fondement de l'application impartiale de la loi. Les magistrats du parquet sont tenus à l'application du droit et doivent se conformer aux instructions écrites émanant de l'autorité hiérarchique.<sup>58</sup>

The standards in Articles 109 and 110 of the Moroccan Constitution – understood in light of the King's speech—are fully consistent with international standards such as those set forth in the *Bangalore Principles of Judicial Conduct* (in Value 1.1): “A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”<sup>59</sup> But as discussed below, there are inherent limits to this proposition as it presumes that the law the judge is called upon to apply meets a standard of justice and

---

57. HM King Mohammed VI, Speech to the Nation (June 17, 2011), available at <http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html> (last visited Mar. 12, 2012).

58. See MOROCCO CONST. art. 110. [Editors' translation: *The judges are required to enforce the law. Judicial decisions are made solely on the basis of the impartial application of the law. Prosecuting authorities are bound to enforce the law and must comply with written instruction from their superiors.*].

59. See *Bangalore Principles of Judicial Conduct*, supra note 7, ¶ 1.1. See also THE UNIVERSAL CHARTER OF THE JUDGE (1999), available at American Bar Association, Rule of Law Initiative (initially published under Central European and Eurasian Law Initiative Judicial Reform Program) in COMPILATION OF INTERNATIONAL STANDARDS ON JUDICIAL REFORM AND JUDICIAL INDEPENDENCE, pp. 15, 16 (Central European and Eurasian Law Initiative 2004), available at [http://apps.americanbar.org/rol/docs/judicial\\_reform\\_compilation\\_international\\_standards\\_2004.pdf](http://apps.americanbar.org/rol/docs/judicial_reform_compilation_international_standards_2004.pdf) (last visited June 24, 2012) (“Article 4. Personal autonomy. “No one must give or attempt to give the judge orders or instructions of any kind, that may influence the judicial decisions of the judge, except, where applicable, the opinion in a particular case given on appeal by the higher courts.”).

fairness. Consider the appropriate rule when the law is odious or otherwise unjust, and pressure comes from quarters calling on the judge to be just and fair.<sup>60</sup>

Moroccan Foreign Minister Taieb Fassi Fihri once observed that improper influence on judges has taken place in Morocco, including through “telephone justice,”<sup>61</sup> where political figures dictate case outcomes. As the Associated Press reported, “Foreign Minister Taieb Fassi-Fihri acknowledged ‘phone call justice’ exists, in a speech before the Brookings Institute in March [2011]. Judicial independence ‘is not the reality today, because [there are] some calls from time to time, from the Justice Department to some judge. But now we want to assure this total

60. The *U.N. Basic Principles* are to the same effect under Principle 2. See *U.N. Basic Principles*, *supra* note 8, princ. 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”). To suggest that the principle requiring impartial application of the law depends on context – including the fairness and justice of the law – is not intended to suggest that any particular Moroccan law is unfair and unjust. See, e.g., *A Perspective on Nazis in the Courtroom*, *supra* note 10 (citing sources); *Executioners, Jailers, Slave-trappers, and the Law*, *supra* note 10 (citing sources).

61. See Foreign Minister Taieb Fassi Fihri, *Embracing Reform: A Message from King Mohammed VI of Morocco* (March 23, 2011), available at [http://www.brookings.edu/~media/Files/events/2011/0323\\_morocco/032311\\_morocco\\_transcript.pdf](http://www.brookings.edu/~media/Files/events/2011/0323_morocco/032311_morocco_transcript.pdf) (last visited Mar. 12, 2012). See in particular page 15 of the transcript of the Foreign Minister (“First, [Morocco is seeking] total [judicial] independence. It’s not the reality today. And because some calls [come] from time to time, from the Justice Department to some judge. But now we want to assure this total independence.”). See also Carolyn A. Dubay, *Morocco’s “Arab Spring” and Judicial Independence*, INTERNATIONAL JUDICIAL MONITOR, American Society of International Law (2011), available at [http://www.judicialmonitor.org/archive\\_spring2011/sectorassessment.html](http://www.judicialmonitor.org/archive_spring2011/sectorassessment.html) (last visited June 10, 2012) (“[I]t is behind the scenes exchanges between politicians and judges that must be addressed through a change in legal culture and a true understanding of the role of an independent judiciary in a constitutional democracy or monarchy. Certain trappings of a modern judicial system may be necessary to attract foreign investment and serve commercial interests, but improving the legitimacy and independence of the judiciary will require far more of a cultural shift. . . .”)

U.S. Supreme Court Justice Stephen Breyer has also extensively discussed what is commonly referred to as “telephone justice.” See Norman L. Greene, *Appointive Selection of Judges, Limited Jurisdiction Courts with Non-Lawyer Judiciaries, and Judicial Independence*, 43 CT. REV. 80, 98 (2007). See also Kathryn Hendley, *‘Telephone Law’ and the ‘Rule of Law’: The Russian Case*, HAGUE JOURNAL ON THE RULE OF LAW, 1:241-262 (2009), available at [http://law.wisc.edu/m/nmytc/telephone\\_law\\_and\\_rol.pdf](http://law.wisc.edu/m/nmytc/telephone_law_and_rol.pdf).

Nor is the issue of judicial independence fully resolved in the United States. See, e.g., *Perspectives from the Rule of Law*, *supra* note 13 (among other things, addressing the rule of law, judicial independence, and judicial elections in the United States); Norman L. Greene, *How Great is America’s Tolerance for Judicial Bias? An Inquiry into the Supreme Court’s Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W.VA. L. REV. 873 (2010) [hereinafter *America’s Tolerance for Judicial Bias*].

independence,' he [i.e., the Foreign Minister] said."<sup>62</sup> This is not an issue of whether judicial impartiality is required as a matter of Moroccan law (which it is and has been even before the 2011 constitutional reforms),<sup>63</sup> but rather whether it exists as a matter of fact, and if it does not, how to achieve it.<sup>64</sup> Prohibiting such practices as telephone justice and other coercion, including under the authority of Articles 109 and 110 of the Constitution, is essential to protect judicial impartiality, not to mention judicial independence.<sup>65</sup>

Lack of impartiality (or judicial bias) also implicates the question of the rules governing recusal (or disqualification): that is, when should a particular judge be removed, or voluntarily step down from, a particular case because the judge has a conflict of interest or it appears that the judge cannot be fair.<sup>66</sup> The *Bangalore Principles of Judicial Conduct* thus provide that a "judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially."<sup>67</sup> Thus the appearance of bias is enough to disqualify:

While personal corruption is certainly a problem, the appearance of judicial bias—or what could be called “perceived corruption”—is also a problem. Many legal systems view this latter type of corruption as equally dangerous, particularly

---

62. See Paul Schemm, *Moroccan Justice: sold to highest bidder*, ASSOCIATED PRESS (December 8, 2011), available at <http://www.guardian.co.uk/world/feedarticle/9985284> (last visited Mar. 7, 2012) (also quoting author); see also Foreign Minister Taieb Fassi Fihri, *supra* note 61.

63. NATHAN J. BROWN, ARAB JUDICIAL STRUCTURES: A STUDY PRESENTED TO THE UNITED NATIONS DEVELOPMENT PROGRAM (2001), available at <http://www.undp-pogar.org/publications/judiciary/nbrown/morocco.html> (last visited Mar. 7, 2012) (citing “Article 82 [of the pre-2011 reformed [i.e., 1996] Moroccan Constitution]. The Judiciary shall be independent from the legislative and executive branches.”). The pre-reformed Moroccan Constitution’s Judiciary Articles also appear at MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 12.

64. *Morocco: Justice Lacks Independence & Public Confidence*, Wikileaks, MOROCCOBOARD (Dec. 21, 2010), available at <http://www.moroccoboard.com/news/34/5005> (“A cable, recently released by wikileaks, and written a year ago by the US Embassy in Rabat, noted that the Moroccan judicial system lacks independence and public confidence, and it represents an impediment to Morocco’s development and reform. . . . The Judges are not independent of the Ministry of Justice, political pressure to influence outcomes is used by officials and palace insiders”).

65. See, e.g., *America’s Tolerance for Judicial Bias*, *supra* note 61; *Perspectives from the Rule of Law*, *supra* note 13 (among other things, addressing the rule of law, judicial independence, and judicial elections in the United States).

66. See, e.g., *America’s Tolerance for Judicial Bias*, *supra* note 61.

67. *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.5.

because it causes public distrust in the judiciary. Public confidence is vital to a well-functioning judiciary, so regardless of whether actual bias exists, the appearance can be sufficient to remove a judge from a particular case.<sup>68</sup>

In addition to covering (in Articles 109 and 110 of the Moroccan Constitution) the importance of impartiality and the consequences of its absence, Moroccan law should provide details on when and how judges should be disqualified from handling cases. Preserving impartiality is not only an issue of designing the right system, but also an issue of having the appropriate procedures in place for use, case by case, judge by judge.

In addition to formal law, this may also involve professional codes, ethics and standards and many of the ideas set forth in the *Bangalore Principles of Judicial Conduct*, the *U.N. Basic Principles*, and like models.<sup>69</sup>

### *B. Implementing Reform Through Structural Changes in Judicial Oversight*

Maximizing independence requires insuring that judges' careers do not depend on their making decisions favoring a particular group of persons with the power to enhance their careers.<sup>70</sup> Among other things, this is necessary to ensure that judges are not put into a position of deciding between their professional judgment and their career advancement.<sup>71</sup> (In

---

68. Kevin J. Mitchell, *Neither Purse Nor Sword: Lessons Europe Can Learn From American Courts' Struggle For Democratic Legitimacy*, 38 CASE W. RES. J. INT'L L. 653, 656–57 (2006–2007) (footnote omitted).

69. The author is informed of at least one ethical code for Moroccan judges, which does not have the force of law, prepared recently by an association of judges in Morocco (*amicale hassanienne des magistrats*). Source: Moroccan judge, anonymous. See *Charte D'Ethique Judiciaire* (on file with the author and the law review). Rules must fix not only when a judge should be disqualified but how the disqualification procedure should operate. For example, is the decision to disqualify the judge's alone or may it be reviewed and enforced by other authorities where the judge refuses disqualification himself or herself? See generally, e.g., *America's Tolerance for Judicial Bias*, *supra* note 61.

70. See Schemm, *Moroccan Justice: sold to highest bidder*, *supra* note 62 ("Morocco's courts have historically been weak and under the control of the king and his Justice Ministry, which determines judges' salaries and appointments so that they will often rule as instructed for the sake of their careers."). However, even the statement in the text may be over-inclusive. Assume such persons with economic or political power over judges prize even-handed and impartial justice and the efficient handling of cases. In that situation, there might be nothing wrong with pleasing them. The problem, more narrowly conceived, is judges who slant the law to help the rich and powerful because they are rich and powerful in order to maintain their position or get ahead, and the rich and powerful request outcomes for personal or political gain, not for impartiality or efficiency.

71. Susan Rose-Ackerman, *Judicial Independence and Corruption*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 16 (Transparency Int'l 2007), available at [http://www.transparency.org/publications/gcr/gcr\\_2007#download](http://www.transparency.org/publications/gcr/gcr_2007#download) (last visited Mar. 12, 2012) (the

the United States, a different problem occurs where judges are elected: namely, judges appearing to make certain decisions to please the electorate—or campaign contributors—in particular cases, rather than making impartial decisions according to the law.)<sup>72</sup>

Achieving this independence requires more than attention to a constitution but also to judicial selection and promotional processes. According to a 2010 USAID-sponsored report on Morocco, “[t]he current judicial system [in Morocco] is permeable to political influence, and the mechanisms through which judges are appointed, promoted, sanctioned, and dismissed leave them vulnerable to political retribution.”<sup>73</sup> The hope of career enhancement needs to be removed as one incentive for becoming less independent. As the U.N.’s *Basic Principles on the Independence of the Judiciary* provides, “promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.”<sup>74</sup>

Thus it is necessary to design independent committees to select, nominate or promote judges, without over-involvement of other branches of government, such as the Ministry of Justice, to help ensure that they act

---

article makes general observations but is not specific to Morocco). Judicial independence may be threatened by other branches of government, of course. But, as previously noted, it may also be threatened by the judicial election system in place in a number of states in the United States. Any observations in this paper about other countries are not intended to suggest that there are no judicial independence problems or issues in the United States.

72. See, e.g., *Perspectives from the Rule of Law*, *supra* note 13 (among other things, addressing the rule of law, judicial independence, and judicial elections in the United States); see also Valerie Wigglesworth, *Former Judge Suzanne Wooten Maintains Innocence Despite Bribery Conviction in Challenge to Subpoena*, DALLAS MORNING NEWS, June 21, 2012, available at <http://crimeblog.dallasnews.com/2012/06/former-judge-suzanne-wooten-maintains-innocence-despite-bribery-conviction-in-challenge-to-subpoena.html/> (last visited May 12, 2012) (“Suzanne Wooten acknowledged the jury’s nine guilty verdicts on felony charges last year that forced her to resign from the 380th Judicial District Court bench. But she maintains her innocence in a scheme that prosecutors say funded her 2008 judicial campaign in Collin County in exchange for future favorable rulings in court.”). Of course, judges are not bound to issue decisions which displease the electorate or campaign contributors. The problem arises when pleasing them is the principal motivating factor for decisions as opposed to the impartial application of the law.

73. MOROCCO RULE OF LAW ASSESSEMENT, *supra* note 3, at 12. See also *Moroccan Judges, Lawyers Demand Judicial Reform*, May 17, 2012, available at <http://www.iranian.com/main/blog/darius-kadivar/check-balances-moroccan-king-receives-judges-calling-legal-reform-and-justice-0> (last visited June 10, 2012) (“The Moroccan government and the Royal family are seen to have inordinate power over the judiciary through their control of salaries and promotions and it is believed that many verdicts follow the will of the executive branch.”)

74. See *U.N. Basic Principles*, *supra* note 8.

independently.<sup>75</sup> In a leading text not involving Morocco (but applicable to it), the author observed that “[i]f promotion is handled by a government agency—the ministry of justice—independence may be compromised. . . . One outcome may be judges who are reluctant to stand up to the government.”<sup>76</sup> “The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal.”<sup>77</sup>

The constitutional reform removes any leadership role of the Ministry of Justice from the newly established judicial regulatory council (*Le Conseil Supérieur du Pouvoir Judiciaire*) unlike what had been the case with the predecessor council, but it remains unclear whether other influences on the judicial evaluation or regulatory processes will unduly affect judicial independence.<sup>78</sup> (For example, the King chairs the council as

---

75. See Siham Ali, *King Mohammed VI Calls for Overhaul of Judicial System*, MAGHAREBIA (August 24, 2009), available at [http://www.magharebia.com/cocoon/awi/xhtml1/en\\_GB/features/awi/features/2009/08/24/feature-01](http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/08/24/feature-01) (last visited Mar. 7, 2012), noting:

It is high time that Morocco change the poor domestic and international perception of its justice system, said Habib Choubani of the judiciary committee in parliament. Also important is the independence of the judiciary from the government, “for as long as the Minister of Justice has . . . a role in the appointment of judges, it will be impossible to speak of an independent judiciary.”

See also MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 13, which observed before the 2011 constitutional reforms:

[The Ministry of Justice] exercises significant influence over the appointment, discipline, transfer, and promotion of judges. The exercise of these powers makes judges beholden to the [Ministry] not only for their initial appointment but for their continued job security as well, with obvious negative implications for judicial independence.

Although, as noted above, the 2011 constitutional reforms reduced the involvement of the Ministry of Justice, the above sources may be read as cautioning against any other branch involvement with judicial opportunities for similar reasons.

76. DAM, *supra* note 47 at 117.

77. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 608 (1996).

78. See HM King Mohammed VI, Speech to the Nation (June 17, 2011), available at <http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html> (last visited Mar. 12, 2012):

Similarly, the draft Constitution sets up the “Higher Council of the Judicial Branch,” as a constitutional institution headed by the King, in replacement of the Higher Council of the Judiciary, with a view to giving administrative and financial autonomy to the new Higher Council. It also makes the President of the Court of Cassation Executive President of the Council—instead of the Minister of Justice in the current Constitution—the aim being to bolster the separation of powers.

well as nominates judges).<sup>79</sup> This is not a question of whether separation of powers among the executive, legislative and judicial branches is required by law (which it is), as the constitutional reform confirms. Rather, it is a question of whether it is required (or exists) as a matter of fact and that the systems in place ensure that.<sup>80</sup>

### C. *The Limits of Judicial Independence—A Philosophical Perspective*

There are limits to judicial independence. “Fixing the meaning of behavioral independence, for example, requires attention to key questions, including independence from what and to do what. No one wants judges to be free to do whatever they like.”<sup>81</sup> Moreover, “[w]hile adequate institutions might enhance judicial independence and minimize the problems of a politicized judiciary, increasing the powers and independence enjoyed by judges risks creating the opposite problem of over-judicializing public policy.”<sup>82</sup>

In the United States, it is common to observe that judges, absent special circumstances, such as constitutional review which the new Moroccan constitutional court is empowered to conduct,<sup>83</sup> should not be

---

(The “Higher Council of the Judicial Branch” mentioned in the King’s speech is referred to elsewhere in this article as the Supreme Judicial Council.)

79. See MOROCCO CONST. art. 56 (Le Roi préside le Conseil Supérieur du Pouvoir Judiciaire) [Editors’ translation: “*The King chairs the Supreme Judicial Council.*”]; art. 57 (Le Roi approuve par dahir la nomination des magistrats par le Conseil Supérieur du Pouvoir Judiciaire) [Editors’ translation: “*The King approves by decree the appointment of judges by (or for) the Supreme Judicial Council.*”].

80. See BROWN, *supra* note 63, ¶ 5 (prior to the 2011 Moroccan Constitution) (“The Moroccan Constitution clearly endorses the principle of separation of powers, but the Ministry of Justice still plays a significant role in judicial affairs.”).

81. *Appointive Selection of Judges*, *supra* note 52, at 97 (article extensively analyzes judicial independence). This section does not lessen the importance of judicial independence; however, in exploring its meaning and highlighting its ambiguities, it seeks to sharpen the dialogue.

82. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 201, 215 (2009).

83. See HM King Mohammed VI, Speech to the Nation (June 17, 2011), available at <http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html> (last visited Mar. 12, 2012):

To confirm the principle of the supremacy of the Constitution and the law, the Constitutional Council has been elevated to the rank of a “Constitutional Court” with extensive powers which, in addition to existing prerogatives, include checking the constitutionality of international conventions and ruling on disputes between the State and the regions. In order to promote democratic citizenship, this Court has been authorized to look into litigants’ claims regarding the unconstitutionality of a law which the Judiciary may deem detrimental to constitutional rights and freedoms.

rejecting legislation; and judges certainly should not be doing so solely because of their own personal preferences. This is the issue of deference to legislation, which has arisen in Morocco, notably in connection with judicial enforcement of the acclaimed Moroccan family code (or Moudawana) reforms in 2004. (Such reforms are discussed below and in many referenced sources.<sup>84</sup>)

As the U.S. State Department has observed in 2011, for instance, “Implementation of the controversial family law remained a concern because it is largely dependent on the judiciary’s willingness to enforce it, and many judges rooted in conservative attitudes did not agree with its intent.”<sup>85</sup> The difficulty in such implementation has been the subject of extensive commentary, including on whether such judges should be asserting their patriarchal preferences in opposition to the law.<sup>86</sup>

How far the general proposition may be extended—that judges should enforce, not thwart constitutional legislation—of course, is beyond the scope of this article. Some legislation may be so odious (yet constitutional

---

*See* MOROCCO CONST. arts. 129–34 (establishing Constitutional Court).

84. *See Access to Justice*, *supra* note 40, 22–24 (citing many sources). For a view of the old family law, *see Sharia and National Law in Morocco*, *supra* note 35, at 89–138. *See also id.* at 113:

Until the reforms of 2004 the patriarchal model of family relations formed the basis for Moroccan family law. Marriage and regulations concerning divorce, descent, custody over children, and inheritance law were structured by intrinsically unequal relations of exchange between a husband and wife. . . . This patriarchal model is rooted in classical Islamic law and the related world view, as well as in conceptions shared by many Moroccans. In family law this resulted in institutions criticised by reformers, such as obedience of a wife to her husband, polygamy, male marriage guardianship over daughters, and repudiation as a male privilege.

85. U.S. DEPT. OF STATE, 2010 HUMAN RIGHTS PRACTICES: MOROCCO (Apr. 8, 2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154468.htm> (last visited Mar. 8, 2012) [hereinafter 2010 HUMAN RIGHTS PRACTICES: MOROCCO]. For a more detailed discussion citing excellent sources, *see generally Access to Justice*, *supra* note 40, at 20–24. *Cf. Sharia and National Law in Morocco*, *supra* note 36, at 109–110 (“Until now, our knowledge about actual practice is scant; progressive Moroccan scholars and activists have been very critical of the judges’ interpretations of the new law (e.g., Benradi et al. 2007). Research on judicial practice and everyday understandings of the law is still required.”).

86. *See generally Access to Justice*, *supra* note 40 (especially the cited references). Further research might be conducted concerning whether opposition to the implementation of the law has been spearheaded by judges appointed before the time the law went into effect or judges appointed since that time, and what, if any, lessons may be drawn from such analysis.

In some contexts where there is a contest between certain customs and traditions and a planned formal justice system (perhaps embodying modern human rights principles), such customs and traditions may prevail since nothing else may be practicable. Where various forms of law exist simultaneously like this, the environment is termed legally pluralistic. *See, e.g., CUSTOMARY JUSTICE AND RULE OF LAW*, *supra* note 6.

under the laws of a particular country at a particular time) that conventional wisdom and theory fail.<sup>87</sup> In that context (presumably not applicable to Morocco), it may be impossible to serve as a judge in the ordinary sense, if the judge has a conscience. That situation aside, a few other observations are in order.

If a judge is typically unwilling to apply a nation's existing rules and makes her own, whenever she does so she is acting not like a judge but a legislature or perhaps something else.<sup>88</sup> Although the results in particular cases might be good (or bad, depending on the judge and the context), it is unclear why a nation would wish to have a single official (like a judge) legislate on behalf of everyone, following personal rules. (Judges are typically trained to apply the law, regardless of their personal agreement or disagreement).

Indeed, if several judges disagreed with each other, one might have conflicting "judicial legislation," and predictability in the law (to the extent it is a virtue) would vanish (unless a higher court resolved conflicts between individual judges).<sup>89</sup> So would equal treatment under the law, since results in like cases would vary depending on the assigned judge. Of course, even

87. Although this is a common statement in the United States—that American judges should not be applying their own personal preferences as opposed to the law—one might argue that it might not be universally applicable. For example, justice in some countries might be better served from an international human rights perspective by a judge personally opposing an anti-human rights law, even though the law technically required the opposite result. Of course, where judges impose their own personal preferences to avoid odious laws, the judiciary would be a very different type of judiciary than is commonly understood by American lawyers. In addition, if a legislative process lacked legitimacy derived from popular election or other indicia of popular support (for example, a corrupt legislature or one which merely did the bidding of a despot), there is scant basis for insisting that judges adhere to the laws as presented by the legislature.

There is ample literature regarding whether and when judges may follow their conscience rather than law, how they should do so, and what are the implications of their doing so. *See, e.g., A Perspective on Nazis in the Courtroom, supra* note 10 (citing sources); *Executioners, Jailers, Slave-trappers, and the Law, supra* note 10 (citing sources). Of course, were each judge in a particular country to apply her own personal preferences regardless of law, a chaotic and whimsical judicial system would result.

This problem, like many, may not be conducive to neat solutions, and the resolution may depend on circumstances and trade-offs, such as trading lack of certainty or predictability for more humane outcomes.

88. It has become an American convention to use the feminine personal pronoun rather than the masculine wherever possible when gender is unknown. However, the extent to which this fits this situation involving the Moroccan judiciary may depend on the number of women in the Moroccan judiciary.

89. Extreme examples of deference to legislation include the post-revolutionary French judiciary, which played a "very minor role of merely interpreting in a narrow, almost mechanical way, the meaning of legislation passed by the Assembly." DAM, *supra* note 47, at 107.

while applying the law with which she disagrees, a judge need not silently accept it: rather, she may signal to the public how she recommends that the law should be changed.

But predictability is not an absolute virtue, particularly where there is no structural independence. Predictability in that context might mean that the judicial power always follows the rule of the legislative or executive power. Nor is predictability a virtue where the laws are unjust, since that would lead to predictable injustice.<sup>90</sup>

Yet in other situations, predictability is considered a positive attribute since it allows people and businesses to plan their affairs and reasonably anticipate that their wishes will be respected. Among other things, this plays an important role in commerce and personal succession (e.g., inheritance). Predictability is also important for civil wrongs and crimes, since a person needs to know what is permitted or not so that compliance is possible.

If a judge disagrees with a few of the nation's laws (yet the laws are permissible under the nation's constitution), the law may provide that the judge may decline to serve or step aside in particular cases, depending on the applicable law. If a judge disagreed with many, it is unclear why the judge would wish to serve, except to subvert or ameliorate them. Although that approach may make things better (or worse), the judge would not be acting as a judge under the common understanding of that term, perhaps "something else" instead, such as an insurgent or movement leader. Again, even though that might be appropriate in certain times, places and circumstances, such a judge would not satisfy the common understanding of what a judge is.<sup>91</sup>

---

90. See *Perspectives from the Rule of Law*, *supra* note 13 at 62 (the rule of law should not be the rule of any law even if that enhances predictability; the goal of rule of law reform is not to strengthen the efficiency of authoritarian regimes).

91. *A Perspective on Nazis in the Courtroom*, *supra* note 10, at 1122. See also, Stephen Ellmann, *To Resign or Not to Resign*, 19 CARDOZO L. REV. 1047, 1048 (1997) (reflecting, among other things, on anti-apartheid judges in apartheid-era South Africa, who chose to remain on the bench). The article was part of a symposium entitled *Executioners, Jailers, Slave-trappers and the Law: What Role Should Morality Play in Judging?* The symposium is published beginning at 19 CARDOZO L. REV. 963 (1997), commencing with Norman L. Greene, *Preface*. *Id.* at 963. See *supra* note 10.

## V. THE NEED FOR ANTI-CORRUPTION ENFORCEMENT AS A TOOL FOR JUDICIAL REFORM

*Though common in every society, whether democratic or authoritarian, corruption is the great curse of developing countries, and Morocco is no exception.*<sup>92</sup>

\*\*\*

*For an “agent of corruption,” the Moroccan courts are a cornucopia of opportunity. The country’s judges are notoriously susceptible to pressure from the executive branch of government and business interests as well as from more humble petitioners with handshakes full of cash.*<sup>93</sup>

\*\*\*

*ARTICLE 36 of the Moroccan Constitution [Anti-corruption provision]*

*Les infractions relatives aux conflits d'intérêts, aux délits d'initié et toutes infractions d'ordre financier sont sanctionnées par la loi. Les pouvoirs publics sont tenus de prévenir et réprimer, conformément à la loi, toutes formes de délinquance liées à l'activité des administrations et des organismes publics, à l'usage des fonds dont ils disposent, à la passation et à la gestion des marchés publics. Le trafic d'influence et de privilèges, l'abus de position dominante et de monopole, et toutes les autres pratiques contraires aux principes de la concurrence libre et loyale dans les relations économiques, sont sanctionnés par la loi. Il est créé une Instance nationale de la probité et de lutte contre la corruption.*<sup>94</sup> [Editors' translation in footnote.]

---

92. JOSEPH BRAUDE, *THE HONORED DEAD* 188 (2011).

93. *Id.* at 190. See also MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 18: Corruption in Morocco – both financial and misuse of authority and power – is one of the most significant challenges confronting the transition to democracy and results in lack of procedural fairness for citizens. While there have been some campaigns against corruption and impunity, they are short-lived and perceived by the community as a show for the outside world.

94. MOROCCO CONST. art. 36. [Editors' translation: *Offenses relating to conflicts of interest, insider trading and all financial offenses are punishable by law. Public authorities are obliged to prevent and punish, according to law, all forms of crime related to the activity of government and public bodies and the use of the funds they have available for the award and management of public contracts.*

\*\*\*

*ARTICLE 167 of the Moroccan Constitution [Anti-corruption provision]*

*L'Instance nationale de probité et de lutte contre la corruption, créée en vertu de l'article 36, a pour mission notamment de coordonner, de superviser et d'assurer le suivi de la mise en Œuvre des politiques de prévention et de lutte contre la corruption, de recueillir et de diffuser les informations dans ce domaine, de contribuer à la moralisation de la vie publique et de consolider les principes de bonne gouvernance, la culture du service public et les valeurs de citoyenneté responsable.<sup>95</sup>*  
*[Editors' translation in footnote.]*

*A. Corruption and the Judiciary*

Given the extensive attention to corruption in Morocco and the close ties between anti-corruption efforts and judicial reform, the subject of corruption warrants a separate section. Articles 36 and 167 of the Moroccan Constitution are the principal anti-corruption provisions of the constitution, both broadly banning corrupt activities (including influence-peddling and conflicts of interest), and establishing as a constitutional matter an anti-corruption commission (to oversee the policies to fight corruption and more). Also relevant are Article 158 of the Moroccan Constitution (which requires, as a constitutional matter, public disclosure of the assets of public officials<sup>96</sup>) and Article 109, which prohibits forms of judicial corruption.

---

*Trading in influence and privileges, abuse of a position of dominance and monopoly power, and all other practices contrary to the principles of free and fair competition in economic relations, are sanctioned [i.e. punishable] by law. There shall be a national authority for integrity and for the fight against corruption [i.e. an anti-corruption commission].]*

95. MOROCCO CONST. art. 167. [Editors' translation: The particular mission of the [anti-corruption commission] established under Article 36 [of the Moroccan Constitution] includes to coordinate efforts to supervise and monitor the implementation of policies to prevent and fight corruption, to collect and disseminate information in this area, to contribute to the moralization of public life and to strengthen the principles of good governance, a culture of public service, and values of responsible citizenship.]

96. See MOROCCO CONST. art. 158:

Toute personne, élue ou désignée, exerçant une charge publique doit établir, conformément aux modalités fixées par la loi, une déclaration écrite des biens et actifs détenus par elle, directement ou indirectement, dès la prise de fonctions, en cours d'activité et à la cessation de celle-ci.

[Editors' translation: Any person, elected or designated, having a public office must set forth, in accordance with the terms laid down by law, a written declaration of property and assets such person holds, directly or indirectly, as of

The ills of corruption, as commonly defined,<sup>97</sup> are well-documented and need not be reiterated here, except to note that a corrupt judge is decidedly not an independent judge or impartial one. The corrupt judge—beyond committing a crime—puts the judge’s own interest over the judge’s commitment to law and makes law generally irrelevant. In the case of bribery, corrupt judges sell judicial decisions, and the most relevant consideration is not legal reasoning or persuasive facts (or simply what is right or wrong) but rather price.

Not only are bribes prohibited, but according to the *Bangalore Principles of Judicial Conduct*, so should be other types of private gain, including gifts, loans, and favors, as the *Bangalore Principles* state: “A judge and members of the judge’s family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.”<sup>98</sup> To the same effect are the United Nations’ *Basic Principles on the Independence of the Judiciary*.<sup>99</sup>

Finally, judicial corruption undermines impartial justice, and the lack of such justice (according to much commentary, including the King’s<sup>100</sup>), impedes economic development and investment.<sup>101</sup> Ensuring judicial impartiality requires targeting and eliminating judicial corruption.

---

the time such person took office, while engaged in such office, and when such person’s term of office ends.].

97. For a definition of corruption, see BERTRAM I. SPECTOR ET AL., USAID: CORRUPTION ASSESSMENT HANDBOOK Sect. 2 (Mgmt. Systems Int’l May 8, 2006) (Draft Final Report), available at <http://www1.worldbank.org/publicsector/anticorrupt/USAIDCorAsmtHandbook.pdf> (last visited March 7, 2012):

Corruption is often defined as *the misuse of entrusted authority for private gain*. It occurs any time that public officials or employees misuse the trust placed in them as public servants for either monetary or non-monetary gain that accrues to them, their friends, their relatives or their personal or political interests.

(emphasis in original).

98. *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 4.14.

99. See *U.N. Basic Principles*, *supra* note 8, ¶ 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”).

100. HM King Mohammed VI, Speech on 9th Anniversary of Throne Day (July 30, 2008), available at [http://www.map.ma/eng/sections/speeches/full\\_text\\_of\\_hm\\_king\\_1/view](http://www.map.ma/eng/sections/speeches/full_text_of_hm_king_1/view) (last visited March 7, 2012).

101. See e.g., DAM, *supra* note 47, at 127 (“Simply put, the absence of a reliable contracting law and independent judicial enforcement system is a barrier to economic development.”). See generally *Perspectives from the Rule of Law*, *supra* note 13, at 71 (citing Brad Smith, Senior Vice President, Legal & Corporate Affairs, General Counsel and Corporate Secretary, Microsoft Corporation, American Society of International Law Second Century Dinner, Text of Prepared Remarks,

### B. *Judicial Corruption in Morocco*

Examples of judicial corruption in Morocco, based on a variety of sources, including academics,<sup>102</sup> journalists,<sup>103</sup> U.S. government,<sup>104</sup> and Moroccan government (witness the royal speeches),<sup>105</sup> have been extensively reported. The World Bank has also observed in a 2003 report that the private sector believes that judicial corruption is prevalent in Morocco and the Moroccan public has an expectation of judicial corruption.<sup>106</sup> The report observed that progress is being made but more is needed.<sup>107</sup> Of course, once the public becomes aware of prevalent corruption (even if it is not 100% or is improving), suspicion and wariness of the court system abounds. Imagine how an American lawyer (or even a business) would respond to the news that many, if not all, of the courts in a particular city or state are corrupt. Who would take the chance of using the courts there?

A U.S. State Department publication on Morocco issued in 2011 noted, “[c]orruption and impunity reduced police effectiveness and respect

---

Washington, D.C. (Nov. 3, 2006)), available at <http://www.microsoft.com/presspass/exec/bradsmith/11-03-06InternationalLaw.msp> (last visited Mar. 7, 2012) (relationship between economic growth and judicial independence).

102. Monjib, *supra* note 41, at vi (“The judiciary should be reformed to end corruption and a lack of independence from the executive.”). See also *id.* at 25:

A reform of the judiciary is needed. The judiciary suffers from corruption and a lack of independence from the executive, and fails to enforce many rulings. Reforming the judiciary would enhance the population’s sense of security and rule-of-law, and thus boost entrepreneurial initiatives while attracting more foreign investment.

103. See Schemm, *Moroccan justice: sold to highest bidder*, *supra* note 62; see also Abderrahim El Ouali, *Morocco Clamours for Justice*, IPSNEWS, NORTH AFRICA UNITED, Apr. 23, 2012, available at [http://www.northafrica-united.com/Morocco-Clamours-for-Justice\\_a1268.html](http://www.northafrica-united.com/Morocco-Clamours-for-Justice_a1268.html) (“Huge swathes of the population have long called for sweeping reforms of Morocco’s corrupt justice system. . . . Just last month, police arrested a judge in Tangier, 300 kilometres north of Casablanca, for corruption. According to the Justice Minister, the judge in question was caught red-handed receiving a sum of 70,000 dirham (approximately 663 euros) from a citizen.”).

104. See, e.g., 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 25 (“In July 2009 the High Judiciary Council sanctioned 70 judges on corruption-related charges, according to NGOs.”).

105. *Id.* at 24–25 (“The judiciary’s lack of independence and susceptibility to influence were widely acknowledged, including by the king. In August 2009 the king called for judicial system reform, including greater judicial independence and corruption prevention. Since 2007 the law has required judges, ministers, and members of parliament to submit financial disclosures.”).

106. LEGAL VICE PRESIDENCY, WORLD BANK, MOROCCO, LEGAL AND JUDICIAL SECTOR ASSESSMENT 32 (June 2003), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MoroccoSA.pdf> (last visited Mar. 7, 2012).

107. *Id.*

for the rule of law. Petty corruption was widespread among the police and gendarmes, and broader, systemic corruption undermined law enforcement and the effectiveness of the judicial system.”<sup>108</sup> Wikileaks cables are to the same effect, reflecting allegations of extensive corruption through the highest levels of government, affecting the real estate sector.<sup>109</sup> According to another report, “[d]uring the last decade, successive national and international reports have shown that corruption in Morocco has reached ‘endemic’ proportions, i.e., that it permeates every aspect of life: politics, business, the central administration, local government, public services, and the judicial system. Even before WikiLeaks revealed American worries about the royal circle’s encroachment on the economic sphere, Transparency International’s *Global Corruption Report (2007)* highlighted the connection between royal powers and corruption in the Moroccan justice system.”<sup>110</sup>

In an Associated Press article published in December 2011, a reporter observed that results in cases in Morocco have been sold for \$5000 and provided examples of bribery.<sup>111</sup> Others have reported that judicial corruption includes “the use of intermediaries, or ‘samsara,’ [a practice which] is [allegedly] widespread in the Moroccan court system. In exchange for a commission these middlemen go between the litigant and lawyers, police officers or judges in order to influence the judgment, or even prevent the case from being taken to court.”<sup>112</sup> The Associated Press’s

---

108. 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85..

109. Ian Black, *WikiLeaks Cables Accuse Moroccan Royals of Corruption*, GUARDIAN.CO.UK (Dec. 6, 2010), available at <http://www.guardian.co.uk/world/2010/dec/06/wikileaks-cables-morocco-royals-corruption> (last visited Mar. 7, 2012).

110. Abdeslam Maghraoui, *Ducking the Arab Spring in Morocco*, IMMANENT FRAME (May 23, 2011), available at <http://blogs.ssrc.org/tif/2011/05/23/ducking-the-arab-spring-in-MOROCCO/> (last visited Mar. 7, 2012).

111. Schemm, *Moroccan justice: sold to highest bidder*, *supra* note 62 (“Justice is one of the most sensitive issues in this tourist-friendly North African country of 32 million, where there is widespread distrust of a court system that most Moroccans believe serves the highest bidder. ‘Justice’ can be bought in civil trials for just \$5,000. In sensitive trials against terror suspects or feisty journalists, a call from a powerful official is enough to seal a guilty verdict.”).

112. Business Anti-Corruption Portal, Morocco Country Profile (2011), available at <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/morocco/corruption-levels/judicial-system/> (last visited Mar. 7, 2012) (citing March 2009 article by LA VIE ÉCO). The Moroccan Country Profile further observed that “[t]he use of intermediaries testifies to a lack of trust in the judiciary system, which is also observed [by the Morocco Country Profile] in Transparency International’s (TI’s) Global Corruption Barometer 2010, according to which, less than a fifth of the surveyed households states that the judicial system is ‘extremely corrupt,’ while in TI’s Global Corruption Barometer 2009, more than one-third reports to have paid a bribe to the judiciary within the precedent year.” *Id.* The Business Anti-Corruption Portal does not cite to any particular pages of the

observations are essentially in line with the introductory quotation to this section referencing handshakes of cash and the courts being a cornucopia of opportunity for graft. A USAID-sponsored publication likewise references judicial demands for bribes in exchange for procedural advantage.<sup>113</sup>

But where courts issue corrupt decisions, they make the judicial system a mockery, one which renders decisions for the sake of decisions regardless of law.<sup>114</sup> No reasonable government would abandon the state to such corruption,<sup>115</sup> and as noted below, anti-corruption activities in Morocco are underway.

### C. What to Do: Improved Regulation and Enforcement

To strengthen the effort against corruption, governments as a general matter must encourage and protect reporting of corruption and provide confidential ways to report (*e.g.*, whistleblower protection). If people are too intimidated to report, nothing will be reported except by the boldest.<sup>116</sup> There should be no retaliation by or on behalf of judges or other authorities permitted against persons who fairly report. Without whistleblower protections of this nature, far from those who report being protected, some

---

Barometers or state whether it is relying on Moroccan or regional specific sources or other data within the Barometers. (The Barometers are annual multi-regional and multi-country public opinion surveys.) Interpreting Transparency's Global Corruption Barometers either in general or as to Morocco in particular is beyond the scope of this article. Nonetheless, the implications of both Barometers, taken together with other sources cited in this article, are that there is much work to do in addressing corruption in Morocco.

113. MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 18–19 (“Attorneys and human rights activists reported that judges have been known to phone parties before their hearing in order to explain that the hearing could be cancelled if they pay a fee.”).

114. Nigel Rodley, *A Symposium on Constitutional Rights and International Human Rights Honoring Professor David Kretzmer: The Singarasa Case: Quis Custodie . . . ? A Test for the Bangalore Principles of Judicial Conduct*, 41 *ISR. L. REV.* 500, 512 (2008). *See also* Benjamin Weiser, *Ex-Senator Receives 7-Year Term in Bribery Case*, *N.Y. TIMES*, April 27, 2012, A-21, available at <http://www.nytimes.com/2012/04/27/nyregion/carl-kruger-sentenced-to-seven-years-in-corruption-case.html> (sentencing an American legislator for bribery, U.S. District Judge Jed Rakoff stated that “it was difficult to overstate the evils that are wrought when government officials succumb to bribery. . . . ‘We have only to look at other countries . . . to see that once corruption takes hold, democracy itself becomes a charade, justice becomes a mere slogan camouflaging a cesspool of self-interest.’”)

115. The question may not come to actual abandonment of the state to corruption but rather how effectively the state fights the battle against corruption, including which and how many resources it devotes to the effort of eradicating it.

116. 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 25. (“Officials attributed the low number of complaints in part to the lack of legislation protecting plaintiffs and witnesses in corruption cases.”). As noted below, since the date of the cited article, such protective legislation has been enacted.

may end up as targets for inquiry or other retaliation.<sup>117</sup> Prosecution will help deter and remove the sense of impunity from those who would corrupt the judiciary. It may also lead other witnesses, who see that complaints are being taken seriously by the authorities, to come forward.

Having absorbed this message, in addition to adopting the anti-corruption constitutional reforms, Morocco enacted new anti-corruption legislation in 2011, which, among other things, protects against retaliation and provides safe measures for reporting,<sup>118</sup> although the future success of the law (including enforcement) will need to be assessed.<sup>119</sup> Some details of the law, which focuses on whistleblower, victim and witness protection, and which already have been the subject of some enthusiastic news coverage in Morocco,<sup>120</sup> follow:

---

117. Schemm, *Moroccan justice: sold to highest bidder*, *supra* note 62. See also JOSEPH BRAUDE, *THE HONORED DEAD* 190 (2011) (“A broader scandal came to light a year earlier [in 2006] in the northern city of Tetouan, where seven lawyers published an open letter slamming the city’s courts for dealing in graft every day. They complained of rampant complicity between area drug lords, judges, and city magistrates. Rather than earn accolades for coming forth, the lawyers faced legal proceedings initiated against them by magistrates in Tetouan that led to their disbarment.”). *The Honored Dead* further reported a person who “reputedly makes his living greasing palms in the city’s judiciary.” *Id.* “This specialization would not altogether surprise me,” the book’s author observed. *Id.*

118. See Siham Ali, *New Moroccan Law Protects Graft Trial Witnesses: Just-passed Legislation Will Enable Moroccan Citizens to Speak Out Against Corruption Without Fear of Retaliation*, *MAGHAREBIA* (Oct. 18, 2011), available at [http://magharebia.com/cocoon/awi/xhtml1/en\\_GB/features/awi/features/2011/10/18/feature-02](http://magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2011/10/18/feature-02) (last visited Mar. 7, 2012) [hereinafter Ali, *A New Moroccan Law*].

119. See *id.* (“Earlier this month [of October 2011], Parliament passed a law protecting the victims of corruption as well as whistleblowers who speak out to expose it. The new law also provides for a special hotline on which people can tip off the police about corruption.”). The Full Title of the Law is “Loi no. 37-10 modifiant et completant la loi no. 22-101 relative a la procedure penale en matiere de protection des victims, des temoins, des experts et des denonciateurs en ce qui concerne les infractions de corruption, de detournement, de traffic d’influence et autres.” (A copy of the law, in French, is on file with the author and law review). Article 82-7 of the law, among other things, indicates the types of crimes for which protection is provided.

120. Mustapha Safar, *Arrest of Land Registrar of Ain Achok is an Execution of Witness Protection Bill*, *ASSABAH*, Dec. 1, 2011. This article was written subsequent to the date of the anti-corruption legislation, which is referenced as Bill 10-37 [sic] related to the protection of witnesses and whistleblowers published in the official journal n 5988 on 23 October 2011, and modifying and completing the provisions of the Bill of Criminal Procedures regarding the protection of victims, witnesses, experts and whistle-blowers of crimes of corruption, embezzlement, abuse of power, etc. The article points out how the arrest it describes was made possible by the law protecting witnesses and whistleblowers from harassment and observes that previous whistleblowers and witnesses were indeed harassed and subject to retaliation. The article, which appeared in a daily newspaper in Casablanca, is in Arabic and on file along with its translation with the author and law review. It was translated into English by Professor Brahim El Guabli, Swarthmore College.

The [anti-corruption] law envisages a raft of measures, including ways to protect the families of graft trial witnesses and guarantees to prevent any material or moral harm to witnesses. The legislation also provides for the protection of the property and interests of those involved in such cases. A special telephone number will be made available to notify the police should trial witnesses receive threats or have any concerns about their safety or that of their family. The witness, expert or whistle-blower will be granted anonymity during the trial and will not be named in case documentation. Measures have also been set out to prevent intimidation or violence towards the person concerned and members of their family, such as the provision of protection officers. In addition, the law will also prosecute anyone reporting a supposed crime with malicious intent or making unfounded allegations.<sup>121</sup>

Morocco's anti-corruption commission, called The Central Authority for the Prevention of Corruption (ICPC), has the following "main objectives [which] are to propose strategic directions for a corruption prevention policy, build a database on all information related to corruption, inform the judiciary of corruption cases and organise [sic] corruption awareness campaigns."<sup>122</sup> (It is further noteworthy that "Morocco [has

---

121. Ali, *New Moroccan Law*, *supra* note 118. See also American Bar Association, Rule of Law Initiative, *Morocco Approves Landmark Witness and Whistle Blower Protection Law*, Nov. 21, 2011, available at [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/middle\\_east/morocco/news/news\\_morocco\\_witness\\_whistleblower\\_protection\\_law\\_approved\\_1111.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/middle_east/morocco/news/news_morocco_witness_whistleblower_protection_law_approved_1111.html) (last visited May 22, 2012):

The law offers significant protection to witnesses and experts, allowing judges and prosecutors to ensure their safety (and the safety of their families) through a number of mechanisms, including new identities and safe houses. While these are common practices in many countries, they are new to Morocco. Moreover, a witness or expert may demand these protections if they are not offered by the judge or prosecutor, and whistleblowers are now protected from administrative or criminal sanctions if corruption is revealed to them in the course of their duties. Oversight mechanisms will be established to ensure that neither individuals nor agencies can engage in reprisal.

For the importance of protecting whistleblowers from retaliation as part of an effective anti-corruption program, see David Banisar, *Whistleblowing: International Standards and Developments* (Instituto de Investigaciones Sociales, UNAM, Mar. 2006), available at [http://www.corrupcion.unam.mx/documentos/investigaciones/banisar\\_paper.pdf](http://www.corrupcion.unam.mx/documentos/investigaciones/banisar_paper.pdf) (last visited Mar. 7, 2012).

122. OECD, *Fostering Integrity in the Public Sector: Morocco*, OECD Middle East and North Africa Initiative on Governance and Investment for Development, available at [http://www.oecd.org/document/27/0,3746,en\\_34645207\\_34645555\\_45699803\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/27/0,3746,en_34645207_34645555_45699803_1_1_1_1,00.html) (last visited Mar. 7, 2012). Prior to the recent anti-corruption whistleblower legislation and the passage of

held] as of December 2011, the presidency of the Arab Anti-Corruption and Integrity Network (ACINET).”<sup>123</sup> Anti-corruption agencies are one of the devices used by governments as a tool against corruption, with varying results depending on their structure, relationship to other branches of government, resources, and government commitment to the task.<sup>124</sup>

There were also existing anti-corruption provisions in the laws in Morocco governing judges, yet the problems do not appear to have abated before the adoption of the 2011 Moroccan Constitution. Existing law, for example, includes the *dahir portant loi formant statut de la magistrature*,<sup>125</sup>

---

the constitutional reforms, the Moroccan corruption agency was criticized for ineffectiveness. See JOSEPH BRAUDE, *THE HONORED DEAD* 190 (2011) (noting criticism of ICPC for lacking “independence, a clear mandate, or any significant authority.”). For a critical view of anti-corruption commissions generally, see John R. Heilbrunn, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, WORLD BANK INST. (2004), available at <http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf> (last visited Mar. 7, 2012). The official website for Morocco’s ICPC is available at: <http://www.icpc.ma/wps/portal> (last visited Mar. 7, 2012).

123. *Morocco to be President of Arab Anti-Corruption Network as of December 2011*, YACOUT INFO (Oct. 27, 2011), available at [http://www.yacout.info/Morocco-to-be-president-of-Arab-Anti-Corruption-Network-as-of-December-2011\\_a3991.html](http://www.yacout.info/Morocco-to-be-president-of-Arab-Anti-Corruption-Network-as-of-December-2011_a3991.html) (last visited Mar. 7, 2012).

124. See John R. Heilbrunn, *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption?*, *supra* note 122. For a cynical view of certain anti-corruption commissions, see, e.g., *id.* at 1:

[G]overnments in poor countries need international investments and donors require that they reduce corruption and improve their management of the economy. An anti-corruption commission may therefore represent an effort to satisfy international donors and placate domestic calls for reform, if only for a short while. Anti-corruption commissions are especially problematic when political leaders are only responding to demands from international donors. In such countries, policymakers can ignore domestic demands for reform and enact minimal reforms to satisfy external agents. This minimum may be nothing more than the establishment of an anti-corruption commission, an office of the ombudsman, or an anti-fraud unit without enabling legislation, competent staff, or a budget.

125. *Dahir portant loi n° 1-74-467 du 26 chaoual 1394 (11 novembre 1974) (dahir portant loi formant statut de la magistrature)* (copy on file with author and law review), noting at Article 20:

*Les magistrats sont protégés, conformément aux dispositions du code pénal et des lois spéciales en vigueur, contre les menaces, attaques, outrages, injures ou diffamations dont ils peuvent être l’objet.* [Editors’ translation: “Judges are protected under the provisions of the Penal Code and special laws in force, against threats, attacks, insulting or defamatory acts to which they may be subjected.”].

The law also includes, among other things, a description of the types of judges, qualifications for employment, retirement provisions, some disciplinary procedures, assorted other regulatory procedures, and various provisions reminiscent of the “terms and conditions” of employment for judges. *Id.* A

which, among other things, bars threats, insults and attacks against judges. But the sweep of the law (the *dahir*) is not comparable to the broad anti-corruption provisions in the constitutional reforms: e.g., barring coercion and inducements of judges. Existing law on judges—whether by its amendment or by passage of separate law—may need to be expanded to comport with the constitution’s anti-corruption themes in Articles 36, 109 and 167, cited above.

Anti-corruption constitutional reforms and legislation need to be combined with judicial, prosecutorial, and investigatory resources to develop the evidence (in addition to the whistleblower evidence) in order successfully to prosecute corruption cases. Anti-corruption efforts should be a budgeting and financial priority.

#### *D. Education or Cultural Changes as Strategic Solutions*

Corruption is partly a legal issue susceptible to legal solutions such as those above: e.g., are there adequate laws against corruption, and if so, are they enforced with sufficient resources allotted to the enforcement and investigative authorities.<sup>126</sup> Allowing people to “get away with it” (impunity) may lead to more of the same, with some even seeing this as a way to earn a living.<sup>127</sup> Improved and enforceable (and enforced) laws may help.

---

complete analysis of Moroccan criminal law available to prosecute judicial corruption is beyond the scope of this article. *But see* 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 11:

The law provides criminal penalties for official corruption, but the government did not implement the law effectively, and officials often engaged in corrupt practices with impunity. It was common knowledge that corruption was a serious problem in the executive, including the police, legislative, and judicial branches of government. There were reports of government corruption during the year, and the World Bank’s Worldwide Governance Indicators indicated that corruption was a problem.

126. *See* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 8:

In December 2008, the King appointed the members of the Corruption Prevention Instance [i.e. the anti-corruption commission], in part to comply with the UN Convention against Corruption which entered into force for Morocco in 2007, but also in reaction to Morocco’s low score on several key corruption indices, such as that of Transparency International. The mission of the Instance is the prevention of corruption although it has neither powers of investigation nor prosecution.

127. JOSEPH BRAUDE, *THE HONORED DEAD* 190 (2011). *Cf.* Benjamin Weiser, *Ex-Senator Receives 7-Year Term in Bribery Case*, N.Y. TIMES, April 27, 2012, A-21, available at <http://www.nytimes.com/2012/04/27/nyregion/carl-kruger-sentenced-to-seven-years-in-corruption-case.html> (U.S. District Judge Jed Rakoff, when sentencing a defendant in a government corruption scandal to jail, observed, “The message must always go out that if you help corrupt our government in any of its parts, prison is the consequence.”)

Corruption is also an educational or public awareness concern, a message which has resonated in Morocco. “[A Moroccan teacher observed that] ‘[t]he culture of blackmailing must be stamped out from an early age and children must be steeped in positive values based on integrity and honesty. . . . [A]dults must give a concrete demonstration of corruption’s negative repercussions on the country’s development.’”<sup>128</sup> To that end, the “Moroccan education ministry and the kingdom’s main corruption watchdog body are working together on plans to integrate ethics into school curricula. The Central Authority for the Prevention of Corruption (ICPC) and the education ministry signed an agreement on July 11th [2011] that establishes a framework for co-operation to drive home the issue through education.”<sup>129</sup> Indeed, public awareness is part of the stated mission of the anti-corruption commission. Moreover, as noted at a recent conference in Morocco, judicial reform requires additional educational efforts overall.<sup>130</sup> Civil society also may play a role.

As a further safeguard against judicial corruption, judges should be adequately compensated.<sup>131</sup> Although it is unclear whether judges who are underpaid are more corrupt than adequately paid ones, and a poorly paid judge is capable of being an excellent judge, low pay (in the case of some individuals) may provide an incentive to do the wrong thing (e.g., to supplement one’s income through bribes).<sup>132</sup> Of course, raising salaries

---

128. Siham Ali, *Morocco Fights Corruption Through Education: Schools Are the New Battleground in Morocco’s Anti-corruption Strategy*, MAGHAREBIA (July 17, 2011), available at [http://magharebia.com/cocoon/awi/xhtml1/en\\_GB/features/awi/features/2011/07/17/feature-01](http://magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2011/07/17/feature-01) (last visited Mar. 7, 2012).

129. *Id.*

130. Euro-Mediterranean Hum. Rts. Network, *Seminar on Judicial Reform in Morocco* (Sept. 2, 2010), available at <http://www.euromedrights.org/en/news-en/emhrn-releases/emhrn-statements-2010/4124.html> (last visited Mar. 7, 2012) (reporting on conference held on January 22–23, 2010) (“Such change will require great efforts in terms of adult education for all actors in the judicial field because they will need to absorb and integrate the precepts of a human rights culture founded upon the universal principles of dignity, equality and equity.”).

131. BROWN, *supra* note 63, ¶ 6 (“There have been some complaints in recent years that salaries are low and the Ministry of Justice has worked to improve the situation in order to combat opportunities for corruption.”). *Accord* MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 19 (relating low judicial salaries to potential for corruption). The word “adequate,” of course, is imprecise; and it is unclear how high salaries need to be to have an effect in warding off corruption.

132. Schemm, *Moroccan justice: sold to highest bidder*, *supra* note 62. *See also id.*: Judges are often poorly trained and badly paid. Worse, they see it as their job to help to police, said Rachid Filali Mknassi, the Moroccan representative for global anti-corruption group Transparency International. “In the face of the police, the judges are scared, in the face of politics, the judges are scared, but when they have power, they sell it,” he said.

does not constitute a guarantee against corruption,<sup>133</sup> yet there are other reasons to provide judges adequate compensation, including enabling them adequately to support their families and enhancing the prestige of the judiciary so as to attract and retain qualified persons to a judicial career.<sup>134</sup>

Judicial corruption is a multilayered problem. Without seeking to be comprehensive, it is a “perception problem” since it may lead some to avoid the courts or even to engage further in corruption “as less expensive and more certain than litigation.”<sup>135</sup> It is a political stability problem; among other things, an end to corruption was one of the demands of the February 20 movement. As an obstacle to development and investment, it is also an economic problem. In the final analysis, it is indeed an injustice problem, since corrupt judiciaries yield results for a price (or something else of value) regardless of law.

With the constitutional and other reforms, an improved legal framework against corruption is in place. But with widespread adverse publicity about dishonesty and lack of public confidence in the courts, it may be a while before the poor (or mixed) reputation ends.<sup>136</sup>

## VI. JUDICIAL DISCIPLINE AND JUDICIAL REFORM

*Independence is necessary but not sufficient. An independent judiciary might itself be irresponsible or corrupt. If judges operate with inadequate outside checks, they may become slothful, arbitrary or venal. Thus, the state must insulate judicial*

---

133. See USAID OFFICE OF DEMOCRACY AND GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 32 (U.S. Agency for Int’l Dev. Jan. 2002), available at [http://apps.americanbar.org/rol/docs/judicial\\_reform\\_usaid\\_guidance\\_judicial\\_independence\\_2002\\_english.pdf](http://apps.americanbar.org/rol/docs/judicial_reform_usaid_guidance_judicial_independence_2002_english.pdf) (last visited Mar. 7, 2012) (“However, it is unclear whether increased salaries decrease the temptation to accept bribes, especially among judges who are already steeped in a culture of corruption and who may have taken the job in the first place because of its potential for exploitation.”).

134. DAM, *supra* note 47, at 116. Addressing Ukraine, the author observes that there is little judicial independence, low judicial pay, and “law students continue to consider a judgeship ‘the lowest position available in the legal profession.’” *Id.*

135. *Id.* at 55.

136. See also ABDELAZIZ NOUYADI, MOROCCO, THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY 29 (Euro-Mediterranean Hum. Rts. Network 2008) (The legal profession in Morocco needs to “enjoy a certain number of safeguards and immunities allowing them to exercise their duties and perform their mission dedicated to justice and litigants” for there to be independent and impartial justice.).

*institutions from improper influence at the same time as it maintains checks for competence and honesty.*<sup>137</sup>

Improvement of the judiciary not only requires judicial independence, but also judicial accountability. In Morocco, the mechanisms for holding judges accountable for their compliance with professional and legal standards should be reviewed, and if necessary, reformed. Even if they are working well, a good approach may still be improved.

Judicial promotion and discipline are among the matters entrusted to the Supreme Judicial Council (*Le Conseil Supérieur du Pouvoir Judiciaire*), a body whose membership (including many judges, but which is presided over by the king) and purpose are set forth in Article 113 of the Moroccan Constitution.<sup>138</sup> The adequacy of the functioning of the Council, a common form of judicial regulatory body,<sup>139</sup> is beyond the scope of this article, and the author expresses no opinion as to its effectiveness. Moreover, the Council is replacing a prior judicial council<sup>140</sup> in a stated effort to enhance judicial independence, and assessment of the Council's work (which was yet to begin at the time of the passage of the Constitution) appears to be

---

137. Rose-Ackerman, *supra* note 71, at 16. *See also id.* at 24 (“Corruption in the judiciary can occur even when the courts are independent of the rest of the state. In fact, their very independence may facilitate corruption because no one has the authority to oversee them.”).

138. *See also* MOROCCAN CONST. art. 113:

Le Conseil Supérieur du Pouvoir Judiciaire veille à l'application des garanties accordées aux magistrats, notamment quant à leur indépendance, leur nomination, leur avancement, leur mise à la retraite et leur discipline. A son initiative, il élabore des rapports sur l'état de la justice et du système judiciaire, et présente des recommandations appropriées en la matière. A la demande du Roi, du Gouvernement ou du Parlement, le Conseil émet des avis circonstanciés sur toute question se rapportant à la justice, sous réserve du principe de la séparation des pouvoirs.

[Editors' translation: *The Supreme Judicial Council enforces the guarantees accorded to the judges, especially regarding their independence, appointment, advancement, retirement and discipline. On its own initiative, the Council produces reports on the state of justice in the judiciary system, as well as makes appropriate recommendations on that subject. At the request of the King, the Government, or the Parliament, the Council issues opinions on matters relating to justice, consistent with the principle of separation of powers.*]

For promotional and disciplinary practices for judges, *see also* NOUYADI, *supra* note 136, at 17–20.

139. *See* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 201 (2009).

140. For Morocco's previous system of judicial evaluation, *see* BROWN, *supra* note 63 (“Judicial supervision and inspection is generally the responsibility of the Ministry of Justice, although judicial personnel are used extensively in the task. Each level of courts carries some responsibility as well and sanctions are meted out by the Supreme Judicial Council.”).

premature.<sup>141</sup> (The heavy involvement in the prior council of the Minister of Justice has been criticized for impairing judicial independence.<sup>142</sup>)

As a general matter, councils of this sort “are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability. Judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline. The first model of judicial self-management arguably errs too far on the side of

141. *See Morocco New Constitution: HM King Mohammed VI Addressed a Speech to the Nation*, LA VIE ÉCO (June 20, 2011), available at <http://www.lavieeco.com/actualite/morocco-new-constitution-hm-king-mohammed-vi-addressed-a-speech-to-the-nation-5886.html> (last visited Mar. 7, 2012) [hereinafter *Morocco New Constitution*]:

Similarly, the draft Constitution sets up the “Higher Council of the Judicial Branch” [Author’s note: the name of the Council has been translated into English in various ways, including the Supreme Judicial Council], as a constitutional institution headed by the King, in replacement of the Higher Council of the Judiciary, with a view to giving administrative and financial autonomy to the new Higher Council. It also makes the President of the Court of Cassation Executive President of the Council – instead of the Minister of Justice in the current Constitution – the aim being to bolster the separation of powers.

Similarly, the composition of the new Council has been enhanced by increasing the number of elected representatives of judges, as well as the representation of women judges, making sure Council membership is open to personalities and institutions operating in the area of human rights and the defense of judicial independence.

Council powers have also been expanded to include, in addition to the judges’ career issues, the functions of inspection as well as the expression of opinions on legislative and regulatory texts relating to the judiciary, and assessment of the judicial system.

The prior council remains in place until the installation of the new one. *See MOROCCO CONST.* art. 178, which so provides (“Le Conseil supérieur de la magistrature, actuellement en fonction continuera d’exercer ses attributions jusqu’à l’installation du Conseil Supérieur du Pouvoir Judiciaire prévu par la présente Constitution.”)

142. *See MOROCCO RULE OF LAW ASSESSMENT*, *supra* note 3, at 13:

In addition, the MOJ [Minister of Justice] exercises significant influence over the appointment, discipline, transfer, and promotion of judges. The exercise of these powers makes judges beholden to the MOJ not only for their initial appointment but for their continued job security as well, with obvious negative implications for judicial independence.

*See also* Associated Press, *Morocco’s judges demand greater independence*, AL ARABIYA NEWS, May 15, 2012, available at <http://www.alarabiya.net/articles/2012/05/15/214343.html> (last visited May 27, 2012):

Morocco’s courts have historically been weak and under the control of the king and his Justice Ministry, which determines judges’ salaries and appointments so that they will often rule as instructed for the sake of their careers.

independence, while pure political control may make judges too accountable in the sense that they will consider the preferences of their 'political principals' in the course of deciding specific cases."<sup>143</sup>

However, international experience suggests the standards and functioning of any judicial council warrant further research, including in the following areas: *viz.*, confidential reporting of disciplinary matters, the development and implementation of codes of judicial conduct, and effective enforcement of such codes, including the fairness of judicial discipline. (The *U.N. Basic Principles* note, for example, that fairness to judges in disciplinary procedures needs to be assured).<sup>144</sup>

Codes of conduct should regulate and reinforce common rules of judicial behavior, such as those governing fairness and good temperament in the courtroom and conflicts of interest: *e.g.*, including when a judge should not sit on a case because of conflicts of interest or other reasons raising a question as to the judge's impartiality. They should also prohibit improper secret communications involving judges and parties (*ex parte* communications), whether they implicate bribe-taking or other matters. Confidential reporting of judicial misconduct to the Council is essential to ensure that proper Council action may result, with reporters of misconduct protected in order to ensure safety from judicial retaliation. (A model to follow might be the Moroccan 2011 whistleblower legislation referenced above). Court monitors may also be sent to observe courtroom proceedings and report back to disciplinary authorities. Adequate resources should be budgeted for investigation of misconduct and enforcement of codes of conduct.

Judicial conduct codes should become part of the culture among judges, lawyers and the public. Ethics training for judges has already been called for by the King as well.<sup>145</sup> International principles such as the *Bangalore Principles of Judicial Conduct* and the *U.N. Basic Principles* provide a good start. So does *Charte D'Ethique Judiciaire*, prepared by *Amicale Hassania des Magistrats* (a Moroccan association of judges).<sup>146</sup>

---

143. Garoupa & Ginsburg, *supra* note 139, at 204.

144. See *U.N. Basic Principles*, *supra* note 8, ¶ 17 ("A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.")

145. See Aziz Mekouar, *Judicial Reform in Morocco*, N.Y. TIMES (Sept. 3, 2009), available at <http://query.nytimes.com/gst/fullpage.html?res=9D06E6DE173FF930A3575AC0A96F9C8B63> (last visited Mar. 7, 2012).

146. A copy of *Amicale Hassania des Magistrats*, *Charte D'Ethique Judiciaire*, is on file with the author and the law review. The document consists of ten principles or goals sought to be achieved and multiple sub-principles, recommending certain behaviors in order to achieve those goals. The

Presentations or seminars may be given on the subjects and articles written on them at law schools and bar associations and elsewhere. (To the extent that legal education and bar associations need development, doing so is another task to address).<sup>147</sup> As previously observed, however, passing rules is different from enforcing rules and changing behavior; and attention needs to be paid to all aspects of the problem and potential solutions.

## VII. RESPONSIBLE FREEDOM OF THE PRESS AS AN AID TO JUDICIAL REFORM

### *ARTICLE 28 of the Moroccan Constitution [Freedom of the press]*

*La liberté de la presse est garantie et ne peut être limitée par aucune forme de censure préalable. Tous ont le droit d'exprimer et de diffuser librement et dans les seules limites expressément prévues par la loi, les informations, les idées et les opinions. Les pouvoirs publics favorisent l'organisation du secteur de la presse de manière indépendante et sur des bases démocratiques, ainsi que la détermination des règles juridiques et déontologiques le concernant. La loi fixe les règles d'organisation et de contrôle des moyens publics de communication. Elle garantit l'accès à ces moyens en respectant le pluralisme linguistique, culturel et politique de la société marocaine. Conformément aux dispositions de l'article 165 de la présente Constitution, la Haute Autorité de la Communication Audiovisuelle veille au respect de ce pluralisme.*<sup>148</sup> [Editors' translation in footnote.]

---

principles include: *l'indépendance, l'intégrité, l'impartialité et la neutralité, l'égalité, le courage moral, la dignité et la réserve, la compétence, le comportement judiciaire, la décence, and la solidarité.* See also MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 32 (likewise recommending code of professional ethics); NOUYADI, *supra* note 136, at 28 (referencing efforts of the "Moroccan civil society, the Hassanian Association of Judges"). These documents obviously predated the Moroccan constitutional reforms. The adequacy of judicial conduct codes and proposed codes in Morocco is beyond the scope of this article.

147. See with respect to judicial education in Morocco, BROWN, *supra* note 63, ¶ 8 ("Morocco has established the National Institute of Judicial Studies which has a mandatory three-year training period for new judges. The Institute is working to expand its offerings for continuing education for judicial personnel. All judges trained in recent years are graduates of the National Institute for Judicial Studies, where they undergo three years of study heavily focused on human rights and the rule of law.").

148. MOROCCO CONST. art. 28. (Editors' translation: *Freedom of the press is guaranteed and cannot be limited by any form of prior censorship. All have the right to express and disseminate information, ideas and opinions freely, within the limits provided by law. Public authorities shall support the organization of an independent press on a democratic basis, and also the determination of legal and ethical rules relating to it. The law sets the rules of organization and controls the means of*

Freedom of the press (including from censorship) is generally guaranteed by Article 28 of the Moroccan Constitution (*La liberté de la presse est garantie et ne peut être limitée par aucune forme de censure préalable*). For the steps toward judicial independence and accountability to be most meaningful, the press should be encouraged to investigate and report abuses. Not only should problems, where appropriate, be reported to deter others, but successes should be reported as positive models for others.

Although allegations of constraints on press freedom as have been reported in particular instances in Morocco are a matter of concern<sup>149</sup> (the new constitutional reforms aside), the press should be especially aggressive in the area of judicial reform. This may be particularly important when reporting on corruption.

However, the press should also be certain to play a responsible role, including in civic education. This may entail explaining that the role of the judge is to decide according to law and not attacking judges for unpopular but lawful decisions in pending cases. There is a delicate balance or tension between judicial independence and excessive public pressure on the judiciary.<sup>150</sup>

---

*public communication. It guarantees access to these means, respecting linguistic pluralism and the cultural and political pluralism of Moroccan society. Pursuant to section 165 of this Constitution, the High Authority of Audiovisual Communication oversees this pluralism.)*

149. 2010 HUMAN RIGHTS PRACTICES: MOROCCO, *supra* note 85, at 15.

The law generally provides for freedom of speech and of the press; however, the government continued to restrict freedom of the press through the legal system. Government-provided figures for this year showed that six journalists or media outlets faced criminal or civil charges, down from 56 such cases in 2009 and 42 in 2008. These numbers included cases the government initiated as well as private citizens' libel complaints. Numerous human rights groups criticized the steady stream of criminal prosecutions, newspaper closings, and libel suits.

The law prohibits citizens from criticizing Islam or the institution of the monarchy. It is also illegal to voice opposition to the government's official position regarding territorial integrity and Western Sahara. The press, however, reported on controversial and culturally sensitive topics involving the military, national security, and sexuality.

*Id.*; see also Loubna Flah, *Perils of Journalism in Morocco: Nini Behind Bars, Jamai Out of the Country and Hafiani Abusively Dismissed*, MOROCCO WORLD NEWS, (Jan. 9, 2012), available at <http://moroccoworldnews.com/2012/01/perils-of-journalism-in-morocco-nini-behind-bars-jamai-out-of-the-country-and-hafiani-abusively-suspended/22207> (last visited Mar. 7, 2012) ("The recurrence of different abuses against journalists remains inimical to the consolidation of democracy in Morocco. . . . The journalist community adds to the crowd of dissatisfied protesters rejecting cosmetic reforms and proclaiming its desire for real change.").

150. COMPILATION OF INT'L STANDARDS, *supra* note 8, at 11, 14 ¶¶ 33, 34, citing IBA *Minimum Standards of Judicial Independence* (adopted 1982) (observing that judges are not free from public accountability, but cautions that press needs to be aware of the potential conflict between judicial

Nonetheless, judicial decisions should not be free from criticism, and the press should be vigilant in reporting on areas where law reform is appropriate, both as to the nature of the law and to the implementation or enforcement of the law.

#### VIII. ENHANCING ACCESS TO JUSTICE AS A PREDICATE TO MEANINGFUL JUDICIAL REFORM

*ARTICLE 118 of the Moroccan Constitution [Access to justice]*

*L'accès à la justice est garanti à toute personne pour la défense de ses droits et de ses intérêts protégés par la loi.*<sup>151</sup>

\*\*\*

*ARTICLE 121 of the Moroccan Constitution [Access to justice]*

*Dans les cas où la loi le prévoit, la justice est gratuite pour ceux qui ne disposent pas de ressources suffisantes pour ester en justice.*<sup>152</sup>

Moving toward a fair and impartial judiciary is a benefit in and of itself, but one must also consider who is left out or lacks access and who has it. To those who are left out, to what extent does judicial reform create meaningful change?

The issue of access to justice may be addressed through a case study, such as through the 2004 Moroccan Personal Status Code reforms, even though the problems of access and the perception of lack of access in addition to overall unfairness are more pervasive.<sup>153</sup> Although the

---

independence and excessive pressure on judges; and especially recommends restraint in publishing on pending cases).

The United States has particular experience with excessive external pressure on judges, including by politicians. See, e.g., Norman L. Greene, *Introduction, "Politicians on Judges: Fair Criticism or Intimidation,"* 72 N.Y.U. L. REV. 294 (1997).

151. MOROCCO CONST. art. 118 (Editors' translation: *Access to justice is guaranteed to all for the defense of their rights and legally protected interests.*). A broad statement like this raises obvious questions concerning how it will be implemented, in which cases and with what resources.

152. MOROCCO CONST. art. 121 (Editors' translation: *In cases where required by law, justice is free for those who do not have sufficient resources to litigate.*) This general statement likewise raises the question of implementation, including the amount of resources to be allocated to provide "free justice," the overall quality of justice to be provided, and the definition of resources in the text of the law (*pas de ressources suffisantes*), which appears to apply a "means" test. That is, how, by whom and using what criteria is it determined that sufficient resources are absent?

153. This section is heavily drafted from Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20

combination of political forces leading to the passage of the reforms is beyond the scope of this article, scholars have pointed out the involvement of the monarchy, political parties, parliament, human rights non-governmental organizations (NGOs), backlash arising from the terrorist attack in Casablanca in 2003, and the feminist movement, with different scholars weighting the effect of some of the principal factors differently.<sup>154</sup>

These reforms affected, among other things, rights involving marriage (including polygamy), divorce, child custody, and inheritance. The reforms, which have been “[h]ailed as one of the most progressive legal reforms in the Islamic world, . . . elevates the status of women, limits some rights men had over women, and grants women more affirmative rights in their affairs.”<sup>155</sup> It includes a restriction on, but not abolition of, polygamy<sup>156</sup> under certain circumstances (including when a wife inserts a

---

ILSA Q. 20–24 (2011). For the reported low public opinion of access to justice and the judiciary generally in Morocco based on a 2005 report, see Katie Zoglin, *Morocco’s Family Code: Improving Equality for Women*, 31 HUM. RTS. Q. 964 (2009).

The public lacks confidence in and expresses ambivalence toward the justice system as a whole. Litigants see the justice system as failing to regulate social inequalities; the poor view the wealthy and those with connections as receiving preferential treatment. Young women feel particularly vulnerable and do not believe that they are treated fairly. Citizens do not have a high opinion of the judiciary as a general matter. The judiciary is criticized as corrupt, lacking independence, and inaccessible. Lawyers are often described as motivated by money.

*Id.* at 975–76 (footnotes omitted) (citing, among other things, *Public Perception of the Moroccan Judiciary: Findings from Qualitative Research Conducted in July and August 2005*, at 11–12 (2005)) (reported as on file with author Katie Zoglin).

154. Extensive literature addresses the political forces leading to the reform of the Moudawana. See, e.g., Fatima Sadiqi, *The Central Role of the Family Law in the Moroccan Feminist Movement*, 35(3) BRIT. J. OF MIDDLE E. STUD., 325–37 (Dec. 2008). But see Francesco Cavatorta & Emanuela Dalmaso, *Liberal Outcomes Through Undemocratic Means: The Reform of the Code de Statut Personnel in Morocco*, 47(4) J. OF MODERN AFR. STUD. 487, 500–01 (2009) (noting both the predominant role of the king in bypassing other political forces—through what amounted to a “top-down reform”—in order to secure passage of the legislation as well as the positive aspects of the legislation).

155. Amna Arshad, *Ijtihad as a Tool for Islamic Legal Reform, Advancing Women’s Rights in Morocco*, 16 KAN. J. L. PUB. POL’Y 129, 137–38 (2006–2007). Under the 1958 version of the Moudawana, by way of contrast, “women were dependent on their fathers and husbands throughout their lives.” *Id.* at 135.

156. See Buskens, *Sharia and National Law in Morocco*, *supra* note 36, at 115:

Polygamy has been an important symbol in the struggle for reform of the family law. For progressives, it has been seen as a sign of inequality, for conservatives and part of the islamists, a God-given privilege for the man. It is remarkable that the Moroccan legislator, like legislators in other Arab countries, did not dare to abolish this practice completely, even though it seldom occurs in practice.

monogamy clause in her marriage contract) and an increase in the minimum age for women to marry to eighteen (same as for men), up from the minimum age of 15, although judges retain discretion to reduce the age under certain circumstances, and additional reforms as documented in the literature.<sup>157</sup>

Access to justice faces substantial obstacles even in the context of these reforms. These obstacles include lack of knowledge of such rights, as many women are not trained in or otherwise informed of them, particularly in rural areas,<sup>158</sup> and patriarchal attitudes among men, including among some judges (limiting their impartiality), which have led to illiberal interpretation and enforcement of the law.<sup>159</sup> Government and civil society efforts (including various NGO's) are ongoing to improve acceptance of the law.<sup>160</sup> In addition, in light of the new anti-discriminatory constitutional provisions recognizing the equality of men and women, judicial patriarchal attitudes may well need to be revisited and addressed. See Article 19 of the

---

See also RACHEL NEWCOMB, *supra* note 27, at 52-78 (chapter entitled "Mudawana Reform and the Persistence of Patriarchy," exploring attitudes both for and against continuation of polygamy; book is based on anthropological fieldwork primarily conducted pre-Moudawana reform). The author observes inconsistent spellings of Moudawana, although there is no confusion over what is intended.

157. For a detailed description of the reforms to the Moroccan Personal Status Code, see generally Katja Zvan Elliott, *Reforming the Moroccan Personal Status Code: A Revolution for Whom?*, 14 MEDITERRANEAN POL. 213 (No. 2, July 2009); Katie Zoglin, *Morocco's Family Code: Improving Equality for Women*, *supra* note 153.

158. See Leila Hanafi, *Promoting a Rule of Law Culture in the Middle East and North Africa Region: Reflections from the MENA Rule of Law Conference 2010* (Al Akhawayn Univ., Ifrane, Morocco, June 25-26, 2010), available at <http://www.mena2010wjp.org/conference/reflections-from-the-mena-conference> (last visited March 7, 2012) ("[L]egal education should also be about raising legal literacy and reaching out to the underserved groups, to educate them about the system and to help make it inclusive and accessible, not only financially, but also procedurally.").

159. See Buskens, *supra* note 36, at 121 ("Not all Moroccans endorse the new vision according to which women and children have increased rights, while men are forced to accept stricter obligations. In fact, the significance of the reforms largely depends on the way in which judges and 'udul apply the law in practice. . . . Likewise, it appears that not all judges of the old guard are prepared to apply the new visions espoused by the most recent version of the Mudawana."). See also MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 21 ("Some judges and citizens view the law as inconsistent with Islamic principles or cultural practice, making application of the law problematic.")

160. *Id.* at 121 ("The Moroccan government has started a widespread campaign to clarify the vision of the legislator to the judiciary and to thereby promote the application of the law. The Ministry of Justice organizes courses and meetings all over the country. It has also published an official manual for the application of the law in practice, which provides for the proper interpretation of articles and further legitimises their existence in Islamic terms. A French version of this guide has also been published, and is available on the website of the ministry as well.").

Moroccan Constitution (establishing equal rights for men and women and opposing all forms of discrimination).<sup>161</sup>

The situation limiting full enjoyment of the rights granted by the Moudawana is exacerbated by high levels of illiteracy among women (hampering awareness of such rights, especially in rural areas); a lack of infrastructure (such as roads), making travel to and from remote rural areas difficult, including by “legal aid and non-profit organizations,”<sup>162</sup> and once again, the effect of patriarchal approaches to the law. The status of implementation remains fluid as efforts continue by the government and civil society to overcome long-standing problems.<sup>163</sup>

In addition, because of the high cost of representation combined with widespread poverty and insufficient legal services, the right to counsel and (therefore to justice) has been limited. Extensive court delays have also been the result of overburdened courts.<sup>164</sup> Delays or backlogs also “lead to a lack of public confidence in a country’s judiciary and to hesitancy to rely on the judiciary in business planning.”<sup>165</sup> Poverty and illiteracy are not necessarily linked in Morocco as there is widespread unemployment among

161. MOROCCO CONST. art. 19 (“L’homme et la femme jouissent, à égalité, des droits et libertés à caractère civil, politique, économique, social, culturel et environnemental, énoncés dans le présent titre. . . . L’Etat marocain Œuvre à la réalisation de la parité entre les hommes et les femmes. Il est créé, à cet effet, une Autorité pour la parité et la lutte contre toutes formes de discrimination.”) [Editors’ translation: “Men and women enjoy equal rights and freedoms of a civil, political, economic, social, cultural and environmental nature as stated in this title. . . . The Moroccan State works to achieve parity between men and women. It has created for this purpose a commission to achieve equality and combat all forms of discrimination.”].

162. Leila Hanafi & Christine S. Pratt, *Morocco’s 2004 Family Code Moudawana: Improving Access to Justice for Women* 18 (publication forthcoming as part of a volume entitled *Women and Knowledge in the Mediterranean Region*, Sept. 2010) (placing 2004 reform in historical context). The authors identify literature written in Arabic and French on women’s rights as another problem where the languages of some women are solely Moroccan Arabic and Berber [Amazigh]. *Id.* Still other problems not restricted to the Moudawana reform but affecting its implementation are delays in the courts and corruption. *Id.* at 17, 20. See also Norman L. Greene, *Morocco: Beyond King’s Speech & Constitutional Reform: An Introduction to Implementing a Vision of an Improved Judiciary in Morocco*, MOROCCO BOARD NEWS SERV. (Apr. 5, 2011), available at <http://www.moroccoboard.com/news/5176-morocco-beyond-kings-speech-a-constitutional-reform> (last visited Mar. 7, 2012).

163. See Fatima Sadiqi, *Morocco: Gender at Heart of New Constitution*, COMMON GROUND NEWS SERV. (Sept. 6, 2011), available at <http://www.commongroundnews.org/article.php?id=30326&lan=en&sp=0> (last visited Mar. 7, 2012).

164. See Schemm, *Moroccan justice: sold to highest bidder*, *supra* note 62. See also *id.* (“To make matters worse, Morocco’s 3,000 judges are inundated by cases they say they barely have time to handle. In 2007 there were 2.57 million new cases filed and 3.25 million ongoing, according to a 2010 USAID report on the rule of law in Morocco.”).

165. DAM, *supra* note 47, at 104.

university graduates which has been the subject of ongoing demonstrations through 2012 by what has been termed an “unemployed graduates” movement.<sup>166</sup>

A loss in confidence may also lead some to seek alternatives to courts. Disputes will need to be resolved one way or another, and even invoking customary law (or an informal justice system) is another approach to a traditional judicial system. Such informal and customary systems have historically played some role in Morocco.<sup>167</sup> Alternative dispute resolution,

---

166. See Paul Silverstein, *Weighing Morocco's New Constitution*, MIDDLE E. RES. & INFO. PROJECT (July 5, 2011), available at <http://www.merip.org/mero/mero070511> (last visited Mar. 7, 2012):

Ironically, the more educated Moroccans are, the more likely they are to be jobless. Over the last decade, unemployed university graduates (*les diplômés chômeurs*) have staged weekly demonstrations in front of Parliament calling for an open job market that does not simply benefit those with family connections. The graduates' organizational structure, non-violent tactics and militant experience laid the groundwork for the February 20 movement.

See also Paul Schemm, *5 Unemployed Moroccans Set Selves on Fire*, ASSOCIATED PRESS, ABC NEWS, (Jan. 19, 2012), available at <http://abcnews.go.com/m/story?id=15392114> (last visited Mar. 7, 2012):

Five unemployed Moroccan men set themselves on fire in the capital Rabat as part of widespread demonstrations in the country over the lack of jobs, especially for university graduates, a rights activist said Thursday. Three were burned badly enough to be hospitalized.

Once rare, self-immolation became a tactic of protest in the Middle East and North Africa ever since a vegetable seller in Tunisia set himself on fire in December 2010 to protest police harassment, setting off an uprising that toppled the government and sparked similar movements elsewhere in the region.

The Moroccans were part of the “unemployed graduates” movement, a loose collection of associations across the country filled with millions of university graduates demanding jobs. The demonstrations are often violently dispersed by police and in some towns and cities have resulted in sustained clashes. While the official unemployment rate is only 9.1 percent nationally, it rises to around 16 percent for graduates.

See also Paul Schemm, *Jobless Moroccan Dies After Setting Himself Afire*, ASSOCIATED PRESS, MIAMI HERALD (Jan. 25, 2012), available at <http://thechronicleherald.ca/world/55439-jobless-moroccan-dies-after-setting-himself-afire> (last visited Mar. 7, 2012).

167. See, e.g., MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 12:

As a response to these inequalities in the formal justice sector, Moroccans have historically used various alternative dispute resolution (ADR) methods, including traditional forms of reconciliation performed by tribal chiefs, arbitration carried out by arbiters selected by parties to the dispute (called *amghar* or *anachram*), and the use of Muslim religious leaders (*imams*) in civil or family disputes. Another form of traditional mediation, largely associated with businesses, involves specially designated individuals from the business community (*amine*). These forms of ADR preceded the current judicial system, and even though dispute referrals to the courts have become more frequent, traditional and local



required. Nonetheless, given the reported scope of the problems, impatience in Morocco is understandable.

#### IX. THE ROLE OF CONSTITUTIONAL REFORM IN ENHANCING PUBLIC CONFIDENCE IN THE JUDICIARY

*We all know there are other countries where, for various reasons, the public lacks confidence in the judiciary. . . . And where those things have happened, I think there have been bad results for the people who live in the country, not just for the judges, not just for the lawyers, but for the ordinary man and woman who lives in the country.*<sup>170</sup> (U.S. Supreme Court Justice Stephen Breyer)

An important purpose of reform is not only to improve the reality of impartial justice, but also to enhance the public perception of justice. Public confidence that judges will act impartially so as to preserve the dignity of all participants in the Moroccan legal system is essential to the perception of justice. Even small lapses in isolated cases may jolt public confidence, and given the widespread news reports, do so for a judicial system already under severe criticism. It is axiomatic that if the courts are viewed as corrupt or biased, their use will be avoided, with many attendant negative consequences, including, as the King has observed, on economic development;<sup>171</sup> and it “feeds into” public “anger and desperation.”<sup>172</sup>

For example, a number of Moroccan and Moroccan-American colleagues have stressed how concern that the courts will not treat them fairly keeps them from using them. In some cases, the author was informed, people are afraid that, because of corruption and other failures by the courts, they “could go to the police station as a plaintiff and emerge as the defendant.” In other words, one’s complaint against another for a crime may get distorted into retaliation against oneself. People also fear a lack of fair treatment where their adversary is rich or powerful.<sup>173</sup> Under these circumstances, some ask, why bother with the courts?

---

170. Television Interview by PBS of U.S. Supreme Court Justices Stephen Breyer and Anthony Kennedy (1999), available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html> (last visited Mar. 7, 2012) (quoting United States Supreme Court Justice Stephen Breyer).

171. *Accord DAM*, *supra* note 47, at 93–94; see also *Perspectives from the Rule of Law*, *supra* note 13, at 69 (U.S. domestic context).

172. JOSEPH BRAUDE, *THE HONORED DEAD* 190 (2011) (also observing that such anger and desperation fuels extremism).

173. See *MOROCCO RULE OF LAW ASSESSMENT*, *supra* note 3, at 12 (“In general, justice in Morocco is perceived by the public to be more of a matter of access to power rather [than] the function

The constitutional reforms are a significant national statement in favor of a good judicial system for Morocco. The government needs to follow through on its promises in all their aspects, among other things, through establishing impartiality, eliminating corruption, and increasing access to justice, including addressing court delay.<sup>174</sup> Initial measures to be taken might include enhanced corruption investigations and prosecutions of those who would corrupt the judiciary, and for lesser offenses, judicial disciplinary and disqualification procedures, all with appropriate protections for witnesses. Particular targets might be telephone justice and other improper efforts to influence the judge, such as those referenced in Article 109 of the Moroccan Constitution.

The success of the new reforms in the establishment of fair and impartial courts, and if so, how long it will take, is unclear.<sup>175</sup> But implementation of the reforms must become a priority (including a budgetary priority), combining enforcement, education, and more.

## X. CONCLUSION

*[N]o degree of improvement in substantive law—even world “best practice” substantive law—will bring the rule of law to a country that does not have effective enforcement. A sound judiciary is key to enforcement. . . . One conclusion widely agreed upon, not just in the economic literature but also among lawyers and legal scholars, is therefore that the judiciary is a vital factor in the rule of law and more broadly in economic development.*<sup>176</sup>

---

of an independent and impartial rule of law system. . . . The public in general lack confidence in and respect for the judicial system.”).

174. Of course, increasing access may have the incidental effect of increased court delays under certain circumstances. See DAM, *supra* note 47, at 105 (referencing Brazil, where “unfettered access for everyone had produced, not surprisingly, access for no one.”).

175. By way of comparison, past international proposals for Morocco have projected relatively long-range proposals for judicial reform, with time horizons varying for some measures of from one to three years and for others four to ten years; and some past proposals in Morocco have apparently been inadequate in addressing the problems. Whether those reforms are appropriate are beyond the scope of this article. See MOROCCO RULE OF LAW ASSESSMENT, *supra* note 3, at 30 *et seq.* (targeting certain aspects of justice system reform.) Also, the “Ministry of Justice reportedly initiated a reform effort in 2000” whose objectives included “increasing the number of corruption cases” and assuring “ethical conduct of the judiciary.” *Id.* at 44. Yet now in 2012, despite the 2000 reform effort and whatever (if any) effects it had, the issues of corruption and unethical judicial conduct have still merited constitutional reform and widespread concern over the lack of honest and impartial justice.

176. Dam, *supra* note 47 at 93.

King Mohammed VI stated a plan to implement his March 2011 speech, well aware that one does not achieve the ideals set forth by speeches alone. The King's speech mentioned a "comprehensive package" of constitutional amendments to be proposed and added, "[c]onsistent with a standard practice of resorting to a participatory approach in all the major reforms we have introduced so far, I have decided to set up an ad hoc committee for the revision of the Constitution."<sup>177</sup> In subsequent months, this in fact occurred, and the constitutional reforms were overwhelmingly approved by the July 1, 2011 Moroccan referendum, thus avoiding much of the unrest embroiling other parts of the region during the Arab Spring.<sup>178</sup>

Although the author's earlier article on this subject observed that the King's speech focused on a level of detail unlikely to be the subject of constitutional provisions, those constitutional provisions ultimately were quite specific in many instances. Such measures and legislation that follows may help improve Moroccan justice, so long as the government and the public are committed to their implementation. As the King has conceded, constitutional reform is only a beginning:

As perfect as it may be, a constitution is never an end in itself, but rather a means for the establishment of democratic institutions. The latter require reforms and political overhauling in which all stakeholders should take part, so as to achieve our shared ambition, namely to promote development and enable all our citizens to lead a dignified life.<sup>179</sup>

Current questions thus include—now that the constitutional reform implemented the king's speech—what will implement the constitutional reform? The reform is promising, but not self-executing.<sup>180</sup>

Judicial reform requires a multi-level approach, from increasing independence to ensuring accountability and freedom from interference. The goal, if people are so inclined, is to establish an impartial judicial system, and whether that goal will be obtained or retained in Morocco or anywhere else, including in the United States, is an ongoing struggle. Judicial reform is ambitious, but reform sometimes must be bold. To quote

---

177. His Majesty King Mohammed VI, Speech at Rabat, Morocco, MAP (Mar. 9, 2011), [http://www.map.ma/eng/sections/speeches/hm\\_the\\_king\\_addresse\\_6/view](http://www.map.ma/eng/sections/speeches/hm_the_king_addresse_6/view) (last visited Mar. 6, 2012).

178. The adequacy of the procedures for developing the constitutional reforms is beyond the scope of this article.

179. *Morocco New Constitution*, *supra* note 141.

180. Silverstein, *supra* note 28 ("But such a new Morocco does not simply come into being because 98.5 percent of a possible majority of the electorate votes 'yes' to an eloquent governing document promulgated by the 'commander of the faithful.'").

Stephen Sondheim from the commencement speech in his musical *Merrily We Roll Along*—although the differences between commencement speeches in Broadway musicals and governing are conceded—boldness is sometimes the best way: “My final thought is a simple but mighty one: it is the obligation we have been given. It is to not turn out the same. It is to grow, to accomplish, to change the world.”<sup>181</sup>

Finally, protecting and enhancing the judicial branch of government is well worth the effort on many levels, including because a strong judiciary also may serve to protect against tyranny, to safeguard human rights, and otherwise to enhance the rule of law. The *Bangalore Principles of Judicial Conduct* thus observes that “the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.”<sup>182</sup>

A new federal district court judge in the United States set the tone for how much judges can do to protect liberty in his induction speech (just after being sworn in as judge) in November 2011, a speech which bears further study and repetition. As the judge stated, referencing the famous Federalist papers<sup>183</sup> leading up to the U.S. Constitution, which observed that “the judiciary” was “the least dangerous branch [of government]”:

[E]nemies of the rule of law have and will continue to find the judges of this court more than dangerous enough after the horrors of nineteenth century slavery and twentieth century holocausts. All civilized men and women of the law now declare that when it comes to confronting evil, from Auschwitz and Dachau to Darfur

---

181. Stephen Sondheim, Commencement Speech to the Hills of Tomorrow (Finale) Lyrics, ALL MUSICALS (2012), available at <http://www.allmusicals.com/lyrics/merrilywerollalong/hillsoftomorrowfinale.htm> (last visited Mar. 7, 2012).

182. *Bangalore Principles of Judicial Conduct*, *supra* note 7, ¶ 2.

183. See THE FEDERALIST NO. 78 (Alexander Hamilton), available at <http://www.constitution.org/fed/federa78.htm> (last visited Mar. 7, 2012):

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

and Rwanda, never again will the law stand aside in a shameful silence. And so I have a word of friendly advice for those who might be tempted to challenge the rule of law: not in this court, not in our house, not on my watch.<sup>184</sup>

The judge's speech naturally leads to a question and a challenge to all countries, including Morocco: If you do not have a fair and impartial judicial system, who will protect you in difficult times?<sup>185</sup> Who, if anyone, has done so in the past?<sup>186</sup> And if no one does, what happens *then*?

The new Moroccan constitutional reforms are an important start—and an opportunity to do more. Additional steps might include more extensive assessments in Morocco by the Moroccan government, civil society or others to come up with even more specific recommendations in light of the reforms. For example, Morocco's Minister of Justice has committed to organizing a national dialogue working with various stakeholders to develop judicial reform proposals and presumably seek their implementation, a commission has been appointed to address the effort, and

---

184. William F. Kuntz, United States District Judge, Induction Speech for the United States District Court for the Eastern District of New York, Brooklyn, N.Y. (Nov. 9, 2011) (copy on file with the author and the law review). The speech is also available at RUTHFULLY YOURS: THE RIGHT NEWS FRONT AND CENTER, (Nov. 15, 2011), <http://www.ruthfullyyours.com/2011/11/15/william-kuntz-ii-united-states-district-court-judge-please-read-this-inspiring-speech-by-a-great-american/> (last visited Mar. 7, 2012).

185. See, e.g., Alison L. McManus, JADALIYYA, April 26, 2012, [http://www.jadaliyya.com/pages/index/5252/el-haqed\\_examining-moroccos-judicial-reform-in-201](http://www.jadaliyya.com/pages/index/5252/el-haqed_examining-moroccos-judicial-reform-in-201) ("Until the monarch's power is diminished and authority is given to an independent judiciary, political dissent in Morocco remains a risky undertaking."); Edward Wong, *Missing Chinese Lawyer Said to Be in Remote Prison*, N.Y. TIMES, Jan. 2, 2012, at A9 ("Scholars of China's legal system say security forces are acting with growing impunity and increasingly do not feel constrained by the law. . . . [S]ecurity forces have regularly detained intellectuals, lawyers, and rights defenders without giving any legal cause for doing so. The government is now considering revising its criminal procedure law to effectively legalize secret detentions, the scholars say."). See also Norman L. Greene, *International Law Weekend Panel Examines Access to Justice in the Middle East and North Africa Before and After the Arab Spring*, 20 ILSA Q. 22, 22–24 (2011) (referencing, among other things, Morocco's own history of human rights abuses, leading to the establishment of the 2004–2005 Equity and Reconciliation Commission in Morocco); Buskens, *supra* note 36, at 102 ("The first twenty-five years of King Hassan's rule are known as 'the years of lead'. They were characterized by serious violations of human rights and elimination of political adversaries.").

186. See James N. Sater, *Reforming the Rule of Law in Morocco: Multiple Meanings and Problematic Realities*, 14 MEDITERRANEAN POL. 181, 182 (No. 2, July 2009) ("First, since independence, the system of justice has been an instrument of state power. The large number of serious human rights abuses that were committed by police and other auxiliary forces especially under Hassan II remained unchecked by the system of justice.").

the work is underway.<sup>187</sup> There is reason to believe from past and present unfolding events that the reform opportunity will be taken, and if not, that the Moroccan population will be watching closely.<sup>188</sup>

---

187. See, e.g., Souhail Karam, *Interview—Morocco Government to Seek Royal Pardon for Jailed Activists*, TRUSTMEDIA (Jan. 5, 2012), available at <http://www.trust.org/trustmedia/news/interview-morocco-govt-to-seek-royal-pardon-for-jailed-activists> (last visited Mar. 7, 2012), and <http://www.canada.com/entertainment/Jailed+activists+Morocco+royal+pardons/5952290/story.html> (last visited Mar. 7, 2012) (“Mustafa Ramid, minister of justice and public freedoms, also said in an interview he planned to organise a national debate involving judges, the bar and civil society groups to help draft proposals for the reform of the judiciary.”). See also *id.*:

The judiciary should gain independence, especially from the security apparatus, under charter reforms crafted last year by the Arab world’s longest-serving monarchy to pre-empt a popular revolt like those that have ended the rule of four Arab leaders. . . . As well as being accused of widespread corruption, Morocco’s justice system has a reputation for taking its cue from the authorities, especially when it comes to verdicts in cases of graft or Islamic militancy. “We should seek to grant judges all the means . . . to ensure the highest level of integrity,” Ramid said.

With respect to the national debate on the judiciary, see *National dialogue on judiciary reform to last two weeks with visits to courts in 21 cities—Minister*, MOROCCO WORLD NEWS, April 6, 2012, available at <http://morocoworldnews.com/2012/04/34122/national-dialogue-on-judiciary-reform-to-last-two-weeks-with-visits-to-courts-in-21-cities-minister/> :

Ramid told the weekly government council that the national dialogue on the judiciary reform will proceed through gathering proposals and paying visits to courts in 21 cities.

Ramid added that the dialogue also includes the holding of workshops and meetings to examine issues pertaining to the independence of the judiciary, the facilitation of access to justice, the modernization of the justice administration and the reinforcement of courts’ infrastructure.

See also *L’Instance chargée de la réforme de la justice entame ses travaux avec la bénédiction royale* [Editors’ translation: *The Commission responsible for justice reform begins its work with the royal blessing*], PANORAMAROC, May 9, 2012, available at <http://www.panoramarc.ma/fr/linstance-chargee-de-la-reforme-de-la-justice-entame-ses-travaux-avec-la-benediction-royale/> (last visited June 4, 2012) (describing justice reform commission members and their affiliations). But see Associated Press, *Morocco’s judges demand greater independence*, AL ARABIYA NEWS, May 15, 2012, available at <http://www.alarabiya.net/articles/2012/05/15/214343.html> (last visited May 27, 2012) (demonstration by Judges’ Club in favor of judicial independence; none of the members is appointed to justice reform commission):

On May 8 [2012], the king nominated a 40-person commission to begin the dialogue on judicial reform. No member of the Judges’ Club was named to the commission.

“It is very good that a discussion has been opened on this difficult question. But I ask why no one from our association was included in this commission,” Aziz said to The Associated Press.

See also Youssef Jalili, *Dernière chance pour la réforme de la justice*, May 11, 2012, PANORAMAROC, available at <http://www.panoramarc.ma/fr/derniere-chance-pour-la-reforme-de-la->

Even with the reforms set forth in this article, Morocco may not magically have a model internationally-renowned judicial system. The goal is not to use nationally specific models to make the Moroccan judicial system resemble another's.<sup>189</sup> However, with the implementation of the reforms in its constitution and otherwise, Morocco may and should advance towards achieving a better and steadily improving version of its own.<sup>190</sup>

---

*justice-par-youssef-jajili/* [Editors' translation of title: *Last chance to reform justice.*] (last visited June 4, 2012).

188. With respect to citizen interest in judicial reform, see Siham Ali, *Justice Reform Begins in Morocco: A new government panel aims to protect judicial independence and modernise the courts*, MAGHREBIA, May 20, 2012, available at [http://www.magharebia.com/cocoon/awi/xhtml1/en\\_GB/features/awi/features/2012/05/20/feature-01](http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2012/05/20/feature-01) (last visited June 10, 2012):

Citizens are eager to see the government implement its promises. "For years, we've been hearing about reforms, but no change has taken place," social worker Chabli Mounia told Magharebia.

"Hopefully this project will work, because people really suffer if they have to deal with the courts," she said.

"There must be safeguards in place to ensure that the citizen can have confidence in justice," Mounia added.

With respect to the importance for business of implementing the judicial reforms in the constitution, see also Interview, Author and Adil Naji, Moroccan-American businessman, who has businesses in both the United States and Morocco, June 21, 2012 (quoting Mr. Naji):

The struggle for judicial improvement through the constitutional reforms—and undoubtedly from the coming recommendations to implement them—is essential for business development in Morocco. For the country to thrive commercially and prosper financially in the MENA region, many things must change, and some will take some time to address. But an improved judicial system, such as the reforms now require, should certainly be one of the first.

189. See also Carolyn A. Dubay, *supra* note 61 ("This is not to suggest that movement towards judicial independence in Morocco must resemble the structure of judicial independence adopted in western democracies.").

190. For a discussion of the need for implementation in addition to general support for the constitutional reforms among public officials, see Larbi Arbaoui, *Mr. Benkirane's Coalition Government: Intentions Versus Reality*, MOROCCO WORLD NEWS, May 4, 2012, available at <http://morocccoworldnews.com/2012/05/38058/mr-benkiranes-coalition-government-intentions-versus-reality/> (last visited May 4, 2012).

All the ministers of the new government have expressed more than once through different public media outlets that they are ready to do all that it takes to put the statements of the new constitution into practice and to abide by its guidelines. But unfortunately, press releases and good intentions don't make politics. In the absence of a strategic program and a clear future vision, all that remains is just talk. Politics is not manufactured by an aura of hopes as it is not based on aspirations. One swallow doesn't make spring.

See also Moha Ennaji, *The Arab Spring in Morocco: Reform Without Regime Change*, QANTARA DE, Nov. 16, 2011, available at <http://en.qantara.de/Reform-without-Regime-Change/17793c39/index.html> (last visited Mar. 12, 2012):

---

Morocco's various political parties, civil society organisations and media believe that the new constitution will have far-reaching results, but will take much work to ensure constitutional changes be implemented effectively and widely. They have faith that the King will embrace this challenge in consonance with the February 20 movement's call for the rule of law, the values of citizenship, freedom, social justice and democracy.