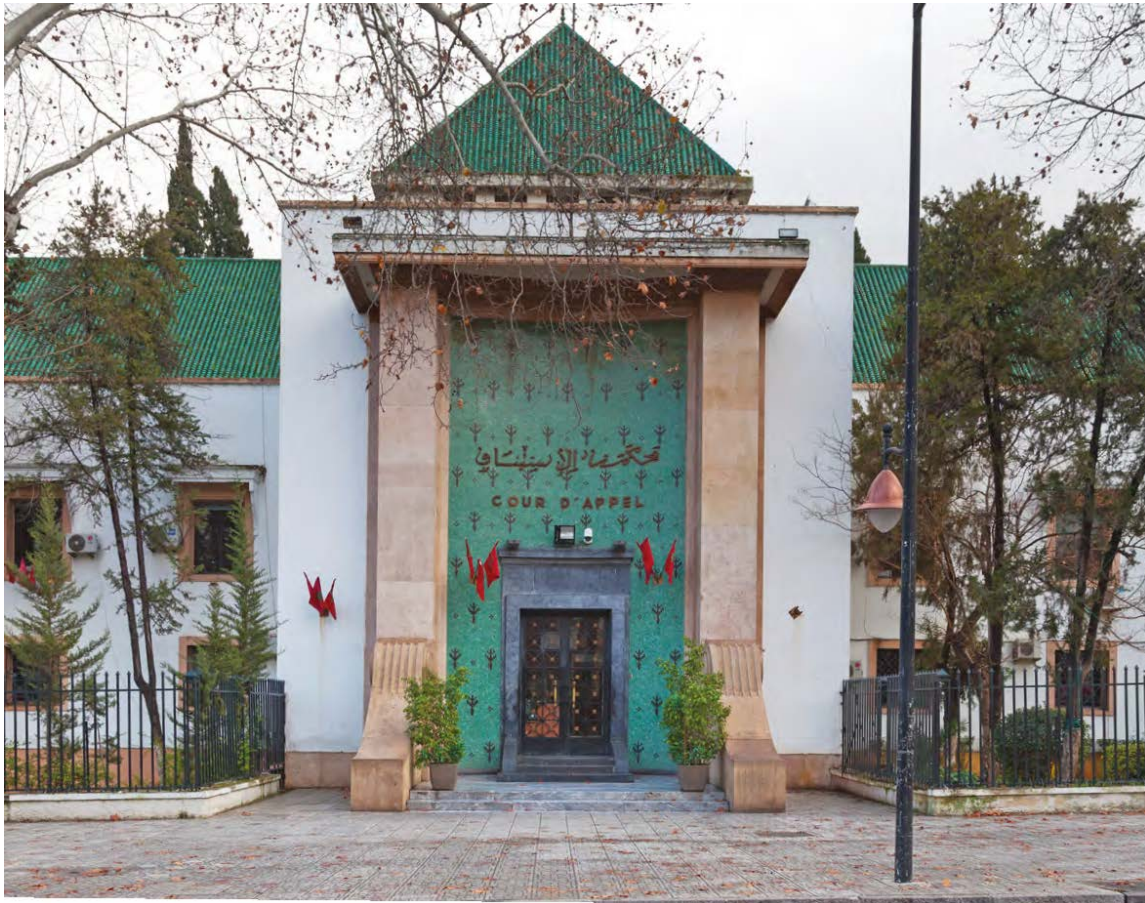




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# The Legal System of Morocco

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## An Overview

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The history of Morocco shows a divide between the rigid and enforceable nature of the French civil code and the traditional *Amazigh* informal justice system as well as *Sharia* law that focuses more on custom than strict adherence to text. Thus, there is a strong basis for access to justice and the legal system generally, but with room to follow a less legally principled path. This overview further considers the way these primary influences coexist in the context of legal pluralism.

## I. Historical Influences

The first known inhabitants of Morocco were *Amazighs* and other tribal groups. Their legal structure was defined by informal systems based primarily on Islamic and non-Islamic customary law.<sup>1</sup> Initially, most *Amazighs* were Christian, but through encounters with Arabs, beginning in the 7<sup>th</sup> century, many converted to Islam and thus their informal legal systems became increasingly informed by Islamic teachings.<sup>2</sup> Despite embracing Islam, however, the *Amazighs* followed a unique brand of Islamic *Shi'ism*, incorporating their own cultural differences.<sup>3</sup> The *Amazigh* culture is distinguished from other Moroccans primarily through language, which leads many children to drop out of school because they are taught in a 'foreign' language, Arabic.<sup>4</sup> Approximately two-thirds of the *Amazigh* population in Morocco live in rural regions, where the culture remains the strongest.<sup>5</sup> The *Amazigh* political system is centred on tribes and family.<sup>6</sup> Families remain close together and patriarchy is strong.<sup>7</sup> Each tribe has a chieftain and communities often have *Sharifs*, families who claim descent from the prophet, who are afforded significant respect in mediation of matters.<sup>8</sup>

The rejection of formal education based on language barriers, and the value of traditional authority figures lead modern day *Amazigh* communities, particularly in rural areas, to be most affected by IJS as defined by the original *Amazigh* inhabitants. The other major influence in Morocco, outside of the Arabic-Islamic majority, comes from European colonialists from the 15<sup>th</sup> century onward.<sup>9</sup> The Portuguese, Spanish, and French all had a stake in Morocco at some point.<sup>10</sup> In the early 1900s, Morocco was primarily divided between Spain and France, with the central area dominated primarily by the French, while the North and South had more Spanish influence.<sup>11</sup> Britain recognised the French sphere of influence and,

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<sup>1</sup> Hoffman, K.E. (2010). Berber Law by French Means: Customary Courts in the Moroccan Hinterlands, 1930-1956, *Comparative Studies in Society and History* 52(4), 851-880.

<sup>2</sup> Earth Cultures (2010). *The Berber People* [Online]. Available from: <http://www.earth-cultures.com/destinations/morocco/Berber-of-morocco>

<sup>3</sup> Abd al-Salam, Y. (2015). *Shi'ism in Morocco*. [Online]. *Imam Reza Network*. [Online]. Available from: <http://www.imamreza.net/eng/imamreza.php?id=6618>

<sup>4</sup> Weitzman, B. (2006). Ethni-politics and Globalisation in North Africa: The Berber Culture Movement, *The Journal of North African Studies* 11(1).

<sup>5</sup> The Culture and Arts of Morocco and the Berbers, *supra*.

<sup>6</sup> Buskens, L. (2003). *supra*.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Brignon, J. (1967). *History of Morocco*. [*Histoire du Maroc*]. Hatier: Casablanca, Librairie nationale.

by 1912, Morocco was declared a French protectorate.<sup>12</sup> It was, thus, legally controlled and protected by France.<sup>13</sup> until it acquired its independence from France in 1956; the remaining Spanish colonialists withdrew at approximately the same time as their French counterparts.<sup>14</sup>

The primacy of French control is evident through the continued prevalence of the French language throughout Morocco, particularly in higher education, and the Moroccan legal system's adoption of several principles of the French civil code.<sup>15</sup> The civil code focuses on clearly defining legal obligations instead of relying on case law precedent.<sup>16</sup> It codifies the legal rights and obligations of citizens and laws of property, inheritance, and civil procedure.<sup>17</sup> The French influence presses for secular government, particularly in the judiciary.<sup>18</sup>

Morocco has established civil, criminal, and commercial codes, as well as outlining procedure for such cases.<sup>19</sup> Although the Family Code is likewise codified in a format not unlike the civil code, it finds its source more readily in religious teachings.<sup>20</sup> **The *Moudawana* is also distinguished from this general practice of the civil code because it does not apply universally among Moroccans; Christian and Jewish citizens are not held to the same Islam-based law that applies to Muslim citizens.**<sup>21</sup> True to its French civil code roots, Moroccan case law does not have binding precedent, but can serve as persuasive rhetoric.<sup>22</sup>

**The final and preeminent source of the Moroccan legal system is Islamic law.** Despite its history of tolerance and diversity, modern day Morocco is rather homogenous.<sup>23</sup> Ninety-nine per cent of the population is Muslim, and of them, virtually all are Sunnis, less than 0.1 per cent is Shi'a Muslims.<sup>24</sup> The other one per cent is Christian, Baha'i, and Jewish.<sup>25</sup> Muslims have been present in Morocco since the 7<sup>th</sup> century, when soldiers of the Prophet Mohammed spread throughout North Africa.<sup>26</sup> In 1961, Islam was declared the official state religion, but maintained the full religious freedom accorded to Christians and Jews.<sup>27</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> Hoffman, K.E., *supra*.

<sup>14</sup> Hursh, J. (2012). *supra*.

<sup>15</sup> *Id.*

<sup>16</sup> Ministry of Justice and Liberties, Morocco (2013). Direction de Legislation. Code de Procedure Civile (Version consolidée en date du 6 Juin 2013). Dahir portant loi n° 1-74-447 (28 Septembre 1974) [Online] Available from: <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/codecivil.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> Hashas, M. (2013). Moroccan Exceptionalism Examined: Constitutional Insights Pre- and Post-2011, *IAI Working Papers*, 1-18, Istituto Affari Internazionali.

<sup>19</sup> The World Bank, Legal Vice Presidency (2003). *Morocco Legal and Judicial Sector Assessment* [Online]. Available from: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MoroccoSA.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> UNICEF (2011). *Morocco MENA Gender Equality Program* [Online]. Available from: <http://www.unicef.org/gender/files/Morocco-Gender-Eqaulity-Profile-2011.pdf>

<sup>22</sup> The World Bank, Legal Vice Presidency (2003). *supra*.

<sup>23</sup> Miller, S.G. (2013). *A History of Modern Morocco*. Cambridge University Press.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Moroccan law is based on *Sharia* law as rooted in the legal system of Sunni Islam.<sup>28</sup> Sunni Muslims regard themselves as the more traditional and orthodox branch of Islam. The name Sunni comes from *Ahl al-Sunna*, meaning people of the tradition.<sup>29</sup> The two branches were divided over who should succeed Mohammed as leader of the Muslim community: Sunnis believed the successor should be one who had attained seniority, demonstrated piety, and had adequate qualifications, whereas Shi'ites believed it should pass to his descendants.<sup>30</sup> Sunni Muslims also differ from Shi'ites because they do not exalt leaders the way they do prophets and, thus, have a less elaborate and rigid religious hierarchy.<sup>31</sup> There are four schools of Sunni teachings; Morocco law follows the teachings of the Maliki school of thought.<sup>32</sup> Under the Maliki teachings, legal decisions are based more on community practice, traditions, and analogous reasoning than strict adherence to *hadith* – the sayings of the Prophet and his companions.<sup>33</sup>

*Sharia* law is assured through the constitutional provisions naming the King as Commander of the Faithful,<sup>34</sup> tasked with ensuring respect for Islam throughout the legal system.<sup>35</sup> Where civil law governs contracts, commercial law, administrative law, civil procedure, and criminal law; *Sharia* law applies to family law, succession, and personal status.<sup>36</sup> Islamic law is pronounced in first instance courts by *Taoutiq* judges with assistance from traditional clerks, *Adouls*.<sup>37</sup>

## II. Legal Pluralism in Morocco

There are at least two segments of legal and judicial life that coexist in Morocco: codified laws and regulations – along with an informal justice system of dispute resolution based on customs (*urf*). The two systems are considered to be conflicting; attempts to integrate both orders in the same centralised political system, from the pre-protectorate era to post-independence, failed due to the exclusion of informal justice operators in the integration process.<sup>38</sup> Legal pluralism provides a more inclusive conception of access to justice where the use of the two segments is divided, as is the case in Morocco. Several studies have highlighted the relevance of the existence of *urf* and the growing field of informal justice for the development and evolution of the Moroccan legal system. Informal justice is a means of dispute resolution that falls outside the court system. Generally, IJS differ from formal mechanisms because they take a more holistic view of the interests and positions of the parties, as opposed to addressing only those claims that arise under law. The role of the fact-finder tends to be more mediation-driven rather than making a ruling, and they rely more heavily on social and cultural norms and

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<sup>28</sup> Newman, J., 2013. Between Feminism and Islam: Human Rights and Sharia Law in Morocco (review). *Journal of Middle East Women's Studies*, 9(1), 130-133.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Messaoudi, L. (1995). Greatness and Limitations of Islamic Law in Morocco. [Grandeurs et limites du droit musulman au Maroc. *Revue Internationale de Droit Comparé*, 47(1), 146-154.

<sup>33</sup> *Id.*

<sup>34</sup> Morocco Const., 2011. Art. 41.

<sup>35</sup> *Id.*

<sup>36</sup> Weingartner, L.A. (2004). *supra*.

<sup>37</sup> Peyronnie, G. (2013). Formal Justice in Morocco and Tribunals of Pashas and Caids: The Ancient Regime of Dahir 4-8-1918. [La justice makhzen au Maroc les tribunaux de Pacha et Caids. l'Ancien régime, du Dahir du 4-8-1918].

<sup>38</sup> Daouaji, R. (2001). *Civil Dispute Resolution: Background and Rationale of the Duality of Jurisdiction*. [Le contentieux administratif marocain: historique et fondement de la loi instituant la dualité de juridiction]. Perpignan: University of Perpignan. PhD dissertation.

pressures.<sup>39</sup> On a strict legal level of the analysis, this is a key issue because it provides an opportunity to raise the question of legal pluralism throughout the historical development of Morocco.

Communities that rely more heavily on IJS face even greater struggles with judicial independence because the constitutional checks and balances, as well as appellate provisions, do not apply to informal justice procedures.<sup>40</sup> The mediators of informal systems have substantial discretion, thus their morals frame the outcomes.<sup>41</sup> This discretion often presents itself in the form of discrimination towards women because of traditional values held in the community.<sup>42</sup> Particularly in *Amazigh* communities, which exist largely in the rural regions of Morocco, the tribal judges tend to be conservative in their application of the law despite progressive movement by the formal government.<sup>43</sup> Today, there is growing tension between the constitutional guarantees of the universal imperative of equality for women and the coexistence of plural systems of traditional justice in rural Morocco, which are usually patriarchal, both structurally and in the substantive norms that they apply.

In Morocco, one cannot deny the presence of legal pluralism.<sup>44</sup> The specific issue in the country is that of the inheritance of different laws from past colonial periods that disharmonised within the legal system. There is an urgent need to harmonise the system and draft new laws that consider the needs of the population. The state is not and cannot be indifferent to non-state law. The coexistence of two legal systems is even positively assessed by stakeholders, *urf* being praised as the expression of positive social values.<sup>45</sup> Nevertheless, it cannot be denied that there is a strong contradiction between the informal justice style of dispute resolution and that personified by the state courts.

The eras of legal development milestones show a perpetual shift in the predominant influence in the judicial system without meaningful integration. In the pre-protectorate era, prior to 1912, informal justice was controlled in the kingdom. The sultans of Morocco were, predominantly, responsible for overseeing the judiciary system. In their capacity as Islamic rulers, they would oversee and appoint judges, called *Kadi Al-Kudat*,<sup>46</sup> who were known in the communities for their Islamic and legal knowledge. At this time, the *Shura* consultation principle was the guiding concept in legal matters in accord with Islamic teachings.<sup>47</sup>

From 1912 to 1956, under the French and Spanish protectorate, informal justice and customary courts were ostensibly supported alongside protectorate courts but, in reality, the power of sultans and informal justice were greatly reduced. In the Protectorate Agreement, France made a series of judicial reforms that functioned mainly to abolish the Sultan's courts and to establish protectorate courts, *Mahakim Makhzania*, under the direct control of the French.<sup>48</sup> These courts were organised in the form of councils, presided over by *Bashas* in cities and *Kayed* in rural communes. During this period, victor's justice was employed, in lieu of a system of laws, to meet the French and Spanish settlers' needs. The protectorate

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<sup>39</sup>Bahdi, R. (2007). *supra*.

<sup>40</sup> Morocco Const. 2011, Arts. 113-116.

<sup>41</sup> Sadiqi, F. *supra*.

<sup>42</sup> *Id.*

<sup>43</sup> Meir-Hosseini, Z. (2007). *supra*, 5.

<sup>44</sup> Daouaji, R. (2001). *supra*.

<sup>45</sup> Dupret, B. and Hounet, Y.B. (2015). Specificities and Implementation of Law in the Maghreb. [Pratique du droit et propriétés au Maghreb]. *L'Année du Maghreb*, (13), .9-15.

<sup>46</sup> Kadi Al-Kudat translates into Supreme Judge.

<sup>47</sup> Abun-Nasr, J.M. (1987). *A History of the Maghrib in the Islamic Period*, Cambridge University Press: Cambridge.

<sup>48</sup> Weingartner, L.A. (2004). *supra*.

established the Courts of Tradition, *Mahakem Urf*, beginning on September 11<sup>th</sup> 1914, as a means to maintain some secular aspects of Berber law to facilitate the French takeover of Berber lands with legal protection. The establishment of such courts was formally codified under the Ministerial Order of April 8<sup>th</sup> 1934.<sup>49</sup> Although the protectorate did not legally deprive Morocco of its status as a sovereign state or the Sultan of his title as the country's leader, in practice, the Sultan had no real power and the country was ruled by a colonial administration that controlled the judiciary to meet its political interests.<sup>50</sup>

The modern judicial structure follows the post-independence changes that began in 1956. In the months following independence, the returning King Mohammed V proceeded to build a modern governmental structure under a constitutional monarchy, in which the Sultan would exercise an active political role.<sup>51</sup> Following the country's independence, Mohamed V reinstated the Moroccan court system and abolished the judicial system initiated by the protectorate.<sup>52</sup> As part of these reforms, civil affairs divisions in first instance courts became officially tasked with family law issues.<sup>53</sup> In 1974, the Moroccan Government attempted to integrate tribal laws into the formal justice reforms by recognising the inclusion of tribal law through the appointment of rural commune traditional judges, known as *Hakim*, as state mediators.<sup>54</sup> The Government initiated an election process for these traditional judges at the level of each rural commune, but the attempt failed because of disagreement between the Moroccan Government and the rural communes on financial compensation for such roles. Following this failed attempt, the Moroccan legislature did not reattempt to set a policy towards codifying, controlling, or containing the work of informal justice, until the adoption of the 2004 *Moudawana*; whereby unregistered tribal marriage, known as *Zawaj bil- Fatiha*,<sup>55</sup> can be formalised in the Family Court through the application of Article 16 of the *Moudawana*, which registers the marriage retroactively.<sup>56</sup>

Internationally, recent years have seen an upswing in research and reporting on the potential for gaps in legal protection and negative human rights outcomes that may develop within the context of legal pluralism, notably discrimination based on the interests of the powerholders, who define the community rules, depending on their religious or cultural identity.<sup>57</sup> Hence, many of the barriers to women's justice found in the formal legal system can exist in informal mechanisms, and vice versa.<sup>58</sup>

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<sup>49</sup> Pennell, C.R. (2013). *Morocco: From Empire to Independence*, Oneworld Publications.

<sup>50</sup> Morocco Section, Repertory of Decisions of the International Court of Justice (1947-1992).

<sup>51</sup> Pennell, C.R. (2013). *supra*.

<sup>52</sup> Royal Decree of 7<sup>th</sup> March 1956.

<sup>53</sup> Ministry of Justice, Morocco (1974). Dahir of judicial reorganisation 339/74/1 of July 15<sup>th</sup>, 1974. Le Bulletin Officiel.

<sup>54</sup> *Id.*

<sup>55</sup> *Zawaj bil Fatiha* is the traditional marriage wherein the opening sura of the *Quran*, Al-Fatiha, is recited. It is conducted by a group of people who act as witnesses but without the registration of the marriage with the authorities nor the presence of the Adoul.

<sup>56</sup> *Moudawana*, 2004. Art. 16. Petitions for recognition of a marriage are admissible within an interim period not to exceed five years from the date this law goes into effect.

<sup>57</sup> Turquet, L. (2011). *supra*.

<sup>58</sup> Ursua, E. G. (2014). *Access to Justice for Women in Plural Legal Systems in Southeast Asia*. UN Women.

### III. Modern Structure of the Legal System

Morocco's legal system embodies the principles of its mixed lineage. It is a constitutional, democratic, parliamentary, and social monarchy.<sup>59</sup> The King presides over both the legislative and executive branches and it is his duty to ensure compliance with the Constitution and the perpetuation of the state.<sup>60</sup> As Commander of the Faithful, he must also ensure that the laws of Morocco do not contravene Islamic obligations.<sup>61</sup> He exercises his governmental authority through appointment of his Cabinet.<sup>62</sup>

The executive branch consists of the Prime Minister and ministers.<sup>63</sup> It is responsible for administrative law and introducing certain proposed legislation and issues for decision by the legislative branch.<sup>64</sup> The Prime Minister works in conjunction with the Cabinet, particularly because his actions apply to issues regarding military force, proposing bills, and proposed revisions of the Constitution.<sup>65</sup> The specific topics on which he makes recommendations and designates a programme for the legislature include economic, cultural, social, and foreign affairs.<sup>66</sup> The Prime Minister may delegate some of his powers to the ministers, who pursue similar functions in more specific fields; for instance, communication, energy, and transportation.<sup>67</sup>

Parliament is the main body in control of the legislature and is divided into two houses: the House of Representatives and the House of Counsellors.<sup>68</sup> Parliament meets for two normal sessions per year, but can be convened for additional special sessions by decree.<sup>69</sup> The House of Representatives is elected for five-year terms by popular vote, whereas the House of Counsellors is elected for six-year terms by regional electoral colleges and a national Electoral College representing working Moroccans.<sup>70</sup> Parliament is responsible for proposing and passing most bills.<sup>71</sup>

The judicial branch is the only branch of Government that is not subject to the King's direct supervision, and the Constitution further proclaims its independence from the legislative and executive authority.<sup>72</sup> The King is the guarantor of this independence.<sup>73</sup> The judiciary is divided into three types of courts: general jurisdiction courts, specialised courts, and special courts.<sup>74</sup> The Moroccan court structure was revised, following independence in 1956, to create a more unified system of courts out of what had previously been several independent court systems. A law promulgated in 1965 was the final step in consolidating the system. The Municipal and District Courts were established in 1974 to settle minor

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<sup>59</sup> Morocco Const., 2011. Art. 1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Art. 41.

<sup>62</sup> *Id.* Art. 89.

<sup>63</sup> Melloni, D. (2013). The 2011 Moroccan Constitution : Changes in Political and Judicial Command. [La Constitution marocaine de 2011: une mutation des ordres politique et juridique marocains]. *Pouvoirs*, 145(2), 5-17.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Bendourou, O. (2012). La nouvelle constitution marocaine du 29 juillet 2011, 511-535.

<sup>68</sup> *Id.*

<sup>69</sup> Parliament of Morocco. Official website of the Parliament. [Online]. Available from:

<http://www.chambredeseconseillers.ma/en>

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Morocco Const., 2011. Art.107.

<sup>73</sup> *Id.*

<sup>74</sup> *Morocco Legal and Judicial Sector Assessment. Supra.*

criminal offences. These courts are empowered to impose monetary penalties only and may not imprison offenders. There is no appeal from these courts.<sup>75</sup>

General jurisdiction courts can hear any matter, besides those designated to special courts.<sup>76</sup> There are 837 Municipal and District Courts headed by a single judge; who is generally an elected official not a career judge.<sup>77</sup> The courts deal with more minor infractions; hearing only minor criminal offences or civil matters where less than 110 United States Dollars (USD) is in dispute.<sup>78</sup> They are not permitted to hear cases regarding personal status or real property.<sup>79</sup> Within the purview of general jurisdiction courts, there are 71 first instance courts that, unlike the Municipal and District Courts, can hear cases on civil, social, commercial, real property, and personal status claims, and criminal cases involving petty offences and misdemeanours.<sup>80</sup> Panels of three judges sit on first instance courts.<sup>81</sup> The final category of general jurisdiction courts are appeals courts, of which there are 26.<sup>82</sup> In addition to hearing appeals from the lower courts, they may hear more serious criminal claims.<sup>83</sup> Specialised jurisdiction courts have been established, largely through legislative amendments, to deal with audits, commercial claims, and administrative law respectively.<sup>84</sup> The existing specialised jurisdiction courts are widely respected; however, the political tide has turned away from establishing more specialised courts; to push for subdivisions within the general jurisdiction courts.<sup>85</sup> The Ministry of Justice and Liberties believes this will offer both the necessary specialisation for certain types of cases, including family law, while allowing for flexibility in courts.<sup>86</sup>

Special courts primarily deal with government matters that would be unwise to deal with in general courts due to potentially sensitive issues.<sup>87</sup> Both the High Court and the Special Court of Justice primarily deal with cases of corruption involving judges, prosecutors, and civil servants. The Permanent Armed Forces Court addresses claims regarding military personnel and offences involving national security.

The Supreme Court is the highest appellate court in Morocco that addresses only issues of law, not fact.<sup>88</sup> It can acquire jurisdiction in general matters in which the parties have pursued all lower levels of appeal.<sup>89</sup> The Supreme Court also has jurisdiction where the claim concerns bias or the partiality of judges, magistrates, and courts, or regarding a decision by the Prime Minister.<sup>90</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Ballota, A. (1982). *Development and Implementation of Judicial Acculturation and Incriminating Legal Norms*. [L'acculturation juridique et la norme incriminante au Maroc: Essai sur l'élaboration et l'application]. Bordeaux : University of Bordeaux 1, Faculty of Law. PhD Thesis.

<sup>77</sup> Ministry of Justice and Liberties, Morocco (2014). *Justice in Numbers Report*. *supra*.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> The World Bank (2013). *supra*.

<sup>83</sup> *Id.*

<sup>84</sup> Meknassi, R.F., 1994. *Social and Judicial Transformations in Morocco*. [Transformations sociales et mutations juridiques au Maroc]. [Centre d'études et de documentation économiques, juridiques et sociales](#). Cairo: Dossiers du CEDEJ, 60-78.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Morocco Legal and Judicial Sector Assessment, *supra*.



## IV. Performance of the Justice Sector

A limited number of national and international scholars have examined the importance of judicial reform in Morocco and argued that the problem of inaccessibility is combined with the inadequate performance of the justice sector.<sup>91</sup> This is mainly due to the complex and multidimensional issues that are involved in analysing the performance of Moroccan justice sectors. Diverse social norms, cultural values, the religious system as a legal source, the legal structure, and scarcity of data have made any feasible evaluation of the performance of the Moroccan justice sector extremely complicated.<sup>92</sup>

In Morocco, the judicial system underwent several stages of reform. During the 1970s, a wave of judicial reform legislations were passed; including laws related to judicial organisation, judges, the Code of Civil Procedure (CCP), and (to a lesser extent) the CCRP.<sup>93</sup> The main aim of this legislation was to reorganise the judiciary, to simplify judicial procedures, to guarantee the speedy enforcement of verdicts, and to narrow the gap between the judiciary and litigants.<sup>94</sup> During that time, communal and districts courts were also created to settle minor conflicts. In the 1990s, reform expanded into many other areas. At that time, specialised administrative and commercial courts were established; the Ministry of Justice was reorganised; penitentiary by-laws were amended; the system of enforcing court judgements was reformed; the issue of rehabilitation was studied; the judicial inspection process was enhanced; the gap between the judiciary and litigants was narrowed; and new codes for criminal procedure and criminal law were developed.<sup>95</sup> In August 2009, the King highlighted in a speech, the first since his reign, the need to improve justice sector reform and highlighted the following six main axes for additional reforms: (i) strengthening the independence of the judiciary; (ii) modernising its legal framework; (iii) raising the standard of judicial and administrative structures; (iv) raising standards in the area of human resources; (v) improving its efficiency; and (vi) establishing ethical standards for the judiciary.<sup>96</sup> The King's speech triggered a major reorientation of the scope and focus of legal and judicial reforms.<sup>97</sup>

Reforms aimed at facilitating access to justice gradually moved to the top of the justice reform process. The code of judicial organisation, the CCP, the CCRP, and the law on access to justice were modified in August 2011.<sup>98</sup> Since March 2012, these amendments have resulted in the setting up of a specific framework and procedures for community justice – *justice de proximité*. Furthermore, the Government has reiterated its commitment to addressing the systemic weaknesses in the judiciary.<sup>99</sup> To build

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<sup>91</sup> Eisenberg, A.M. (2011). Law on the Books vs. Law in Action: Under-Enforcement of Morocco's Reformed 2004 Family Law, the Moudawana. *Cornell International Law Journal*, 44(693).

<sup>92</sup> Lopez, G. (2014). *Justice in Morocco: Achieving an Integrative Approach to Reform*. Nonviolence International. [Online]. Available from: <http://nonviolenceinternational.net/wp/wp-content/uploads/2014/07/Justice-in-Morocco-Achieving-an-Integrative-Approach-to-Reform.pdf>

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Shalhoub, I. and Henderson, K. (2007). *Comparative Report on the State of the Judiciary in Egypt, Jordan, Lebanon, and Morocco* [Online]. Available from: [http://www.ifes.org/sites/default/files/comparative\\_judiciary\\_report\\_final.pdf](http://www.ifes.org/sites/default/files/comparative_judiciary_report_final.pdf)

<sup>96</sup> The World Bank (2012). *Project Appraisal Document on a Proposed Loan in the Amount of Euro 12 Million to the Kingdom of Morocco for a Judicial Performance Enhancement for Service to Citizen Project* [Online]. Available from: [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/05/23/000356161\\_20120523001304/Rendered/PDF/669210PAD0Buff0SE0ONLY090Box369244B.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/05/23/000356161_20120523001304/Rendered/PDF/669210PAD0Buff0SE0ONLY090Box369244B.pdf). [Accessed 27 August 2015]. [hereinafter 'Project Appraisal'].

<sup>97</sup> Mohammed VI, Morocco (2009). 56<sup>th</sup> Anniversary of the Revolution of King and the People Speech, 20<sup>th</sup> August 2009. [Online]. Available from: <http://mohamed6.canalblog.com/archives/2009/08/21/14805632.html>.

<sup>98</sup> Ministry of Justice, Morocco (2015). *supra*.

<sup>99</sup> See, eg *Project Appraisal, supra*.

consensus about the legal and judicial reform agenda, the Ministry of Justice approved the 2012-2016 Charter for the Reform of the Judicial System.<sup>100</sup> The Charter was adopted in July 2013 as a result of the National Dialogue on Reform of the Judicial System, a year-long process of consultations with stakeholders on the development of reforms.<sup>101</sup> Among its aims, it proposes a plan to evaluate the implementation of the Family Code and improve infrastructure in the family court system to enhance access to justice to women. The former could be beneficial in assessing the impacts of new rights and services, and allow for the improvement of problematic services. Related activities, aimed at enhancing free access to judicial sector information online and via publications, and the provision of free legal aid services through units attached to courts, have the potential to benefit women if implemented properly.

## V. Justice Sector Challenges

The Moroccan justice sector is considered to be inefficient and lacking the trust of the citizenry at large.<sup>102</sup> According to the 2005 Public Perception survey of the Moroccan judiciary, Moroccans perceive justice as a matter of power dynamics rather than as part of an independent, impartial, and accessible rule of law system.<sup>103</sup> The Global Corruption Barometer released by Transparency International in 2010.<sup>104</sup> ranks Morocco slightly above the regional average on broader governance indicators, but the judicial sector is rated as one of the less efficient in this area. The 2010 Global Integrity Report also rates the rule of law in Morocco as 'very weak' (56 out of 100 points) based on a set of *de jure* and *de facto* indicators.<sup>105</sup>

Morocco also struggles with trust and user satisfaction for a range of reasons, such as a strong perception of corruption in the judiciary, bureaucratic and inefficient procedures, and the inconsistent application of laws. A general overview of the most recent governance rankings for Morocco indicates that key elements remain to be addressed in order to improve perceptions of corruption within the judiciary. Perception-based indicators show that corruption hinders people's use of the court system. Several studies indicate the public perception of the formal court system is that the processes are too bureaucratic and often corrupt.<sup>106</sup> According to Transparency International's 2013 Global Corruption Barometer, corruption is perceived as endemic in the public sector, and particularly the judiciary; 70 per cent of Moroccans claim that the judiciary is corrupt, and 41 per cent reported paying a bribe to the judiciary.<sup>107</sup> These rankings are corroborated by assessments of the justice sector completed by

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<sup>100</sup> Penal Reform International (2013). *Morocco's Justice Minister Outlines Ambitious Program to Reform Corrupt Judiciary* [Online]. Available from: <http://www.penalreform.org/blog/moroccos-justice-minister-outlines-ambitious-program-reform-corru-pt/>

<sup>101</sup> The National Charter on Judicial Reforms (2013). *supra*.

<sup>102</sup> Sater, J. N. (2009). Reforming the Rule of Law in Morocco: Multiple Meanings and Problematic Realities. In: *Mediterranean Politics* 14(2) 181-193.

<sup>103</sup> American Bar Association and People's Mirror Focus Group Center (2005). *Public Perception of the Moroccan Judiciary*, 9-10: August 2005.

<sup>104</sup> The other countries from the MENA region that have been included in the survey are: Iraq, Israel, Lebanon, and Palestine. On a scale from 1 (not at all corrupt) to 5 (extremely corrupt), the judiciary in Palestine received the best score (2.4) and the judiciaries in Lebanon and Morocco the worst (3.5). See: Transparency International, Global Corruption Barometer (2010) [Online]. Available from:

[http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2010/results](http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results)

<sup>105</sup> See, Global Integrity Report (2010). Scorecard for Morocco [Online]. Available from: <http://report.globalintegrity.org/Morocco/>

<sup>106</sup> USAID (2010). *supra*.

<sup>107</sup> Transparency International (2013). *Morocco: Global Corruption Barometer 2013*. This ranking has become worse over the past few years, with Morocco ranked 80 out of 177 countries in 2011, and 88 in 2012. [Online]. Available from: <http://www.transparency.org/gcb2013/country/?country=morocco>

international organisations, such as the WB in 2003 and updated in late 2010, which outline the need to: (i) enhance the transparency of the judicial decision process; (ii) improve the qualification and specialisation of judges and auxiliaries of justice; (iii) reduce delays in case management and enforcement of court decisions; (iv) facilitate access to justice and to legal and judicial information; and (v) enhance the capacity of the Ministry of Justice in the area of budget and human resources management. A 2015 WB Survey of Access to Justice and Courts Performance in 12 jurisdictions in Morocco revealed that Moroccans perceive the courts as inaccessible to the public due to the complexity of the procedures and biased performance of the judiciary.<sup>108</sup> Hence, trust and court user satisfaction greatly influence if and when people are turning to the courts to seek a legal remedy.

Improving the efficiency of the justice sector remains a key challenge, as evidenced by the backlog of cases. The total number of cases has risen significantly, from 786,791 cases per year in 1975 to around 2.7 million cases in 2010.<sup>109</sup> While the population grew between 1994 and 2010 from approximately 26 million to almost 32 million, the number of pending cases grew by 58.06 per cent in the same period.<sup>110</sup> The total backlog of cases went up significantly, from 676,591 cases unresolved in 2006, up to 812,480 in 2010.<sup>111</sup> The slow execution of judicial decisions, in particular, is perceived as a major problem that has a negative impact on the functioning of the justice sector.<sup>112</sup>

The distrust and lack of capacity in the formal judicial sector pushes people, particularly women in rural areas, to seek alternative means of accessing quick and inexpensive justice.<sup>113</sup> 'Some women perceive themselves as divorced from the formal legal framework' because of the linguistic and literacy barriers, misunderstanding of the law, lack of resources, and intimidation brought about by the formal legal system.<sup>114</sup> Unfortunately, IJS are plagued with their own challenges. They are criticised for being discriminatory towards women and other disadvantaged groups, they are more isolated, and thus less likely to adhere to international human rights standards, and the resolution is highly dependent on the individual moderator's skills and morals.<sup>115</sup> Accordingly, results are highly inconsistent and difficult to appeal or anticipate. Often, IJS are deeply integrated with religious practices and tradition.

## VI. Judicial Independence

In the scope of international principles of justice, judicial independence is the ability of individual judges and, more broadly, the judicial branch to function independently and without ideological influence. This can be divided into two separate concepts: (a) decisional independence, which refers to a judge's ability to make decisions without political or popular interference, based solely on facts and applicable law; and (b) institutional independence, which indicates separation of powers of the judiciary from the executive and legislative branches of government.<sup>116</sup>

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<sup>108</sup> The World Bank (2015). Survey on Public Perceptions of the Judiciary Performance in Mahkamati's 12 Jurisdictions, *Mahkamati Judicial Enhancement Project*. Washington DC: The World Bank.

<sup>109</sup> *Project Appraisal, supra*.

<sup>110</sup> The World Bank (2013). *supra*.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Sadiqi, F. (2013). *supra*.

<sup>114</sup> Greene, N.L. (2012). *supra*.

<sup>115</sup> See El Hajjami, A. (2009). *supra*.

<sup>116</sup> United Nations (1985). Basic Principles on Independence of the Judiciary; Universal

Judicial independence has both structural and behavioural aspects, and Morocco's 2011 Constitution addresses both under Article 107: 'The judicial power is independent of the legislative power and of the executive power. The King is the guarantor of the independence of the judicial power.'<sup>117</sup> The 2011 Constitution provision expands on Article 82 of the 1996 Constitution<sup>118</sup> by specifying the King's direct role in ensuring judicial independence. The involvement of the King in overseeing the judicial branch runs contra to Morocco's obligations under the ICCPR.<sup>119</sup>

Several factors obstruct judicial independence (including deficiencies in law and practice), including excessive influence of the King and the Ministry of Justice in the judicial system.<sup>120</sup> The 2011 Constitution marked a substantial advancement of judicial independence; however, in practice it remains underwhelming. The Constitution provides for more independence of the judiciary through the creation of the Superior Council for the Judicial Power (*Conseil Supérieur du Pouvoir Judiciaire* – CSPJ), which is set to replace the Higher Council of the Judiciary (*Conseil Supérieur de la Magistrature* – CSM).<sup>121</sup> The CSPJ is chaired by the King and comprises 20 members, including three judges from the Cassation court; 10 judges elected among the judges of Court of Appeals (*Cour d'Appel* – CdAs) and First Instance Tribunals (*Tribunal de Première Instance* – TPIs); five members selected by the King; the Ombudsman of the Kingdom; and the Head of the National Council for Human Rights.<sup>122</sup> The level of independence of the judiciary also depends on the adoption of two organic laws drafted in line with the new Constitution, one regarding the CSPJ, and the other regarding the professional status of judges, both pending approval in Parliament. Young judges in the wake of the Arab Spring began to protest for autonomy *vis-à-vis* the executive branch, particularly the Ministry of Justice.<sup>123</sup> Seemingly in response to the outspoken young judges, the Ministry of Justice issued draft laws that would diminish the power of judges to associate in groups and exert greater control over young professionals.<sup>124</sup> Under the draft laws, judges would be 'deputy judges', a temporary probationary position prior to determining their qualifications to become a judge.<sup>125</sup> Such a position would effectively control the behaviour of the primary group of judges involved in promoting change.<sup>126</sup>

The opinion put forth by the judges regarding the over-involvement of the executive branch in judicial functions has been mirrored by several human rights organisations and foreign judicial systems. The executive, acting through the High Judicial Court, controls nomination, promotion, and disciplinary proceedings for judges.<sup>127</sup> The executive controls the initiation and maintenance of judges' careers.<sup>128</sup>

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Declaration of Human Rights Art. 10; International Covenant on Civil and Political Rights Art. 14.

<sup>117</sup> Morocco Const., 2011. Art. 107.

<sup>118</sup> *Id.* Art. 82

<sup>119</sup> ICCPR Art. 4.

<sup>120</sup> Mathieu, B., 2013. Emergence of Judicial Power in the 2011 Moroccan Constitution. [L'émergence du pouvoir judiciaire dans la Constitution marocaine de 2011]. *Pouvoirs*, (2), 47-58.

<sup>121</sup> Morocco Const., 2011. Art. 113.

<sup>122</sup> *Id.* Arts. 113-116.

<sup>123</sup> Saadoun, A. (2014). Judiciary Draft Laws in Morocco: Undercutting the Young Judges Movement, *Jadaliyya*, 1<sup>st</sup> February 2014 [Online]. Available from: [http://www.jadaliyya.com/pages/index/16077/judiciary-draft-laws-in-morocco\\_undercutting-they-y](http://www.jadaliyya.com/pages/index/16077/judiciary-draft-laws-in-morocco_undercutting-they-y).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

maintaining the impact the executive branch can have in their career.<sup>129</sup> This practice is in direct contrast to the constitutional guarantee of independence from both political branches of the Government.<sup>130</sup> Here, the behavioural independence of the Moroccan judiciary comes into question because behavioural independence relates to not only the issue of 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>131</sup> In terms of constitutional guarantees, the standards in Articles 109 and 110 of the Moroccan Constitution are fully consistent with international standards, such as those set forth in the *Bangalore Principles of Judicial Conduct*: ‘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>132</sup>

The practice of using promotion and transfer as a means of controlling judges has also received criticism for its tendency to limit the independence of the judicial sector.<sup>133</sup> This means of control can be used as a discreet form of punishment for judges, which can be applied without formal disciplinary proceedings and without legally warranted cause for punishment. Being forced to move to a remote transfer location, where living conditions are inadequate, could serve as a deterrent for judges to act in opposition to their controlling superiors. A 2010 international donor-sponsored report on Morocco flags that ‘the current judicial system is permeable to political influence, and the mechanisms through which judges are appointed, promoted, sanctioned, and dismissed leave them vulnerable to political retribution.’<sup>134</sup> It has also been used to incite judges who, hoping for career enhancement opportunities, jeopardise their independence. As noted in the UN’s *Basic Principles on the Independence of the Judiciary*, ‘promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.’<sup>135</sup>

Outside of intergovernmental threats to judicial independence and impartiality, is the risk of corruption. The WB has identified Morocco as being at ‘moderate’ risk for judicial independence.<sup>136</sup> It cites substantial efforts at combatting corruption over the past few years as curbing the risk, while the extremely low salaries of judges makes them highly susceptible to bribery and financial coercion.<sup>137</sup> The percentage of disciplinary hearings based on corruption is low, suggesting that it is not as prevalent as it seems; however, people maintain a low opinion of the judiciary and their integrity is often questioned.<sup>138</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> Morocco Const., 2011. Art. 107.

<sup>131</sup> Dam, K.W. (2006). *The Law-Growth Nexus: The Rule of Law and Economic Development* 107, Brookings Inst.: Washington, D.C.

<sup>132</sup> Judicial Group on Strengthening Judicial Integrity (2002). *The Bangalore Principles of Judicial Conduct*. [Online]. [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) See also *The Universal Charter of the Judge* (1999). Available from: <https://www.domstol.dk/om/otherlanguages/english/publications/Publications/The%20universal%20charter%20of%20the%20judge.pdf>

<sup>133</sup> *Morocco Legal and Judicial Sector Assessment*, *supra*.

<sup>134</sup> Morocco Rule of Law Assessment, *supra* note 3, at 12. See also Kadivar, D. (2012). *Moroccan Judges, Lawyers Demand Judicial Reform*. May 17<sup>th</sup>. Available from: <http://www.iranian.com/main/blog/darius-kadivar/check-balances-moroccan-king-receives-judgescalling>

<sup>135</sup> See U.N. *Basic Principles*, *supra* note 8.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> The European Commission for the Efficiency of Justice (2013). *Perceptions Survey on Justice in Morocco*. [*Enquete Nationale sur la Perception de la Justice au Maroc*].

Another example is the procedural loopholes in Family Law Case Management. According to Moroccan law, the power to assign cases to individual judges lies with the court presidents. This is not an unusual approach but it is not a favourable practice because it exposes the chief judge to allegations of partiality and can contribute to uneven workload assignments.<sup>139</sup> Instead, the international standard is that cases should be assigned based on objective criteria and random selection, based on predetermined parameters. Examples of objective criteria include alphabetical order; assignments by day of filing; or the better choice of random selection for all cases; or separately for different categories of cases; or a mixture thereof. Rules and processes for exceptions to random assignment to accommodate judges that handle an unusual high caseload of complex cases should be based on a similar random reassignment of newly incoming caseloads, and in exceptional cases also for prior assigned cases in an equally open and transparent process. Moreover, these rules should be determined by law or by permanent, published court rules.<sup>140</sup> Publication of such assignment schedules is especially important to demonstrate court transparency and accountability, and to increase public trust.<sup>141</sup>

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<sup>139</sup> See, inter alia, Article 31 para. 3 of the Code of Civil Procedure, Royal Decree n° 1-74-447 (11 ramadan 1394) approuvant le texte du Code de procédure civile. Ministry of Justice and Liberties, Legislation Directorate. [Online]. Available from: <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/codecivil.pdf>

<sup>140</sup> See European Commission for Democracy through Law (2010). *Report on the Independence of the Judicial System – Part 1: The Independence of Judges*, adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010), para. 80.

<sup>141</sup> *Id.* In Slovenia, for example, annual work schedules of all courts are published on the Slovenian judiciary website.

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