



COMBATING CORRUPTION

Constitutional Frameworks for the
Middle East and North Africa



the center for
constitutional
transitions



*Empowered lives.
Resilient nations.*

**Combating Corruption:
Constitutional Frameworks for the the Middle East and North Africa
Center for Constitutional Transitions, International Institute for Democracy
and Electoral Assistance and the United Nations Development Project**

Project Leads:

Sujit Choudhry, Founding Director, Center for Constitutional Transitions,
I. Michael Heyman Professor of Law and Dean, University of California, Berkeley

Richard Stacey, Director of Research, Center for Constitutional Transitions,
Assistant Professor, Faculty of Law, University of Toronto

Project Team Members:

Christopher Beshara, Casey Downing, Matthew Holbreich, Poonam Singh

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About this Report

The Constitutional Transitions Clinic ‘back office’ has, from 2011 to 2014, prepared a series of thematic, comparative research reports on issues in constitutional design that have arisen in the Middle East and North Africa. Zaid Al-Ali, Senior Adviser on Constitution Building at International IDEA, acted as an adviser on these reports and oversaw International IDEA’s participation in the report-drafting process. The United Nations Development Programme’s Regional Center provided both material and substantive support in relation to the last three of the six reports.

The first three of these reports are jointly published by Constitutional Transitions and International IDEA. The second three are jointly published by Constitutional Transitions, International IDEA and the United Nations Development Programme. The reports are intended to be used as an engagement tools in support of constitution-building activities in the region. The full list of reports is:

- Constitutional Courts after the Arab Spring: Appointment Mechanisms and Relative Judicial Independence (Spring 2014)
- Semi-Presidentialism as Power Sharing: Constitutional reform after the Arab Spring (Spring 2014)
- Political Party Finance Regulation: Constitutional reform after the Arab Spring (Spring 2014)
- Anti-Corruption: Constitutional Frameworks for the Middle East and North Africa (Fall 2014)
- Decentralization in Unitary States: Constitutional Frameworks for the Middle East and North Africa (Fall 2014)
- Oil and Natural Gas: Constitutional Frameworks for the Middle East and North Africa (Fall 2014)

The reports are available in English and Arabic at www.constitutionaltransitions.org and www.idea.int. For more information, please visit www.constitutionaltransitions.org.



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Many of the ideas that are set out in this report were tested in a conference that took place on 1 April 2014 in Tunis, Tunisia, attended by Tunisian academics, postgraduate law students, members of the Tunisian Constituent Assembly and legal advisers to the Tunisian state. We are grateful for the helpful suggestions offered by the conference participants.

This report has been prepared by the Center for Constitutional Transitions, with the assistance of students of the New York University School of Law. The report does not purport to present New York University's institutional views, if any. All English-language translations of documents referred to in this report are unofficial, unless otherwise noted.

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Preface

Comparative constitutional law is at the heart of democratic development. Legal scholars, policy makers, constitutional drafters, judges and advocates all over the world have looked to other jurisdictions for ideas on how their own challenges can be addressed and to better understand which reforms are likely to be successful in their own countries. The Arab region is no exception in that regard. Since 2011, at least 10 countries in the region have either replaced, reformed or reconsidered their constitutional frameworks. In that context, national, regional and international institutions have contributed to the legal scholarship that already existed by bringing the knowledge that has been developed in other jurisdictions closer to the region. Dozens of foreign constitutions have been translated into Arabic, existing constitutional frameworks from within the region were analyzed and comparative studies have explored how international and foreign experience could be used to help resolve national problems.

In 2012, International IDEA and the Center for Constitutional Transitions established a partnership to draft a series of regional studies on constitutional law issues that were of particular importance to the Arab region. Three studies were published during the first year of that relationship, covering the composition of constitutional courts, semi-presidentialism as a mechanism for power sharing, and the regulation of political party finance through constitutional reform. The United Nations Development Programme joined the partnership in 2013 and has played a key role in the elaboration of a further three studies, including the current volume. The effort to develop these comparative studies on constitutional law was of a truly international and regional nature, involving input, discussions and debates from a large number of institutions and individuals from across the Arab region, North America, Europe, sub-Saharan Africa and elsewhere. The authors and the institutions who participated in this effort did so in the hope that the published reports will be of use to scholars, researchers, policy makers, constitutional drafters, judges and advocates throughout the region. Each report uses a comparative approach but also has as its ultimate objective to provide assistance to the effort to modernize and reform constitutional frameworks in the Arab region.

The reports that were developed by International IDEA, the Center for Constitutional Transitions and the United Nations Development Programme move beyond the general areas that are traditionally debated during constitutional reform efforts. Instead, they focus on detailed and specific areas that were identified as being of specific interest to the region. Constitutional drafters

and reformers in the region have moved past discussions on general principles such as the separation of powers, judicial independence and fundamental rights and have, particularly since 2011, focused more on the mechanisms that can and should be designed to ensure that general principles such as the ones just mentioned can finally be employed to improve governance and standards of living throughout the region. Thus, for example, judicial independence as a general principle has long been accepted and incorporated in the large number of constitutions that exist throughout the region; the debate today is therefore not whether the courts should be independent from the other branches of government but rather what mechanisms can and should be incorporated into the region's constitutions to increase the likelihood that the courts, including constitutional courts, will be in a position to render justice to the people free from influence from the vagaries of politics.

The current volume focuses on the relationship between constitutional law and the struggle against corruption. The traditional view of constitutional law is that there is very little if anything that a constitution can and should do to limit opportunities for corruption. But the popular demands that were made across the region since the end of 2010 demanded a different approach to constitutional reform, forcing policy makers and constitutional drafters to conceive their fundamental texts differently. In the years that ensued, a number of improvements were made throughout the region which had a direct impact on anti-corruption frameworks. Amongst other things, a more serious effort was made to ensure that supreme audit institutions, which are responsible for auditing the executive, were no longer completely dependent on the government to function. This report discusses the efforts that were made in that respect and also debates some of the very many other measures and reforms that have been made and that could be made in the future to improve anti-corruption frameworks at the constitutional level. The report studies existing frameworks within the region, including some of the new constitutions that were drafted since the uprisings began in late 2010, as well as a large number of comparative examples from other jurisdictions, to determine what lessons exist for the broader region.

International IDEA, the Center for Constitutional Transitions and the United Nations Development Programme are grateful to this report's authors and to all the individuals who reviewed, commented upon and provided input to their content throughout the drafting process. This report would not have become a reality without them. We are confident that their efforts will contribute to improving constitutional frameworks throughout the region.



Executive Summary

The term ‘corruption’ is used to describe a wide range of dishonest behaviour, including bribery, embezzlement, abuse of authority, extortion, illicit enrichment, kickbacks, and trading in influence, in addition to actions connected to, and often used to aid in the commission of, corrupt activities such as money laundering, concealment and obstruction of justice. There is no comprehensive and universally accepted definition of corruption.¹ An alternative approach has been to identify the acts or offences that constitute corrupt practices. In general, these acts and offences share two components: first, they involve the misuse of authority in the public or private sector in order that, second, the persons misusing the authority derive a benefit to which they are not entitled.²

This report considers the constitutional frameworks and mechanisms available to prevent and reduce corruption, with particular reference to the transitional states of the Arab region. The question of whether a constitution has ‘horizontal application’, or whether it applies to and binds the activities and relationships of private persons, is an open one that different countries answer in different ways. This report does not take a position on the horizontal application of constitutions, and therefore focuses on corruption in the public sector only. Furthermore, this report identifies grand corruption as the misuse of power at the highest levels of government, and differentiates it from petty or administrative corruption, which is identified as instances of low-level officials pocketing small amounts in return for providing government services. While acknowledging that petty corruption continues to be a significant concern, this report begins with the view that a constitutional framework is well-suited to addressing the problems of grand corruption in particular. The report is thus confined to the consideration of how constitutional frameworks can best facilitate and promote efforts to combat grand corruption.

The catalyst for the uprisings that swept the Arab region in early 2011 was widespread disillusionment with corruption, along with other grievances such as entrenched inequality, high unemployment and political repression. For the Arab states in transition, the perceived legitimacy of any new constitutional order will depend partly on whether it addresses the corruption that fuelled popular demands for change in the first place. Combatting corruption should therefore be at the forefront of consideration in the constitution-building process.

Some countries have begun to explicitly address corruption through their constitutional frameworks. The constitutional design choices that can limit corruption are many, and include the vesting of fiscal oversight powers in legislatures and/or supreme audit institutions (SAIs), the constitutional entrenchment of independent anti-corruption agencies (ACAs) and specialized anti-corruption courts, and the use of checks and balances to avoid concentrating power in any one branch of government. The report considers these and other mechanisms for addressing corruption.

The most successful anti-corruption frameworks combine a number of preventive, corrective and restorative safeguards, and adopt a coordinated, rather than piecemeal, approach to the problem of corruption. To that end, the UN Convention against Corruption provides a roadmap of minimum standards that countries should adopt in order to address corruption. It includes measures on prevention, criminalization and law enforcement, international cooperation and asset recovery. Transparency International also calls for the adoption of a ‘national integrity system’, suggesting equilibrium among eight ‘pillars of integrity’ in a country: political will, an ethical culture within the civil service, anti-corruption watchdogs, parliament, public engagement, the courts, the media, and the private sector.³ A national integrity system requires coordination and information sharing among the institutions established to combat and prevent corruption.

Analysis of Specific Issues

Legislatures

The legislative branch is central to anti-corruption efforts. Legislatures are the main arenas of electoral accountability in functioning democracies. They are especially well placed to combat grand corruption because they exercise ultimate control over the executive’s expenditure of public money. This ‘power of the purse’ is the primary check on unaccountable spending by the executive branch. Almost all constitutions prohibit the executive from spending money or raising revenues except in accordance with a legislative enactment appropriating funds for a specific purpose or levying a tax. Given that governments can easily abuse contingency funds and extra-budgetary accounts, the principle of comprehensiveness requires that these unaccountable forms of spending be capped at a fixed amount, or at least made subject to legislative oversight. Legislatures are able to exercise oversight over the government by posing questions to members of the government,



and in parliamentary systems this is institutionalized in a formal ‘question time’ held at regular intervals, at which members of the government must appear in parliament to answer questions posed by members of parliament. Many constitutions provide for formal procedures of interrogation or interpellation, during which members of the government can be required to appear before the legislature to answer questions on the passage of a motion by the legislature.

Legislatures control public expenditures by approving the government’s annual budget, in the form of an annual budget law. Under most constitutions, the legislative branch is responsible for approving the executive’s budget proposal and reviewing its implementation. Because legislatures tend to have more limited resources than the executive government, many constitutional and legal frameworks attempt to coordinate the legislature’s and other institutions’ efforts to combat corruption through public financial accountability. For example, legislative finance committees rely on SAIs for accurate reports on departmental accounts, revenue receipts and government operations. In addition, legislatures are best able to detect and prevent the misuse of public money when they receive technical and analytical support from institutions such as an independent parliamentary budget office, a fiscal council, or an office of budget responsibility. These institutions are collectively described as independent fiscal institutions (IFIs). They operate at arm’s length from government. Although IFIs usually have a statutory basis, their vulnerability to political interference and politically motivated defunding furnishes strong grounds for their constitutional entrenchment.

It is, of course, important to ensure that members of the legislature are not involved in corrupt practices. The legislature is unlikely to be an effective check on government corruption if its members are themselves guilty of corruption. Mechanisms and rules for reducing corruption in the legislature include requirements that members of the legislature declare their interests and assets; prohibitions on members of the legislature occupying offices of profit outside the legislature; disqualification from membership or eligibility for the legislature for conviction for offences involving fraud, dishonesty or corruption; and limitations on protections of parliamentary privilege or immunity for offences involving corruption.

Finally, legislatures make law by passing legislation. The details of an anti-corruption framework are often set out in legislation, and the legislature thus has a crucial role to

play. However, it is very rare that legislation initiated in the legislature itself by members of the legislature becomes law. More commonly, legislation is prepared by the executive and tabled in the legislature. Procedures in different countries vary as to how much discretion the legislature has to make amendments to bills before they are passed into law but in general the influence that the legislature has in passing law is confined to approving or rejecting bills introduced by the executive branch of government. The legislature's opportunities for controlling corruption through ordinary legislation are thus limited, and this report focuses on the legislature's non-legislative tools for controlling government corruption.

Supreme audit institutions

A supreme audit institution is typically an independent government body, often established by the constitution, which oversees all expenditures authorized by the legislature and made by the executive. Many countries provide for the creation of an SAI in their constitution and set minimum criteria and standards for the functioning of the SAI, but leave the details of its work and mandate for later legislation. According to the International Organization of Supreme Audit Institutions, SAIs pursue four key goals: communicating objective information regarding public accounts to public authorities and the general public; developing sound financial management practices; ensuring that administrative activities are properly executed; and ensuring that public funds are spent properly and effectively.

The typical SAI carries out three types of audit: financial audits, in which the auditor reviews the accounts and expenditure reports of government departments for signs of misappropriation or embezzlement; compliance audits, in which auditors review government agencies' use of funds in order to verify that income and expenditure are authorized by law and comply with any rules regulating the use of funds; and performance audits, in which auditors review expenditure to determine whether citizens have received the promised goods and services

Generally, an SAI conforms to one of three existing models. The Westminster Model, which originated in the United Kingdom, relies on auditors to review executive expenditures and report to parliament, which then decides whether to implement its recommendations relating to public financial accountability. The second model, called the Board Model, functions in a similar way to the Westminster Model, but employs a number of



heads, known collectively as a Board of Audit, instead of a single auditor general. In the third model, called the Napoleonic Model, auditors are placed within each of the various government ministries throughout the country. These auditors report to the central auditing agency, which is composed of judges. The judges review the reports of the auditors, and hold those auditors responsible (often personally) for expenditure in their ministries.

Specialized anti-corruption agencies

An anti-corruption agency is a publicly funded, permanent body whose primary function is to provide centralized leadership in one or more of the core areas of anti-corruption activity – including policy, analysis and technical assistance in prevention, public outreach and information, monitoring, investigation, and prosecution.⁴ An ACA can be constituted either as an independent multi-purpose body to investigate and prosecute corruption, or as a small investigative or prosecutorial unit within another police agency. An ACA is usually mandated to perform tasks in one or more of the following areas: prevention, investigation, prosecution and education. The United Nations Convention against Corruption (UNCAC) requires states parties to the Convention to ensure the existence of a body or bodies to prevent corruption, implement the country's anti-corruption policies and increase and disseminate knowledge about preventing corruption (article 6).

There is a growing international consensus that specialized bodies with adequate resources, personnel and powers can make significant headway in fighting corruption, although they are not panaceas. Their effectiveness will depend in large measure on the political will, or lack thereof, to combat corruption, and an ACA should be tailored to suit local circumstances and structured in a manner that makes it compatible with other existing institutions, especially audit and judicial institutions.⁵ An effective ACA is characterized by specialized personnel, independence from other branches of the government, an ability to operate free from bureaucratic hierarchies that may impede its work (or which might themselves be the subject of investigation), adequate resources and powers, transparent practices, and a degree of accountability to the legislature. Because ACAs are vulnerable to defunding and jurisdiction stripping, many countries have entrenched their ACA in their constitutions. However, the specificity with which constitutions spell out the composition and function of ACAs varies from one country to another.

The functions of legislatures, SAIs and ACAs are complementary: while it is important that each institution should be independent and should act without bias, free from undue

influence or interference from the government, these institutions should not operate in isolation. Effective anti-corruption measures require interaction between the institutions and the coordination of their functions.

Judicial involvement

A number of countries have created specific courts, judicial procedures and specialized prosecutorial institutions to deal with corruption-related crimes. Specialized prosecutors are sometimes housed within the ACA. In some countries, the prosecution of corruption crimes is left to the ordinary prosecution services. The powers given to specialist prosecutors include the power to bring charges, the power to direct the investigation and, in some cases, the power to compel the production of evidence.

Several countries have also created specialized anti-corruption courts that are headed by judges with relevant expertise and are insulated from political pressure. Such courts are usually created as part of a statutory framework dealing with corruption. In some countries, the relevant statutory framework creates an expedited judicial process for cases that are brought in the anti-corruption courts, to ensure that they do not languish in the general judicial system. These courts have been most successful when given broad jurisdiction over all government officials and corruption offences. They have been less successful in countries where the constitutional or statutory framework narrowly defines their jurisdiction or provides for government immunity.

In some civil law systems, prosecutorial powers also include investigatory powers. Where prosecutors are given a substantial role in investigating corruption, it is all the more important that they be given institutional autonomy and powers commensurate with their role. As with SAIs and ACAs, some constitutions specifically provide for the appointment, funding and enforcement powers of public prosecutors. Leaving these matters up to legislation may allow future governments to impede the prosecutor's independence in corruption-related prosecutions.

The judiciary and prosecutorial institutions responsible can be assisted in the prevention and combating of corruption by non-specialist independent institutions, such as an ombudsman or a human rights commission. These institutions are mandated to deal with complaints against public officials in subject areas wider than only corruption; but in some cases they may be the primary point of contact for members of the public aggrieved



by government's corrupt practices. These institutions are often empowered to bring complaints to the attention of the courts and the prosecutorial services. This report does not deal with these generalist institutions, but points out that they may become involved in anti-corruption efforts, particularly through the courts.

Disclosure and transparency

Many countries have enacted asset/interest-disclosure laws that periodically require senior government officials, or government officials in positions that are particularly vulnerable to corruption, to declare the assets that they and their immediate family members own. These laws are most effective when declarations are filed periodically and when they are systematically collected and reviewed for accuracy and truthfulness. Often, these asset disclosure regimes will be overseen by an ACA (see above), which will have powers to review their accuracy and take action accordingly. Freedom of information (FOI) legislation has also been particularly successful in bringing instances of corruption to light, although that is not its sole purpose. These laws indirectly outsource corruption detection to private individuals and give the public a direct stake in the fight against corruption. They are most effective when they are coupled with strong proactive public reporting mechanisms, when exceptions are limited to a minimum, when the guidelines for seeking and providing the information are clear, when agencies are prohibited from using broad-ranging and vague exemptions to avoid disclosure, and when there are courts empowered to hear disputes over access.

Although both asset disclosure and freedom of information laws have a statutory rather than a constitutional basis, many countries have enacted these laws in pursuance of a general constitutional mandate to combat corruption. Usually, FOI laws are based on rights found in the Bill of Rights; for example, a general right to freedom of expression, including the right of access to information, or a more specific right to access information (see South Africa for the strongest FOI constitutional protection globally). Finally, some constitutions enshrine a requirement of transparency in public procurement, an area that is particularly prone to corruption. In a number of countries, legislation elaborates on this constitutional commitment by setting out in detail the procedures that must be followed for public procurement, including how contracts or 'tenders' for public work are advertised, the format in which tenders must be submitted, and the criteria by which competing tenders must be assessed. The award of public contracts is usually subject to

judicial review, with courts empowered to set aside the administrative decisions by which tenders are awarded.

The financing of political parties and electoral campaigns is an area in which corrupt practices may thrive. It is particularly important that rules for transparency and disclosure exist in this area. This report does not deal with these rules. In this regard, however, see the report prepared by the Center for Constitutional Transitions and the International Institute for Democracy and Electoral Assistance.⁶

Options for the Arab region

Legislatures

- *Give the legislature the power of the purse.* Constitutional rules should prohibit the executive from spending money or raising revenues except in accordance with a legislative enactment. Constitutional provisions on budgeting should adhere to the principle of comprehensiveness, which requires that as little spending as possible escapes budget mechanisms and procedures.
- *Ensure oversight powers.* Ensure that the legislature is able to exercise oversight of the functions of government, through interpellation and/or formal question time, during which members of the government can be called to account for their actions.
- *Provide in the constitution for a legislative finance committee and an independent fiscal institution.* To ensure proper scrutiny of government accounts, the constitution should provide for a legislative finance committee chaired by a sitting member of the political opposition. Independent fiscal institutions are important complements to legislatures inquiring into government spending, and their autonomy and funding should be constitutionally guaranteed.
- *Create mechanisms to control corruption within the legislature itself.* Persons convicted of an offence involving fraud, dishonesty or misuse of public office should be constitutionally barred from sitting in the legislature for a prescribed period of time (a common period is six months to one year). Members of the legislature must be required to declare their financial interests and assets.



Supreme audit institutions

- *Establish a supreme audit institution.* The constitution should outline the form and responsibilities of the SAI, specifying the auditing model that will be followed, the scope of the auditors' mandates, appointment and removal procedures for audit officers, and how the SAI will be funded.
- *Give the SAI a sufficiently broad mandate.* The SAI should be given jurisdiction to scrutinize the accounts of as many government agencies as possible. Problems tend to arise when certain types of expenditure, such as those relating to national defence, are placed beyond an SAI's jurisdiction.
- *Constitutionally protect the SAI's autonomy, authority and funding.* Constitutional rules can protect the SAI's independence by way of security of tenure for the auditors and constitutional floors for the SAI's budget. The SAI's authority to enforce its findings should be entrenched in the constitution so that it is not dependent on the legislature to implement its recommendations.

Anti-corruption agencies

- *Establish an anti-corruption agency.* Although article 6 of the UNCAC obliges states parties to establish institutions to combat corruption, the form of the institution is not prescribed. Countries are not obliged to establish an ACA. Establishing an ACA remains one of the options for meeting the obligations of article 6 of the UNCAC.
- *Constitutionally protect the ACA's autonomy and funding.* Where an ACA is established, it should be constitutionally entrenched. A constitution can maximize an ACA's chances of success: by requiring an appointment process that is open, uses multiple levels of decision makers, and is resistant to executive capture; by giving the ACA the power to propose its own budget; and by setting the threshold for the removal of personnel at a level that makes it difficult for the government to punish an ACA for doing an effective job. By the same token, service on the ACA should be subject to a term limit to ensure turnover of staff and reduce the likelihood that ACA staff will be 'captured' by the institutions and individuals they investigate.

Judicial enforcement

- *If local conditions so require, create specialized judicial processes for corruption cases.* Countries struggling with government corruption, including a corrupt judiciary, should consider creating specialized anti-corruption courts to try cases of official corruption. Specialized anti-corruption courts should be given broad jurisdiction over all levels of government and a fixed timeline for trying and disposing of cases.
- *Specialized anti-corruption prosecutors.* A specialized anti-corruption prosecutorial service can help to ensure the successful prosecution of corrupt officials. The specialized prosecutors can be a distinct and independent prosecutorial unit, or housed within the ordinary prosecutorial services.

Disclosure and transparency

- *Establish a constitutional obligation on the state to eliminate corrupt practices and ensure honesty and integrity in government.* To promote a culture of integrity and build public trust, the constitution could require all public officials to adhere to principles of honesty, integrity and good governance, thereby encouraging a culture that eliminates corruption. Failure to uphold these principles would amount to the legally actionable breach of a constitutional duty.
- *Asset disclosure.* Public officials should be required to declare the assets and interests they hold. A constitutional provision to this effect would ensure that rights of privacy could not be relied on to hide public officials' corrupt activities.



1 Introduction

This report presents a catalogue of constitutional options for preventing and reducing corruption among public officials. The report is intended primarily as a resource for the ongoing constitution-building processes in the Middle East and North Africa. The catalyst for the ongoing political transformation – commonly referred to as the Arab Spring – was, in part, widespread disillusionment with corruption, along with complaints about entrenched inequality, high unemployment and political repression.⁷ If new constitutional frameworks for the Arab region are to be sustainable over the long term, they will need to satisfy the public that corruption in government will not persist and that legal measures are in place to combat corruption to the greatest extent possible.

While numerous definitions of corruption have been posited by various international organizations, these definitions share two common components. First, corruption involves the misuse of authority in the public or private sector. Second, the persons misusing their authority derive a benefit to which they are not entitled. ‘Corruption’ is thus an umbrella term that encompasses many kinds of illicit behaviour, including bribery, embezzlement, abuse of authority, extortion, illicit enrichment, kickbacks and trading in influence, in addition to actions connected to, and often used to aid in, the commission of corrupt activities such as money laundering, concealment and obstruction of justice. Although definitions of corruption are contested and contestable, there is near universal consensus that certain practices, such as bribery and embezzlement, are corrupt.

Many countries have begun to address corruption in constitutional frameworks: no fewer than 71 constitutions from around the world have been considered in this report. Mechanisms that can limit corruption include the vesting of fiscal oversight powers in legislatures and supreme audit institutions, the constitutional entrenchment of anti-corruption agencies and specialized anti-corruption courts, and the use of checks and balances to avoid concentrating power in any one branch of government. This report focuses specifically on constitutional responses to ‘grand corruption’, which the United Nations defines as ‘corruption that pervades the highest levels of government, engendering major abuses of power.’⁸ The World Bank identifies grand corruption with ‘state capture’, a situation where high-level officials advance the interests of private actors to which they are beholden, or their own, rather than the broader public interest.⁹

Grand corruption can be contrasted with petty or administrative corruption, which involves low-level officials pocketing small amounts in return for providing government services. While the amounts involved are small, in the aggregate, petty corruption can be a significant drag on a country's economy and result in the loss of vast amounts of revenue.¹⁰

The report concentrates on grand corruption for three reasons:

- First, **grand corruption erodes respect for the rule of law and increases the risk of democratic backsliding and authoritarian consolidation.** It offends notions of democratic accountability, transparency and governing for the benefit of the governed. In addition, the spoils of office create a powerful incentive for incumbent office holders to entrench themselves by manipulating elections, neutralizing the opposition and stifling dissent.
- Second, **grand corruption is potentially fatal to long-term social and political stability because of the intense reactions that it provokes among the public.** In the countries of the Middle East and North Africa (MENA) undergoing constitutional transition as a result of the Arab Spring uprisings, dissatisfaction with the audacity, extent and extravagance of the regime's self-enrichment propelled many protesters to take to the streets.
- Third, **reducing grand corruption is likely to reduce petty corruption as well.** Low-level officials who solicit bribes often do so to supplement their meagre wages. In highly corrupt countries, low public-sector wages are partly a function of corrupt elites siphoning off funds that could otherwise be used to remunerate the civil service.¹¹

Chapters 2 to 5 examine the institutions that can most effectively combat corruption, and present evidence-based policy options for their integration into constitutional frameworks. Chapter 2 begins with legislatures, which are the key arenas of accountability in functioning democracies and the ultimate guardians of the public purse strings. Chapter 3 turns to supreme audit institutions, a type of oversight body that reviews and reports on government expenditure. Chapter 4 presents the option of establishing a specialized anti-corruption agency. ACAs are durable, publicly funded bodies with a mandate to fight corruption and remove the structural incentives that encourage it. Chapter 5 considers judicial responses to corruption, with a particular focus on specialized judicial processes



for corruption cases. Chapter 6 shifts the focus from institutions to specific mechanisms and legal regimes that help achieve transparent governance, including freedom of information laws and asset-disclosure requirements.

This introductory chapter proceeds in five sections. The first sets out a legal definition of corruption that is suitable for use in constitutions. The definitions used are based primarily on widely ratified anti-corruption treaties. Section 2 illustrates the relationship between corruption and political instability through an overview of corruption in a number of MENA countries prior to the Arab Spring. Section 3 examines two causes of corruption that have implications for constitutional design: centralized, authoritarian government and low levels of democratization, and certain economic policies. Section 4 situates corruption within a global context, and section 5 explains how and why corruption has come to be a constitutional issue.

1.1 Understanding corruption: a legal definition

This section proposes a workable definition of corruption for the purposes of constitutional design. Definitions of corruption sit within larger theories about its nature, causes and consequences. It is possible to approach the issue of corruption from an economic or moral perspective: defining corruption in terms of agents (public officials) advancing their own interests rather than those of their principals (citizens), or as an affront to shared standards of integrity, honesty and fairness.¹² The report takes a different tack, treating corruption primarily as a legal matter. Specifically, the report defines corruption with reference to a set of paradigmatic offences: misappropriation, illicit enrichment, money laundering, bribery, extortion, trading in influence, and the associated acts of concealment and obstruction of justice. Defining corruption in terms of formal rules and offence categories has the advantages of precision, consistency of application and relevance to enforcement action. Legal definitions enable prosecutors, anti-corruption agencies, courts, government officials and citizens to speak about corruption in a shared language, minimizing the scope for disagreement about unacceptable conduct and bringing definitional clarity to what can sometimes be a divisive issue.

In identifying appropriate legal standards for constitutional frameworks in the MENA region, the report draws on the emerging international consensus that has grown up around the paradigmatic corruption offences. The consensus position is reflected in a

series of multilateral treaties that call for the domestic criminalization of corrupt conduct and propose reasonably specific offence definitions to that end. The report refers to these treaties solely for the purpose of defining corrupt practices, and does not seek to draw any conclusions from the international obligations they impose on states parties.

Many of the offences elaborated below are defined in the United Nations Convention against Corruption (2003) (UNCAC), which calls on states parties to make a range of corrupt acts punishable under their domestic law. At the time of writing, UNCAC binds 171 states parties, among them 19 Arab countries, including Egypt, Jordan, Libya, Morocco, Oman, Tunisia and Yemen.¹³ The report also refers to other corruption-related treaties as necessary, including:

- the African Union Convention on Preventing and Combating Corruption (2003) (35 states parties) (hereinafter ‘African Union Convention’);
- the Council of Europe Criminal Law Convention on Corruption (1999) (45 states parties) (hereinafter ‘Council of Europe Convention’);
- the Inter-American Convention against Corruption (1996) (33 states parties);¹⁴ and
- the Arab Anti-corruption Convention (2010) (22 state parties).¹⁵

From these treaties, three broad categories of corruption can be identified: the misuse of public property; bribery and related offences; and abuse of function. Each of these forms of corruption is discussed in detail below.

1.1.1 Misuse of public property

Embezzlement, misappropriation, or other diversion of property

Embezzlement, misappropriation and the diversion of property are broadly synonymous offences that involve a public official’s theft or misuse of property entrusted to him or her. Together with bribery, embezzlement and misappropriation are the major channels of grand corruption. High-level officials can quickly amass large sums of money by raiding public coffers to which their position gives them access.¹⁶ Except for the Council of Europe Convention, which deals principally with bribery and trading in influence, all of the multilateral corruption treaties recognize embezzlement, misappropriation and the



diversion of public property as quintessential examples of corruption. Article 17 of the UNCAC requires states parties to:

establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Illicit enrichment

Article 20 of the UNCAC defines illicit enrichment as ‘a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income’. Illicit enrichment is similarly defined by articles 9 and 1(1), respectively, of the Inter-American Convention and the African Union Convention. Prosecutors may prefer to lay a charge of illicit enrichment, because the offence focuses on an official’s unexplained increase in assets, rather than on a specific charge of corruption. Illicit enrichment can be easier to prove than the corrupt activity by which assets were gained, since parties to an illicit transaction may try to cover their tracks, and witnesses may not exist or may be unwilling to come forward.

Money laundering

Money laundering refers to the conversion or concealment of the proceeds of a crime, including an act of corruption, in an attempt to disguise the illicit origins of the proceeds.¹⁷ While money laundering takes place after the commission of a corrupt act, its prevention is essential because, if proceeds are successfully laundered, enforcement agencies will be unable to identify the stolen assets and return them to public ownership. Erecting obstacles to money laundering also deters public officials from embezzling funds and taking bribes in the first place.¹⁸ Article 14 of the UNCAC requires states parties to combat money laundering through a combination of transnational law enforcement and a ‘comprehensive domestic regulatory and supervisory regime for banks, non-financial institutions ... and, where appropriate, other bodies particularly susceptible to money laundering’. Article 13 of the Council of Europe Convention also calls on states parties to criminalize money laundering where the predicate offence involves an act of bribery or trading in influence. The Inter-American Convention refers to the ‘fraudulent use or concealment of property’ derived from bribery or an abuse of discretion (art. 6(1)(d)),

and the African Union Convention speaks in more detail of the ‘conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action’ (art. 6(a)).

1.1.2 Bribery and cognate offences

Bribery

Bribery, as defined in article 15 of the UNCAC, refers to the conferral of undue benefits on public officials with the intention of influencing them to do or refrain from doing something in the exercise of their duties.¹⁹ Bribery is one of the most common forms of grand corruption, but it also accounts for most of the world’s petty corruption. The World Bank estimates the global market in bribes at 1 trillion USD annually, which equates to about 3 per cent of the world’s Gross Domestic Product (GDP).²⁰ A bribe can confer many types of undue benefit other than money: shares in a company, inside information, sexual services, employment, a simple favour, or even the mere promise of a future benefit. Article 15 of UNCAC recognizes that the public official need not be the direct recipient of the advantage: the person offering the bribe could, for example, bestow a benefit on the public official’s friends, family or political party of choice, to name but a few possible third-party beneficiaries. Article 15 also makes it clear that a person who offers or gives a bribe is guilty of an offence even if the public official refuses the bribe.

The purposes of bribery are many, but most commonly include enticing a public official to violate a rule, secure a service to which the briber is lawfully entitled but will not receive without a ‘facilitation payment’, escape criminal prosecution, or persuade a public official to award the briber a government contract in return for a proportion of the contract proceeds (commonly known as a kickback).²¹

Extortion

Extortion differs from bribery, in that it involves one party coercing another into providing an undue benefit, usually by threats of violence, prosecution or the disclosure of damaging information. Both members of the public and government officials can be victims of extortion. In the former case, members of the public are left with no choice but to satisfy a public



official's demand if they wish to receive essential services or to be allowed to conduct legitimate business activities. In the latter case, organized crime groups or other members of the public may extract concessions from public officials by threatening violence or disclosure of damaging information against those public officials.²² The petty corruption that pervades many MENA countries is more accurately characterized as extortion than bribery.

Trading in influence

Trading in influence (also known as influence peddling) refers to a public official or other person who sells his or her real or perceived influence over a third-party decision maker, who may or may not be privy to the illicit transaction. Article 18 of the UNCAC defines trading in influence as the promise, offering or giving to a public official or any other person, or the solicitation or acceptance by a public official or any other person, of an undue advantage in order that the public official or person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage. The Council of Europe Convention and the African Union Convention recognize trading in influence as a distinct form of corruption in articles 4(1)(f) and 12, respectively. It can sometimes be difficult to distinguish between legitimate lobbying and influence peddling. As a consequence, both the UNCAC and the Council of Europe Convention limit the offence to instances of 'improper influence' or 'abuse' of influence.²³

1.1.3 Abuse of function

The concept of abuse of function figures in three of the four multilateral corruption treaties. Article 19 of the UNCAC defines the offence as the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another entity or person. The Inter-American Convention defines the offence in article 6(1)(c) as '[a]ny act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party'. Article 4(1)(c) of the African Union Convention adopts a materially identical definition.

According to the United Nations Office on Drugs and Crime, the concept of abuse of function is a residual offence that is capable of reaching those corrupt practices that are not otherwise covered by the offences described in the preceding sections. In particular,

nepotism, cronyism, patronage and clientelism fall outside the scope of the offences listed above, but can each be framed as an abuse of function:²⁴

- **Nepotism** refers to the improper appointment of family members to government posts.
- **Cronyism** involves preferential treatment of friends and political allies, often by appointing them to sinecures in the civil service.
- **Patronage** refers to the selective conferral of state benefits on individuals and groups in exchange for their continued loyalty to the government.
- **Clientelism** emerges when patronage becomes state policy, penetrating all public institutions and all aspects of social, economic and political life, so that all public resources, from birth certificates to building permits to tax breaks, are distributed according to the logic of exchange or 'quid pro quo'.²⁵

The category abuse of function is too vague for enforcement purposes unless it is carefully defined. Poor or vague definition of the offence leads to the possibility that government officials will use the charge as a pretext for undermining or neutralizing political opponents. It is therefore important that the elements of the offence be precisely defined; that removal from office be preconditioned on conviction after a fair trial; and that courts and prosecutors remain independent.

1.2 Why corruption matters: lessons from the Arab countries in transition

This section discusses the nature and extent of corruption in a number of MENA countries, as well as how public perceptions of large-scale corruption helped to foment the uprisings of the Arab Spring and generate commitment to the anti-corruption agenda across the region, albeit to varying degrees. First, corruption is itself a socially and economically destabilizing force. Embezzlement and patronage reduce the tax base that might otherwise support social spending, while partiality in the allocation of contracts results in poor infrastructure and services. In addition, the cost of bribery and extortion discourages foreign investment and makes it difficult for local businesses to make a profit, which in turn promotes the flight of domestic capital.²⁶ Second, the adverse economic effects of corruption yield high levels of under- and unemployment, themselves precursors



to political instability. When struggling communities see leaders flaunting illicit gains and channelling wealth to friends and family, protests and demands for fundamental change become much more likely. Finally, administrative corruption is another major source of political discontent. The onus on workers to pay bribes for essential services is a cause of endless frustration, and patronage sustains an incompetent bureaucracy that is unable to deliver those services.

In time, large sections of the population may calculate that the costs of confronting their government's excesses are outweighed by the possibilities of political change. The consolidation of a democratic transition is more likely to be successful in situations where the corruption of the previous regime was a factor leading to democratic transition, if effective strategies for combating corruption are put in place. Corruption – grand corruption in particular – is not only anti-democratic by its nature, in that it provides benefits to a select political elite rather than the public as a whole, but it can also contribute to political instability.

1.2.1 Tunisia

Despite positive reviews by international organizations, corruption was rife under the 23-year misrule of President Zine El Abidine Ben Ali and his Constitutional Democratic Rally party. The president and his wife, Leila Trabelsi, wielded the power of the state to enrich themselves, their friends and their families.²⁷ At one point, more than half the country's enterprises were controlled by the president and his wife's extended families – a network known popularly in Tunisia as 'the Mafia'.²⁸ The first family's misuse of state resources made them pariahs in the eyes of most citizens.²⁹ Diplomatic cables released by WikiLeaks told of a pet lion kept by the president's daughter and ice cream flown in by private jet from France.³⁰ Of more immediate concern to Tunisians, however, were clientelism and petty corruption. Bureaucrats demanded tips for simple services such as issuing birth certificates and certifying documents.³¹

It was against this background of systemic corruption that Ben Ali was removed from power.³² On 17 December 2010, a youth immolated himself in protest at his dire employment situation. His death led to protracted demonstrations by a broad cross-section of Tunisian society. Ben Ali and his wife were forced into exile in January 2011, following a failed crackdown. A common rallying cry heard across Tunisia was 'No, no to the Trabelsis who looted the budget'.³³

Shortly after the uprising commenced, the Tunisian authorities moved quickly to act against corruption, establishing the Tunisian Anti-corruption Commission. Among the corrupt practices that the Commission uncovered were the granting of licences and public contracts to favoured parties, the privatization of state-owned enterprises by companies that did not submit the most competitive bids, and the misclassification of public property as private.³⁴ In June 2011, a Tunisian court sentenced Ben Ali and his wife, in absentia, to 35 years' imprisonment for misuse of public funds and embezzlement.³⁵

Corruption persists in Tunisia, despite the relative success of its ongoing transition. According to Transparency International's 2013 Global Corruption Barometer, Tunisians have observed an increase in bribes and petty corruption since the fall of Ben Ali's regime.³⁶ A major problem is enforcement. The Anti-corruption Commission is understaffed and lacks expertise in forensic accounting. As a result, it is able to conduct only rudimentary fact-finding before referring cases to the public prosecutor.³⁷

1.2.2 Egypt

Despite having been welcomed into the Organisation for Economic Co-operation and Development (OECD) Governance Committee for alleged successes in governance reforms, grand corruption was ubiquitous in President Hosni Mubarak's pre-revolutionary Egypt. An especially visible channel of corruption was the privatization of electricity utilities, roads and tunnels, public transport and other public assets. Ministers and parliamentarians would sell these assets for private gain and seemingly without any returns to the taxpayer in terms of lower cost or improved service delivery.³⁸ These 'sweetheart deals' became more frequent in the run-up to the 2010 parliamentary elections, leading an editor of *Al Arabiya* to describe a seat in parliament as 'the best investment in Egypt'.³⁹ The first family was a major beneficiary of government largesse. Mubarak's wife, Suzanne, reportedly misappropriated funds and diverted public contracts to family members.⁴⁰ The president's sons, Gamal and Alaa, received land by 'direct order' from the Ministry of Housing, and allegedly held free or discounted shares in large Egyptian companies.⁴¹ Greasing the palms of the Mubarak sons was part of the cost of doing business in Egypt.⁴²

Petty corruption was also a major catalyst of the Tahrir Square protests that erupted in January 2011. People spoke of corruption as if it were a fact of life, reflecting the informal nature of much of Egypt's economy.⁴³ In a 2009 survey of 1,800 Egyptians by the Center for International Private Enterprise, 13 per cent of those surveyed identified corruption



as the issue that government should address as its top priority. Only poverty and unemployment were identified by more survey respondents as more urgent priorities.⁴⁴

The fallout from Mubarak's ouster confirmed what Egyptians had long suspected. It was reported that the former president had amassed between 40 and 70 billion USD during his 30 years in office, putting him in contention with Bill Gates for the mantle of the world's richest person.⁴⁵ Despite this, Egyptian prosecutors charged the former president and his sons with only a single instance of corruption, of which they were later acquitted on a technicality.⁴⁶ In May 2014, Mubarak was sentenced to three years in prison for embezzlement, while Gamal and Alaa were each sentenced to four years on the same charge.⁴⁷ Other Mubarak-era officials have also been sentenced to lengthy terms of imprisonment on corruption charges.⁴⁸

Corruption remains a problem in Egypt. The short-lived presidency of Dr Mohamed Morsi, of the Muslim Brotherhood, apparently failed to restore integrity to government. Some 36 per cent of the 1,000 Egyptians surveyed by Transparency International in 2013 said that they had paid a bribe in the past year – an increase of 19 per cent on the previous survey in 2004.⁴⁹ Since President Morsi was deposed, many of the individuals who were most closely associated with the defunct Mubarak regime have returned to positions in government.⁵⁰ The perceived return to 'business as usual' has confounded the expectations of Egyptians, who saw the uprisings as ushering in a new era of accountability and transparency.⁵¹

1.2.3 Libya

Widespread frustration with corruption was evident in the uprisings that led to the Libyan civil war. During the initial protests in Benghazi, on 15 February 2011, people could be heard chanting 'the people want an end to corruption!', along with other slogans appropriated from rallies in Egypt and Tunisia.⁵² The middle class sensed that ruling elites were denying them the fruits of Libya's economy, which had begun to improve with the gradual lifting of sanctions in the 2000s.⁵³ Muammar Gaddafi and his associates kept much of the economic pie to themselves. According to one US cable, 'the [Gaddafi] family and its close political allies own outright or have a considerable stake in most things worth owning, buying or selling in Libya.'⁵⁴ A recent study of political alienation during the Gaddafi years found that corruption-related grievances were numerous. They ranged

from embezzlement at the highest levels of government, to the appointment of loyalists to government posts, to the routine misappropriation of funds by bureaucrats.⁵⁵

Following Gaddafi's overthrow, the leader of the National Transitional Council, Mustafa Abdul-Jalil, predicted that Libya would need years to change a culture of corruption and instil respect for the rule of law.⁵⁶ As predicted, the process of reform has been slow. In a 2013 survey of 1,000 Libyans by Transparency International, 62 per cent of respondents said that they had paid a bribe in the previous 12 months, and 29 per cent reported that corruption had 'increased a lot' over the past two years.⁵⁷

1.2.4 Yemen

In Yemen, sustained protests beginning in January 2011 forced President Ali Abdullah Saleh to cede power in February 2012, ending his 33 years of unbroken rule. As with the other Arab Spring uprisings, corruption was high on the protesters' list of grievances.⁵⁸ The causes of grand corruption in Yemen were largely structural. In the absence of strong state institutions, the central government availed itself of the country's oil wealth to buy the political loyalty of tribal chiefs and the military-security establishment, whose support was vital to short-term stability. Nepotism also antagonized the population. Saleh ran Yemen as a 'family corporation', installing his sons and members of his extended family in important government posts.⁵⁹

The transitional government concluded a National Dialogue Conference (NDC) in January 2014. The outcomes of the NDC will lay the foundation for deliberations regarding a new constitution for Yemen. Corruption remains a live issue, with the NDC Technical Committee identifying 'combating corruption' and 'enforcement of accountability and transparency' as two areas of particular concern in the drafting process.⁶⁰

1.2.5 Iraq

Corruption has long been a source of concern in Iraq. Prior to 1990, there was a significant blurring of the lines between state property and property belonging to the Baath party, but petty corruption was generally not considered pervasive. After Iraq's invasion of Kuwait in 1990, an international embargo was imposed, eventually culminating in the 1991 Gulf War, which led to the wholesale destruction of Iraq's civilian infrastructure. The consequences for the country's economy were devastating: poverty increased expo-



nentially and salaries in the public sector plunged. Suddenly petty corruption became ubiquitous and grand corruption became much more overt, as the government forced the few international corporations that were permitted to do business in Iraq to pay hefty bribes in exchange for contracts.

Following the 2003 war, Iraq was placed under international occupation. The US-led Coalition Provisional Authority (CPA), which was the highest civilian authority at the time, and the US military operated according to extremely lax standards in the expenditure of funds, and thereby allowed billions of dollars of US and Iraqi money to disappear.⁶¹ When the 2005 Constitution was drafted, very little was done to try to reverse that trend. The Board of Supreme Audit (Iraq's supreme audit institution, which was established in 1927) and the Integrity Commission (an anti-corruption agency established by a CPA Order in 2004) were both constitutionally recognized, but no details were given as to how they should operate. From 2005 to 2008, both institutions were essentially incapable of functioning as a result of deteriorating security. Dozens of staff were assassinated, and their reports were essentially allowed to gather dust and were never used. Meanwhile, during that period, parliament never called any officials to provide evidence on government inefficiency or corruption, despite a widespread belief that billions of dollars were being stolen by government officials annually.

As violence receded in 2008, a window opened, allowing for some anti-corruption action to take place. In particular, the minister of trade, who was almost impeached by parliament, was arrested as he tried to flee the country, and progress was made to improve the working relationship between parliament, on the one hand, and the Board of Supreme Audit and the Integrity Commission, on the other. Eventually, however, as security deteriorated once again in 2013, the scope to work on anti-corruption issues narrowed considerably.⁶² Eventually, the extent of official corruption was exposed as the military melted away in June 2014 in the face of a militant invasion from Syria. Soldiers on the front lines withdrew, complaining that they were not given provisions, water or functioning weapons to defend themselves. Analysts largely blamed corruption and mismanagement for the military's poor performance.⁶³

1.2.6 Syria

The protests that led to the ongoing Syrian civil war were caused in part by growing frustration with corruption. President Bashar Al Assad, like his father and predecessor

Hafiz, buys loyalty through an elaborate system of familial and interest-group patronage.⁶⁴ While the secret police (*mukhabarat*) brook no discussion of such matters, the prevalence of corruption has long been an open secret. Syrian officials privately estimate that up to 85 per cent of Syria's oil revenues is deposited into the bank accounts of the Assad family and its political allies.⁶⁵ Extortion and clientelism are also rife in Syria. Successful business owners are given the choice of either sharing their profits with the regime or shutting up shop,⁶⁶ and bribery reportedly occurs at all levels of society.⁶⁷

1.3 What causes corruption?

A range of factors influence whether a political environment is more or less prone to breed corruption at various levels. While a number of these factors are beyond the scope of this report, at least two have constitutional implications: (i) authoritarianism and low levels of democratization, and (ii) certain economic policies. Each of these causes of corruption may be addressed through constitutional or legal means. In order to understand what may be done to combat corruption using such measures, it is helpful to identify the structures and policies that allow corruption to thrive.

1.3.1 Authoritarianism and low levels of democratization

Authoritarianism refers to the concentration of power in an authority that is democratically unaccountable in any real sense. Studies have identified an inverse relationship between a country's level of democratic participation and its incidence of systemic corruption.⁶⁸ Thus, if a country employs constitutional mechanisms to combat corruption, as discussed below, this may also increase democratization. Similarly, increased democratic participation may lead to greater success for those institutions designed to combat corruption. Democracy may also directly reduce corruption, in that the threat of electoral sanction deters politicians from soliciting bribes and misallocating public resources. Elections can play an effective role in curbing corruption only if two conditions are met. The first is that elections are free and fair and are held regularly, allowing the voting public to remove corrupt politicians. The second is a well-informed electorate, as measured by the circulation of information among the public and the freedom of the press.⁶⁹ As democratic participation increases, so corruption is less likely to thrive.

Just as democracy reduces corruption, so authoritarian government creates incentives for corruption. In any regime, a 'winning coalition' that keeps a leader in power is impor-



tant. The winning coalition is the group of people whose support the ruler must obtain in order to maintain power. In an authoritarian regime, there is a relatively small winning coalition, usually comprising elites with close ties to the ruling party. Thus, public funds are used not to provide public goods that benefit a large portion of the country, but rather to bribe and otherwise satisfy the smaller coalition whose support keeps that party in power. Elites also have an incentive to continue supporting the ruling party, as defection runs the risk of antagonizing the ruling leadership and forfeiting the benefits of association with the regime. In a democracy, by contrast, there is a large winning coalition, as rulers must appeal to something approaching a majority of voters in order to win and maintain power. This raises the likelihood that they will use public funds to benefit a majority of citizens.⁷⁰

That is not to say that democracies are immune to corruption. In developed democracies, the problems of influential lobby groups and political party campaign financing can reduce the size of the winning coalition, with the result that the victors in democratic elections divert public funds towards a small elite. This is an example of the broader problems of vote buying and political financing, temptations which are not present in authoritarian regimes.⁷¹ The vulnerabilities of democracy point to the need for robust mechanisms to combat corruption, even in countries that have successfully transitioned out of authoritarianism. Emerging democracies face additional challenges. Research suggests that, at least in the initial stages, they might be more corrupt than the authoritarian regimes from which they emerged.⁷² The effect lessens with time as democracy takes hold and begins to function as it should. An initial spike in corruption may result less from the democratic transition itself, as some scholars suggest, than from the instability and disorganization that accompany the transitional period. Research indicates that, as stability increases, levels of corruption begin to drop.⁷³ The ‘corruption spike’ in new democracies should not be taken to imply that democratic transitions increase corruption. On the contrary, one recent study found that, all else being equal, levels of corruption in unstable democracies are lower than in stable authoritarian regimes: ‘[T]he global drive towards more open and better-represented societies should not be diminished due to the unfounded fear that the new government will be more corrupt than the overthrown autocrats.’⁷⁴

1.3.2 Economic policies

A number of studies have identified the strong correlation between a country’s economic health and its perceived levels of corruption.⁷⁵ High levels of corruption can reduce economic

growth, as international investors are less likely to invest in countries that are perceived as corrupt.⁷⁶ It is unclear, conversely, whether low levels of economic development lead to higher levels of corruption: it may be that causation runs both ways. Indeed, data suggest that, as GDP per capita rises, the levels of corruption in a country fall.⁷⁷

The salutary effect of economic wealth on corruption is a function of the average wages of government officials. If a country has a low GDP, it is likely that the wages of government officials will be low. This creates a temptation for officials to solicit bribes or embezzle funds. Well-paid officials stand to lose more if their corruption is exposed and they are removed from office, and countries with higher GDP are more likely to be able to pay officials higher wages.⁷⁸ However, paying government officials higher wages is not always an option in developing countries that face resource constraints. It is in these countries that many of the constitutional mechanisms discussed below become especially important in combating corruption.

Finally, a number of studies have found causal relationships between a country's economic policies and its incidence of corruption. One relevant factor is a country's openness to trade. Generally, countries with more open trade policies have higher levels of economic growth, which is also an indicator of less corruption.⁷⁹ But research suggests that the very fact that a country engages in foreign trade may also serve to lower corruption, as foreign companies and governments are less likely to do business with corrupt officials, and participation in international trade requires adherence to a norm of fair dealing.⁸⁰ In addition, barriers to entry into a domestic market tend to foster corruption, as regimes can easily make market access conditional on the payment of bribes.⁸¹ Barriers to market entry lead in turn to reduced competition, which increases corruption by allowing government-backed monopolists to engage in the extortion of the buyers of goods and services.⁸²

1.4 The global context of corruption control

External pressures to combat corruption mean that political leaders in the MENA region can no longer afford to ignore the problem. The United Nations Office on Drugs and Crime has, for many years, been involved in reform efforts in the Arab region, and the United Nations Development Programme (UNDP) has also implemented a large regional programme that focuses on anti-corruption. Both UNODC and UNDP have been pushing



for greater adherence to the United Nations Convention against Corruption . The OECD has also been active, particularly through its ‘Publish what you pay’ initiative.

In addition, international non-governmental organizations (INGOs) have become deeply involved in exposing corruption, making it difficult for governments to hide evidence of their corruption from the public. In the absence of an international body to monitor countries’ compliance with anti-corruption treaties and norms, INGOs and civil society have played an indispensable role in pressing for greater compliance, exposing violations and compiling comprehensive data on corruption. A regional network of anti-corruption bodies and organizations (the Arab Anti-corruption and Integrity Network) was established in 2008 and acts as a permanent forum to exchange knowledge on anti-corruption issues. Transparency International, which has a presence in over 100 countries, measures and disseminates data on perceived levels of corruption around the world, while more dedicated outfits like Revenue Watch and Global Witness have shone a light on poor governance and corruption in the extractive industries of resource-rich states, including those in the MENA region. The capacity and reach of these INGOs is such that governments now find it difficult to cover up their corrupt dealings.

Moreover, aid providers and foreign investors increasingly rely on data about corruption levels in deciding where to direct their money. Powerful intergovernmental organizations such as the World Bank and the International Monetary Fund (IMF) have emphasized on multiple occasions that corruption impedes development, and have made loans and developmental assistance conditional on the implementation of effective anti-corruption measures.⁸³ In addition, corruption indicators have been especially important in enabling the international community to compare corruption rates across countries and within a single country over time.⁸⁴ Indicators have given foreign investors the information they need to channel their capital towards the least corrupt states, and have allowed aid donors to tie their contributions to measurable improvements in a country’s level of corruption. In essence, INGOs, foreign investors and the international community now wield considerable leverage over corrupt regimes. On top of the internal instability that corruption generates, corrupt governments must also contend with condemnation by peers and civil society, reduced aid flows and foreign investment, and a loss of legitimacy on the international stage. External pressures add to an already powerful case for addressing corruption within constitutional frameworks.

INGOs have also been instrumental in expounding theoretical frames for thinking about corruption. Transparency International has developed the concept of a 'national integrity system' to convey the idea that responses to corruption should take a coordinated, rather than a piecemeal approach. According to the theory, which the World Bank has embraced, corruption control requires equilibrium among eight 'pillars of integrity' in a country: political will, an ethical culture within the civil service, anti-corruption watchdogs, parliaments, public engagement, the courts, the media and the private sector. In much the same way as pillars prop up a building, the weakening of any one pillar will place an increased burden on the others to buttress the national integrity system. If multiple pillars fail, the load on the remaining pillars may become unsustainable. For example, it would be unrealistic to expect the judiciary to bring corruption under control if there is a lack of political will to combat corruption, apathy among the public and a corrupt police force. Much of the anti-corruption literature, this report included, draws on the concept of national integrity systems as a theoretical scaffold for thinking about institutional design.⁸⁵ This report addresses several of the pillars directly, including legislatures, ACAs and the courts. The options for institutional design discussed in this report may, if properly implemented, serve to strengthen the other, more abstractly expressed, pillars, among them political will and culture.

1.5 Corruption as a constitutional issue

Various constitutional design choices can affect the incidence of corruption and the likelihood of its detection and punishment, including:

- the powers given to legislatures and SAIs to control and account for the use of public money;
- the constitutional entrenchment of ACAs, public prosecutors and specialized anti-corruption courts, together with guarantees of institutional independence;
- a constitutional requirement for public officials to declare their assets and income on a regular basis;
- the inclusion of clear and appropriately calibrated standards for the removal of public officials;
- a constitutional requirement for transparency in public procurement; and
- the use of checks and balances to avoid over-concentrating power in any one branch of government.



In other ways as well, corruption is highly relevant to constitutional design. Corruption gives rise to violations of human rights, which almost all constitutions protect to some degree. The UN Office of the High Commissioner for Human Rights has made the ‘human rights case against corruption’, highlighting how bribery and theft cut into social spending, drain the economy of much-needed foreign investment, and increase the cost of access to safe drinking water, life-saving medicines, education, sanitation and other basic needs.⁸⁶ The effect of corruption is not limited to economic and social rights, many of which do not figure in constitutions. Corruption can also violate the core civil and political rights that form the bedrock of constitutional bills of rights. For instance, the preferential treatment of bribers violates the right to equality before the law, and corruption within law enforcement and the judiciary can deny people their rights to a fair trial and due process.⁸⁷

Perhaps the most visible sign that corruption has become a constitutional issue is the explicit prohibition of the practice in constitutions, especially in countries where corruption has historically been ubiquitous. To give but one example, the Kenyan Constitution of 2010 is replete with references to corruption and commitments to preventing it. Article 73 spells out the ‘guiding principles of leadership and integrity’, among them ‘objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices’. The Constitution prohibits political parties from ‘engag[ing] in bribery or other forms of corruption’ (article 91), requires that parliament enact legislation to establish ‘an independent ethics and anti-corruption commission’ (article 79), and enjoins parliament to enact a legislative framework for procurement and asset disposal, which may prescribe sanctions for ‘corrupt practices’ (article 227(2)).

The persistence of corruption in many of the states that have denounced corrupt practices in their constitutions indicates that symbolism alone is not a cure. This report does not discount the significance of symbolic commitments to end corruption in a constitution – indeed, the effective use of symbolism can change perceptions and shape public discourse, and the constitution is an especially compelling document through which to speak – but the report emphasizes that aspirations and symbolic commitments must be supplemented by the constitutional machinery to combat corruption. This report considers how constitutions can best facilitate and promote anti-corruption efforts, while remaining mindful that much will ultimately depend on enforcement and the political leadership’s commitment to the rule of law.

2 Legislatures

2.1 Overview

Legislatures are the main arenas of electoral accountability in functioning democracies. Parliamentary elections allow well-informed constituents to identify and remove corrupt representatives, as well as to prevent corruptible candidates from coming to power in the first place. Legislatures can also combat corruption *between elections*. Legislatures operating within the bounds of their constitutional authority have broad powers to enact anti-corruption laws and establish judicially enforceable penalties for corrupt conduct.⁸⁸ Unless SAIs and ACAs are provided for in a country's constitution, it falls to the legislature to pass laws for their creation. Accordingly, many of the recommendations in this report require a reasonably well-functioning legislature for their implementation.

This chapter is concerned mainly with the fiscal oversight role that most democratic constitutions assign to the legislature. Legislatures are especially well placed to combat grand corruption because they exercise ultimate control over the executive's expenditure of public money. The 'power of the purse' is enshrined in most democratic constitutions in the form of rules prohibiting the executive from either spending or raising money without the legislature's consent. Section 2.2 elaborates on the power of the purse as an anti-corruption measure, evaluates constitutional provisions that enshrine the principle, and highlights some of the risks associated with modern-day models of the power of the purse. Whether a legislature effectively controls corruption through these mechanisms will also depend on a country's constitutional and political context. The legislature might not curb corruption to any real degree if the government commands a large majority in the chamber and party discipline is strong, or if the legislature is itself corrupt or closely aligned with the executive. Capacity and effectiveness issues and their relationship to constitutional design are considered in sections 2.2.2 and 2.2.3.

Section 2.3 discusses the legislature's role in the budget process, from budget formulation through *ex post* oversight. Depending on its strength vis-à-vis the executive, the legislature can amend the budget, monitor the budget's implementation, oversee departmental performance and act on the findings of SAIs. The ability and willingness of legislatures to perform these functions will depend on the resources and expertise available to them and the time constraints under which they operate.



Section 2.4 discusses the processes by which the legislature can investigate executive misconduct, obtain information and remove corrupt officials from office. Section 2.5 considers international best practice and distils the chapter's discussion into options for constitutional frameworks in the MENA region, while section 2.6 analyses existing and proposed MENA frameworks.

2.2 Power of the purse

Almost without exception, constitutions in force today confer the power of the purse on the legislature.⁸⁹ This is also true of transitional democracies. In countries with a British Westminster heritage, the power of the purse is given effect by a constitutional provision that creates a 'consolidated revenue fund' or some other similarly named fund.⁹⁰ The fund operates as a centralized government bank account into which all public revenues, no matter the source, must be paid and from which no money may be withdrawn except in accordance with a legislative enactment that authorizes the use or 'appropriation' of funds for a specific purpose. An exemplar provision can be found in the Constitution of the Republic of South Africa, 1996, which establishes a 'National Revenue Fund' into which all money received by the national government must be paid, and from which money may be withdrawn only in accordance with a parliamentary appropriation (article 213). Similar provisions appear in the constitutions of Ghana, India, Kenya, Nigeria and Uganda.⁹¹

On the revenue side, some constitutions also make it explicit that the executive cannot collect taxes except with parliament's approval. For example, the Indian Constitution provides that '[n]o tax shall be levied or collected except by authority of law' (article 265). In non-Westminster constitutional systems, the constitution usually does not require the deposit of all public revenues in a centralized government account. It will, however, specify that the executive must obtain legislative approval of its budget proposal. The budget proposal is a formal statement of estimated revenues and expenditures for a future period, usually a year.

2.2.1 Controlling spending from contingency funds

The vesting of the power of the purse in the legislature is not an absolute principle. A number of constitutions provide for a 'contingency fund' on which the executive may draw for urgent and unforeseen expenditures that are not covered by existing legislatively authorized appropriations. It is best practice for countries to have a contingency

fund to cope with economic crises and the vicissitudes of modern government, although they are more common in younger constitutions like those described in this section. For constitution drafters, the concern is that the executive might use a contingency fund as a backchannel for bribes, the servicing of patronage networks or other illicit economic activity. In 2009, Guyana's auditor general highlighted the 'continual abuse' of the Contingencies Fund provided for by article 220(1) of that country's 1980 constitution. His report indicated that almost 2 billion USD in withdrawals from the Contingencies Fund did not meet legislative requirements of urgency and unavoidability.⁹²

According to the IMF, '[a]n appropriate balance is needed between no contingency reserve and a reserve that provides too much authority to the executive to spend without parliamentary approval.'⁹³ To this end, the IMF recommends that contingency funds should be used only for emergency spending, that the government should inform the legislature of the amount and object of the spending at regular intervals, and that the contingency fund should be capped at 3 per cent of the overall budget.⁹⁴ Some constitutions try to prevent contingency fund abuse by requiring that the executive place a supplementary estimate before the legislature as soon as possible, so that the legislature can ratify the emergency spending after the fact and replenish the fund. The Kenyan Constitution of 2010 requires that the national government seek parliament's approval for any spending from the Contingencies Fund within two months of the expenditure or, if parliament is not in session, within two weeks of parliament next sitting (article 223).⁹⁵ Other constitutions allow a senior member of government, usually the minister of finance or the president, to draw on the contingency fund as and when the need arises. A notable exception is the Ghanaian Constitution of 1992, which requires that 'the committee responsible for financial measures in Parliament' authorize advances from the country's Contingency Fund 'whenever that committee is satisfied that there has arisen an urgent or unforeseen need for expenditure' (article 177(1)).

There are no data on the effectiveness of constitutional provisions that require the executive to seek *ex post facto* ratification of its unauthorized spending. However, these provisions serve to reinforce the constitutional principle that the executive cannot spend money without the legislature's consent, even if an emergency means that such consent cannot be obtained until after the fact. Non-compliance may trigger political enforcement mechanisms, such as a vote of no confidence.



2.2.2 Controlling extra-budgetary spending

The types of expenditures that tend to be moved off budget are subsidies and loans to state-owned enterprises, spending on social security and other entitlement programmes, and military expenditure. Off-budget spending, though justified in the case of self-funding social security programmes, can be dangerously opaque from a corruption-control perspective: the more expenditures that escape legislative oversight, the more opportunities there are for the government to abuse public money by, for example, funnelling it through state-owned enterprises that are controlled by government loyalists.⁹⁶ In light of the obvious potential for abuse, the IMF advises that, ‘[i]n general, it is not desirable that off-budget spending escapes parliamentary control.’⁹⁷

Constitutional provisions on budgeting should adhere to the principle of comprehensiveness. The principle requires that all government revenues and expenditures should be subject to budgetary mechanisms and procedures.⁹⁸ Without comprehensive accounting for expenditure, transparency and accountability to the legislature are impossible to achieve, at least fully. A constitution that fully conforms to the principle of comprehensiveness is one that prohibits off-budget spending, makes it conditional on legislative approval, or in some way requires that the legislature be alerted to its nature and extent.⁹⁹

A number of constitutions operationalize the principle of comprehensiveness, some more fully than others. One of the more all-embracing prohibitions on off-budget spending can be found in the 1988 Constitution of Brazil, no doubt because the practice was rife under the military dictatorship that ruled the country from 1963 to 1985.¹⁰⁰ For the avoidance of doubt, article 167 spells out the various forms of forbidden off-budget spending with a high degree of specificity. Article 167 appears to have had the desired effect, with the Inter-American Development Bank reporting in 2006 that there were no extra-budgetary funds in Brazil.¹⁰¹ To name but a few of the prohibitions listed in article 167, the government cannot:

- begin programmes or projects not included in the annual budget law;
- open a supplemental or special appropriation without prior legislative authorization and without indication of the respective funds;

- reclassify, reallocate or transfer funds from one programming category to another or from one agency to another without prior legislative authorization; or
- institute funds of any nature without prior legislative authorization.

Similarly, the Portuguese Constitution, 1976, and the Guatemalan Constitution, 1985, prohibit secret appropriations (articles 105(3) and 237, respectively). The Finnish Constitution, 1999, provides another example of strong constitutional protection against off-budget expenditure, providing in article 87 that an extra-budgetary fund may be created only by statute, and even then only ‘if the performance of a permanent duty of the State requires this in an essential manner’ and the statute creating the fund is supported by a supermajority of two-thirds of parliament. The Constitution of the German Federal Republic, 1949, has a comparatively weaker check on extra-budgetary spending, requiring only that the minister of finance consent to the spending and that such consent be given ‘only in the event of an unforeseen and unavoidable necessity’ (article 112). Provisions like these make it harder for governments to shift spending off budget in order to disguise politically embarrassing deficits or to facilitate misappropriation.

2.2.3 Preventing executive abuse of the reversionary budget

Many constitutions, particularly in presidential systems, provide for reversionary budgets. According to these provisions, if the legislature does not approve the budget for the upcoming fiscal year, the executive’s budget is either adopted by default or the government is permitted to continue spending at the levels of the previous budget. Reversionary budgets are considered fiscally prudent, because they avert government shutdowns and discourage the legislature from refusing to fund the government for partisan purposes. Note that some Westminster-type systems make no provision for a reversionary budget, and instead adopt a rule that the legislature’s rejection of the budget bill amounts to a vote of no confidence in the government.¹⁰² Thus, in the United Kingdom, parliament has not passed any amendments to the government’s proposed budget since the First World War, and the last attempt to pass a budget amendment dates back to the late 1980s.¹⁰³

In a number of Latin American countries, reversionary budgets give the executive ‘extraordinary leverage over the legislature’ in budget negotiations.¹⁰⁴ In Argentina, Costa Rica, Nicaragua, Venezuela and Uruguay, legislative inaction on the budget results in the extension of the previous year’s budget, while in Bolivia, Chile, Colombia, Ecuador, Panama and Peru,



the executive's budget proposal automatically becomes law if the legislature does not adopt it after a certain number of days.¹⁰⁵ Reversionary budgets are common in Eastern and Northern Europe as well. The Polish Constitution, 1997, is typical in requiring that the Council of Ministers manage finances according to its draft budget if the legislature (*Sejm*) does not enact a budget by the beginning of the fiscal year (article 219(4)).¹⁰⁶ The situation is similar in Africa, where various constitutions provide for reversionary budgets that permit the executive to spend money without legislative approval.¹⁰⁷ For example, the Constitution of Rwanda, 2003, provides that if 'the Finance bill is not voted and promulgated before the commencement of a financial year, the Prime Minister shall authorize by an Order a monthly expenditure on a provisional basis of an amount equal to one-twelfth of the budget of the preceding year' (article 80).

While reversionary budgets promote fiscal stability, they can result in a lower level of legislative supervision over government expenditure. Although the legislature remains able to examine expenditures after the fact and examine whether they are consistent with the reversionary budget, the legislature has no opportunity to control or influence budget priorities at the stage of budget formulation. Especially where the legislature's failure to approve a budget results in the automatic approval of the government's proposed budget, the government will be able to spend its budget without the legislature's approval for the duration of the reversionary budget. A government in this position will be better placed to cultivate loyalties and entrench itself in power through the use of bribes and other fiscal rewards. The threat of removal from office may not provide relief, because the government may abuse a reversionary budget to channel funds to marginal voting districts as a vote-buying measure, or funnel money to its election campaign through state-owned enterprises. A recent study notes that reversionary budgets 'correlate with perceived corruption' as well as 'greater incumbent entrenchment and more frequent use of extra-constitutional means to attain political power'.¹⁰⁸

While recognizing that a reversionary budget provision may be necessary for reasons of fiscal stability, MENA countries should carefully consider the terms of any such provision in drafting their constitutions. One way to limit the risk of executive entrenchment that a reversionary budget presents is to give the legislature some way of forcing the executive from office if it governs under a reversionary budget for too long without seeking a parliamentary mandate. Under the Constitution of the French Fifth Republic, 1958, although the executive can bring its budget into force by ordinance, should the National Assembly

refuse to endorse it, the National Assembly can always dismiss the government through a vote of censure, which requires only an absolute majority of votes to pass (articles 47, 49).

Several constitutions place a limit on the duration of the reversionary budget. Under the Ugandan Constitution, 1995, if the president is satisfied that an Appropriation Act will not or has not come into force by the beginning of the fiscal year, the president may authorize withdrawals from the Consolidated Fund to cover necessary expenditures for up to four months or until an Appropriation Act comes into force, whichever is the earlier (article 154(4)). The Ghanaian Constitution, 1992, is similar in that it permits the president to authorize withdrawals from the Consolidated Fund otherwise than under parliamentary appropriation, for a maximum period of three months, if it appears to the president that parliament has not passed or will not pass an Appropriation Act by the start of the fiscal year. Crucially, however, the president may do so only 'with the prior approval of Parliament by a resolution,' which preserves significant power in the legislature (article 180). The Kenyan Constitution, 2010, also eschews automatic reversion to the executive's budget proposal, instead giving the National Assembly the power to authorize spending on an interim basis until an Appropriation Act is passed (article 222).

A few other approaches are noteworthy. The Liberian Constitution, 1986, which is modelled on the United States Constitution, 1789, does not allow the executive to raise revenues or withdraw funds from the treasury without legislative approval, raising the spectre of a budgetary deadlock and a government shutdown if the legislature cannot agree on a budget. The Croatian Constitution, 1991, allows the president to dissolve the legislature (*Sabor*) if it does not adopt the budget within 120 days of its proposal, but he or she may do so only at the government's request and with the prime minister's counter-signature (article 103). The provision has not been used since the constitution's adoption.¹⁰⁹

2.2.4 Budget amendment powers

Just as the executive can misappropriate public funds if legislative oversight is lacking, so too can the legislature abuse its influence over the budget process.¹¹⁰ The budget process creates opportunities for political patronage, as legislators might try to secure their re-election by pressuring the government to 'earmark' expenditures that favour their relatively small group of constituents to the detriment of the wider electorate. In addition, lobbyists and other private interests might improperly influence legislators to exercise their budgetary powers in a certain way – a form of corruption known as 'influence peddling'.¹¹¹ To avoid concentrating power



in either the executive or the legislature, constitutions often divide budgetary authority between the two branches. There are three basic approaches:

- giving the legislature a *moderate* level of influence over the budget, while requiring it to respect broad budget parameters set by the executive (common);
- giving the legislature a *limited* level of influence, confined to reducing budget expenditures (less common); or
- giving the legislature an *unlimited* level of influence, by giving it the power to amend the budget as it sees fit (rare).

Parliamentary democracies do not fit into this analytical framework, because parliamentary rejection of the budget would necessitate the government's resignation. The legislature in a parliamentary system therefore has little or no capacity to alter the budget. Many parliamentary systems make up for this deficit by establishing a robust 'public accounts committee' within the legislature (see section 2.3.2).

Moderate budgetary influence

Constitutions that give the legislature a moderate degree of power to alter the budget will typically allow it to alter both revenues and expenditures, so long as it counterbalances additional expenditure with savings elsewhere in the budget, or creates a new source of revenue to cover the additional spending. The Polish Constitution, for example, provides that '[t]he increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the *Sejm* [parliament] of a budget deficit exceeding the level provided in the draft Budget' (article 220). Such broad powers of budget amendment, when combined with a presidential line-item veto, create opportunities for corruption in the form of political patronage. In Brazil, the National Congress may propose spending, so long as it proposes equivalent cuts to expenditures (article 166(3)). It is common for members of Congress to pass amendments that favour their constituencies, whereupon the president is free to accept some amendments and exercise a line-item veto over others (articles 66, 84(V)). The process has been heavily criticized for the patronage that it breeds. Legislators enhance their prospects of re-election by agitating for budget amendments that fund projects in their district. The president, in turn, commands the loyalty of Congress by approving the amendments put forward by legislators who support the executive's agenda, while vetoing those proposed by less obedient members of Congress.¹¹²

Limited budgetary influence

The restrictive approach to amendment powers is more common among Latin American constitutions, which generally provide for strong executives.¹¹³ The Chilean Constitution, 1980, prohibits the National Congress from proposing or reducing taxation, permitting it only to reduce proposed expenditures (article 67). Similarly, the Peruvian Constitution, 1993, denies Congress the ability to increase expenditures or impose taxes that the executive has not sought (article 79). The Panamanian Constitution, 1972, permits the National Assembly to eliminate or reduce expenditure, but forbids it from including new expenditures without Cabinet's approval or adding to total revenues without the comptroller general's consent (article 271). The Colombian Constitution, 1991, is particularly restrictive. Like the others, it prohibits Congress from raising revenues or expenditures, but it also disallows spending cuts to the extent that they affect the servicing of public debt, the state's contractual obligations or 'integral funding of the ordinary services of the administration' (articles 349, 351). Although the legislatures in these countries have rather constrained budgetary powers, they can still gain some leverage in budget negotiations by threatening to vote against ordinary bills whose passage is important to the executive.¹¹⁴

Unlimited budgetary influence

The South African Constitution, 1996, gives the National Assembly unlimited powers of budget amendment. The executive has exclusive competence to initiate and prepare Money Bills, including the appropriation acts that comprise the budget (article 55(1)(b)). However, the National Assembly may accept, reject or amend Money Bills before submitting them to the president for assent (article 75). To that end, '[a]n Act of Parliament must provide for a procedure to amend Money Bills before Parliament' (article 77(3)). The decision to give parliament expansive amendment powers gave effect to one of the 34 'constitutional principles' that guided the Constitution's drafting, the fourth of which provided: 'There shall be a separation of powers between the legislature, executive and judiciary, *with appropriate checks and balances to ensure accountability, responsiveness and openness*' (emphasis added). In practice, however, executive accountability to parliament has proven difficult to achieve in South Africa because of African National Congress (ANC) dominance in both chambers of the legislature, the National Assembly and the National Council of Provinces. Indeed, the country's budget process has been described as one 'where ministers and their departments have the monopoly on technical expertise and must answer to MPs [Members of Parliament], often their political juniors, making



oversight at best difficult and, at worst, weak.¹¹⁵ Nonetheless, to the extent that parliamentary involvement creates opportunities for minority parties to oversee the budget process, it is preferable to an executive-dominated process.

Despite the breadth of the amendment power under the South African Constitution, parliament has, until recently, only been able to approve or reject the budget as a package. This was for two reasons: first, the National Assembly lacked an independent research capacity; and, second, the Act of Parliament contemplated by article 77(3) had not been passed. A Bill proposed in 1997 was opposed by legislators and civil society on the grounds that the government was attempting to deprive parliament of any meaningful amendment powers,¹¹⁶ but in April 2009 the Money Bills Amendment Procedure and Related Matters Act, 9 of 2009 came into force. The Act divides responsibility for budgetary review between parliamentary finance committees tasked with scrutinizing macroeconomic and fiscal policy, and a set of appropriations committees whose role it is to supervise spending and the division of revenues among the provincial governments (section 4). The Act also provides for a Parliamentary Budget Office, discussed below in section 2.3.1, to assist parliament in proposing amendments to the budget (section 15). Finally, the Act creates possibilities for public participation through committee hearings (sections 8(2), 9(5), 10(8), 11(4) and 13), which give effect to the constitutional imperative that parliament ‘facilitate public involvement’ in its work (section 59).¹¹⁷ The Act has been described as the product of a ‘belief among legislators and civil society that the executive dominated budgetary decision-making to an excessive degree.’¹¹⁸

In general, legislatures are unlikely to play a direct role in combating corruption among members of the executive or administrative officials. However, in maintaining close oversight of the budget itself, legislatures can minimize the opportunities for the misappropriation or abuse of public funds. Closer legislative scrutiny of the funds allocated to the government can help indirectly to reduce corruption. While it is for each country to decide exactly how much influence the legislature should have in setting the budget, the doctrine of checks and balances suggests that neither the executive nor the legislature should exercise full control over budgetary decisions. As the Brazilian example demonstrates, executive line-item vetoes are especially susceptible to abuse. The Guatemalan Constitution, 1985, expressly prohibits line-item vetoes (article 178) while the Constitution of Honduras, 1982, and the Constitution of Costa Rica, 1949, prohibit budget-related vetoes altogether (article 218 and article 125, respectively).

2.3 Role of the legislature in the budget process

2.3.1 Ex ante review: independent fiscal institutions

One of the rationales for entrusting the legislature with the power of the purse is that the executive might be tempted to use public money for illicit purposes. The legislature's oversight role will be of little use if the executive has a monopoly on budget information.¹¹⁹ To address the accountability gap that informational asymmetry between the executive and the legislature creates, governments around the world have established independent fiscal institutions, with mandates to give the legislature non-partisan advice on fiscal policy, scrutinize the assumptions in the budget draft and give parliamentarians the technical and research support they require to propose changes to the budget.¹²⁰ IFIs go by different names in different jurisdictions: parliamentary budget offices, fiscal councils, offices of budget responsibility, and so on. They are answerable to, but separate from, the legislature and its budget committees, and are usually headed by an apolitical bureaucrat with experience in public financial management.

IFIs contribute to the fight against corruption in three ways. First, an IFI breaks the executive's monopoly on budget information, making it easier for the legislature to detect corruption, irregular spending practices, the misuse of budget items and extra-budgetary spending. Second, IFIs promote a culture of budget transparency, which 'discourages executives and executive agencies from subterfuge.'¹²¹ Third, the presence of an IFI has a deterrent effect on governments that might otherwise engage in corruption, because executives draft their budgets and make expenditures in the knowledge that their actions will be scrutinized by an independent agency. Overall, an IFI combats corruption by helping to close budgetary loopholes that would otherwise allow members of the government to appropriate funds for partisan or personal objectives.

IFIs almost always have a statutory basis, making them vulnerable to abolition. The IMF notes that political interference with IFIs 'is not uncommon' and recommends 'a strong legal basis for independence ... to give them time to become established and build reputational capital.'¹²² Constitutional entrenchment would prevent IFIs from being dismantled or undermined for exposing corruption and speaking inconvenient truths about the government's fiscal policy. Hungary's IFI, the Fiscal Council, was starved of funding by a 2010 statute, effectively spelling the end of its ability to hold the executive to account.¹²³



Africa's emerging democracies have also begun to establish IFIs. Uganda's IFI has been particularly effective, by reducing the opportunities for manipulating the allocation of funds in the budget and ensuring transparency in the budget process. Uganda's 2001 Budget Act set up the Parliamentary Budget Office (PBO), which aids the Budget Committee in evaluating the executive's budget projections (sections 19–21). On several occasions, the National Assembly has forced the government to delay projects after the PBO advised that they were not accounted for in the current budget – one of the tell-tale signs of misappropriation. The PBO also coordinates with ministries to ensure that extra-budgetary expenditures – a common channel of corruption – do not exceed 3 per cent of the budget.¹²⁴ The 2012 Open Budget Index ranked Uganda's budget process as the second most transparent in Africa.¹²⁵ However, the Public Finance Bill 2012 provides, among other things, for the abolition of the PBO and the Budget Committee (clause 79).¹²⁶ The abolition of these two bodies is likely to reduce the transparency of Uganda's budget process, with a likely corresponding increase in opportunities for the manipulation of the budget and budget process for partisan ends.

The South African budget process consistently ranks as the most transparent on the continent, and among the most transparent in the world. However, it was only in 2009 that the National Assembly legislated to create a parliamentary budget office (Money Bills Amendment Procedure and Related Matters Act, 9 of 2009, section 15). The recent creation of the South African Parliamentary Budget Office (SAPBO) can be attributed to the fact that South Africa only recently passed a law establishing a procedure for parliamentary amendment of the budget (see section 2.2.4). Among other functions, the SAPBO is mandated to 'annually provide reviews and analysis of the [budget-related] documentation tabled in Parliament by the Executive'; 'report on potential unfunded mandates arising out of legislative, policy or budgetary proposals'; and 'provide advice and analysis on proposed amendments to the fiscal framework ... and on policy proposals with budgetary implications' (sections 15(2)(a)–(b), (e)). The Act also empowers the National Assembly, the National Council of Provinces, the legislative budget committees, and individual members of parliament to commission research from the SAPBO on a case-by-case basis (section 15(3)). In June 2013, parliament appointed the office's inaugural director, a former economist at the Development Bank of Southern Africa. His staff of 12 comprises economists and specialists in the areas of public policy and finance.

The South African legislation addresses the risk that a close relationship between the executive and members of parliament will politically colour the SAPBO's work product. Specifically, the Act imposes an obligation on the director 'to report to Parliament any inappropriate political or executive interference' (sections 15(1), (9)). The director, who is appointed by both houses of parliament on the recommendation of the budget committees (section 5(5)(a)), may be removed only if a joint sitting of the finance and appropriations committees makes a finding of 'misconduct, incapacity or incompetence', and if both houses adopt a resolution calling for the director's removal (section 15(8)). Finally, the Act addresses the risk that the executive might drain the SAPBO of necessary funding, as in Hungary, by providing that the office 'must annually receive a transfer of funds from Parliament's budget to carry out its duties and functions'. The director is given a say in the SAPBO's budget allocation, and has broad discretion over the selection of personnel (sections 15(10)–(13)). These provisions offer the SAPBO some security and independence in its functions, but the SAPBO remains vulnerable to disestablishment through legislation, as in Uganda.

2.3.2 *Ex post review: public accounts committees*

Public accounts committees (PACs) differ from the budget committees discussed above in the sense that they focus solely on *ex post* review of the budget. Given the limited research and analytical capacities of legislatures, there is usually a collaborative relationship between PACs and SAIs, which are the subject of chapter 3. The SAI, which often goes by the title of comptroller, auditor general or national audit office, will analyse and report on departmental accounts, revenue receipts and government operations. The SAI's findings then serve as the basis for the PAC's review of whether government policy is being implemented in an economical, effective and efficient way (the 'value-for-money' criteria). The PAC will also make recommendations as to how the executive can improve financial accountability in future. In some systems, the head of the SAI is a parliamentary officer who reports directly to the PAC, while in other systems, like that of India, the auditor general is independent of both the political branches.¹²⁷

In parliamentary systems, the PAC has been described as 'the core institution of public financial accountability'.¹²⁸ Although PACs originated in Westminster-style parliamentary systems, they now feature in other systems, such as in Tunisia's semi-presidential system, where article 60 of the Tunisian Constitution, 2014, provides for a legislative finance committee to be led



by a member of the opposition. Requiring a member of the opposition to lead the PAC helps to minimize the risk that party loyalty will undermine the efficacy of the PAC, and other countries, including India, the United Kingdom, Malta and Tanzania, have adopted a convention or standing order requiring that a member of the opposing party chair the PAC.¹²⁹

Public accounts committees are also constitutionally mandated in Antigua and Barbuda, Bangladesh, Bhutan (where members must be ‘reputed for their integrity’), Gambia, Kiribati, Myanmar, Nigeria, Papua New Guinea, Seychelles, Sierra Leone, St Vincent and the Grenadines, Swaziland, and Trinidad and Tobago.¹³⁰ Elsewhere they are established by parliamentary standing orders or legislation. Whatever its legal basis, a PAC’s effectiveness as a check on corruption will depend on how faithfully its members carry out their functions. Problems can arise when committee members belong to the party or coalition in power. They might be forced to choose between loyalty to their political masters and faithfully executing their duty to expose waste, inefficiency and corruption. Cabinet ministers are even more conflicted in this regard, although the constitutions of many semi-presidential systems explicitly prohibit dual membership of the executive and the legislature, including Tunisia’s 2014 Constitution (article 90) and the Arab Republic of Egypt’s 2014 Constitution (article 164).¹³¹

According to a global study conducted in 2007, PACs are most effective in uncovering government waste and corruption when they enjoy wide powers to make recommendations and publish findings, are able to choose their subjects for investigation, and examine all past, present and committed expenditure. Other factors that are correlated with success include politically balanced membership, exclusion of government members from participation, and the appointment of members for the entire duration of the legislature’s sitting period.¹³²

2.4 Powers of investigation, censure and removal from office

2.4.1 Issue-specific committees

The parliamentary committee system offers up interesting possibilities for corruption control. Kenya’s Parliamentary Anti-corruption Select Committee is one of the best-known examples of a parliamentary committee for controlling corruption. The Kenyan example demonstrates that ad hoc committees with a well-defined mandate concerning

corruption, with coercive powers and with the power to publish politically damaging findings can serve as drivers of systemic change. In 2000, following a series of high-profile corruption scandals that implicated the Kenya African National Union (KANU) government, the parliamentary backbench succeeded in passing a motion for the creation of a committee to study the impact of corruption, name and shame the worst offenders, and recover illicit proceeds. The so-called 'Kombo Committee', named after its presiding member, embarked on two years of investigations and published a report that changed the face of Kenyan politics. Chief among its findings was that an astonishing 56 per cent of tax revenue was being misappropriated.¹³³ The Committee recommended the establishment of an anti-corruption court to try 'economic crimes', as well as a permanent corruption committee within the National Assembly. Most controversially of all, the Kombo Committee published a 'list of shame' that implicated high-level KANU officials in grand corruption. The list was expunged, and the recommendations rejected, under intense pressure from the government, but not before the Committee's efforts had wrought irreparable damage on KANU's political fortunes. In general elections the following year, the National Alliance Rainbow Coalition (NARC) swept to power on a wave of popular disenchantment with corruption.¹³⁴ Acting on its mandate, the NARC government created an Anti-corruption Commission with broad investigative powers, appointed special magistrates to try corruption-related offences, ratified anti-corruption treaties, and forced corrupt judges into retirement.¹³⁵

2.4.2 Written and oral questions

Questions allow members of the legislature to obtain information about possible corrupt dealings by the executive. In most parliamentary and semi-presidential systems, any parliamentarian can put a question to a minister, either in written form or orally on the floor of the chamber, and many constitutions provide for this.¹³⁶ The minister concerned is required to provide a response within a certain timeframe, which can range from three days to two months, depending on the applicable standing orders, conventions or constitutional provisions. An important vehicle for eliciting information from the government is question time, a regular period set aside for the opposition to question ministers, including the prime minister.¹³⁷ The constitutions of some parliamentary systems require question time to be held on a regular basis.¹³⁸ The responses obtained through questioning can serve as the basis for an interpellation or a motion of no confidence in the government or relevant minister (see further section 2.4.3). In addition, the government's responses



are a matter of public record and can be used in investigations conducted by PACs, SAIs and other oversight institutions. In some presidential systems, the constitution allows the legislature to put questions to government ministers.¹³⁹

2.4.3 Interpellation and no-confidence motions: parliamentary systems

In many parliamentary and semi-presidential systems, serious allegations of corruption against the government can be dealt with by way of interpellation, a special form of questioning that compels the government to justify its conduct or policies before the chamber. Interpellations are distinct from ordinary questions, in that the consequences of interpellation are different: interpellations are sometimes followed by a parliamentary debate and a vote on a motion of no confidence;¹⁴⁰ while in El Salvador, for example, refusal to answer an interpellation results in removal from office.¹⁴¹ Given the high stakes involved in interpellation, most constitutions provide that the government may be interpellated in the legislature only if a sufficient number of members of the legislature support the motion. The precise numbers required to initiate an interpellation vary, but generally range from five one-third of the members of the legislature.¹⁴² The larger the number, the more likely it is that only opposition parties of sufficient size and unity of purpose will be able to initiate the interpellation. In most systems, motions of no confidence in the government or a particular minister can be moved with or without a preceding interpellation, but because their passage results in the removal of the government or the minister concerned, they generally require a much higher level of support to be carried, often as high as an absolute majority.¹⁴³

The utility of interpellations should not be underestimated. In some contexts, they are one of the few means by which opposition legislators can bring corruption allegations to light and demand answers of government. In a sign that interpellations had become a thorn in the Mubarak government's side, a National Democratic Party-dominated committee of the People's Assembly decreed in 2001 that no interpellation alleging corruption could be put to a cabinet minister unless the party moving the interpellation had corroborating documents.¹⁴⁴ Despite the decree, opposition and independent MPs were able to address an unprecedented 28 interpellations to then Prime Minister Atef Ebeid in 2003. The interpellations obliged the prime minister to respond to allegations of corruption in the financial, agriculture and housing sectors, as well as to allegations of electoral fraud at the local level.¹⁴⁵

2.4.4 Impeachment: presidential and semi-presidential systems

Impeachment initiates a trial in which the president (or some other high-level member of the executive) stands accused of misconduct in office. A finding of guilt leads either to the president's immediate removal from office or a legislative vote on whether the president should continue in office, notwithstanding the fact that he or she does not require the legislature's confidence to govern. A number of constitutions either expressly or implicitly allow corruption to form grounds for impeachment. The Indonesian Constitution, 1945, contemplates removal of the president or vice-president following an impeachment motion 'if it is proven that he/she has violated the law through an act of treason, corruption, bribery or other act of a grave criminal nature, or through moral turpitude' (article 7A). Similarly, the Constitution of Singapore, 1959, and the Constitution of Sri Lanka, 1978, provide in identical terms that the legislatures may impeach the president where it is alleged that he or she is guilty of 'misconduct or corruption involving the abuse of the powers of his office' (article 22L(3)(c); article 38(2)(A)(iv)). The US Constitution, 1789, provides explicitly that bribery, among 'other high Crimes and Misdemeanors', is a basis for impeaching the president or any federal officer, including cabinet secretaries (article II, section 4).

The impeachment process varies from country to country. Some legislatures are empowered both to initiate an impeachment procedure and to deliver a verdict; in other systems the legislature initiates the impeachment by a quorum of its members, while another body, such as an ad hoc tribunal or a constitutional court, adjudicates on the charge.¹⁴⁶ Whatever the process, impeachment is the ultimate sanction that a legislature can impose on high-level executive officials who violate their constitutional duties, whether by acting corruptly or otherwise.

2.4.5 Addressing misconduct by members of the legislature

The legislature will be unable to hold the executive to account if its members are themselves corrupt. Constitutional disqualification provisions can reduce the incentive for members of the legislature to engage in corruption. For example, the constitutions of parliamentary, presidential and semi-presidential systems prohibit members of the legislature from holding any other paid position or 'office of profit'.¹⁴⁷ These same constitutions also include rules that disqualify a person from membership of the legislature if he



or she is convicted of an offence carrying a prison term of a specified length (typically six months to one year).¹⁴⁸ Some provisions explicitly reference the disqualifying effect of corruption offences. For example, the Ghanaian Constitution, 1992, provides that a person is ineligible to sit in parliament if he or she is convicted of ‘an offence involving ... fraud, dishonesty or moral turpitude’, a formulation that encompasses most corruption-related crimes (article 94(2)(c)(i)). The Kenyan Constitution, 2010, similarly provides that a citizen is disqualified from election to parliament if he or she ‘is found, in accordance with any law, to have misused or abused a State office or public office’ (article 99(2)(h)). The Argentine Constitution, 1853, for example, specifies that ‘he who commits a serious fraudulent crime against the State that leads to his enrichment shall have acted against the democratic system [and] is thereafter disqualified from holding public office or employment for the period of time that the laws specify’ (article 36).

More controversially, some constitutions disqualify undischarged bankrupts from sitting in the legislature.¹⁴⁹ The theory behind disqualification for bankruptcy is that a destitute candidate or legislator will be susceptible to bribes and other material inducements.¹⁵⁰ In practice, however, disqualification for bankruptcy is problematic because of the potential for abuse. In Singapore, for example, members of the People’s Action Party-led government have been known to bring libel suits against opposition politicians for the sole purpose of bankrupting them and thus ending their political careers.¹⁵¹

Legislators may also be more willing to engage in misconduct if they enjoy immunity from arrest and criminal prosecution (‘inviolability’), as is the case under many constitutions. The French Constitution, 1958, for example, provides that a member of the legislature has immunity from arrest for any crime unless the Bureau of the House votes to waive the immunity or the member is caught in the act of committing a major offence (*flagrante delicto*) (article 26). Inviolability ends on the expiry of the member’s tenure. Inviolability of members of the legislature, subject to legislative or judicial waiver at the request of the prosecutor, is also enshrined in the constitutions of, among others, Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, Germany, Italy, Poland and Turkey.¹⁵² Given that the legislature may be reluctant to consent to prosecution of one of its own, it may be wiser to entrust the power to waive inviolability to the courts, as provided for in the Constitution of Cyprus, 1960 (article 83(2)). Another way to prevent abuse of inviolability is to lower the threshold for its inapplicability from cases of *flagrante delicto* to some less onerous standard. The Finnish Constitution, 1999, for instance, pro-

vides that inviolability does not apply where a member of the legislature is ‘for substantial reasons suspected of having committed a crime for which the minimum punishment is imprisonment for at least six months’ (article 30).

In contrast, the doctrine of parliamentary immunity is much narrower under the Westminster system, where members of parliament do not enjoy immunity from the criminal process. Members of parliament enjoy immunity from civil process only for their statements on the floor of the chamber, a protection known as ‘parliamentary privilege’. Parliamentary privilege encourages full and frank discussion of corruption-related matters on the floor of the chamber, without fear of repercussion.

The purpose of inviolability is to protect members of the legislature from politicized prosecutions.¹⁵³ Inviolability may be justified if the country concerned has a history of the executive harassing legislators or controlling them with the threat of prosecution. Even so, the concept of inviolability is difficult to square with the rule of law. In addition, inviolability does not entirely remove the potential for the executive to use the threat of prosecution to coerce members of the legislature. Indeed, the executive can bring criminal charges against a legislator and simply defer trial until he or she leaves office, leaving the threat of prosecution to hang over the legislator’s head.

2.5 International best practices and options for the Arab region

Generally

- Constitutional rules should prohibit the executive from spending money or raising revenues except in accordance with a legislative enactment appropriating funds for a specific purpose or levying a tax or other impost, as the case may be.
- Neither the executive nor the legislature should exercise complete control over the budget process.
- The legislature should receive the technical, analytical and research support it requires to contribute meaningfully to the budget process. Furthermore, the level of support provided to the legislature should be commensurate with its budget amendment powers, ensuring that the legislature has the technical and administrative capacity to exercise those powers.

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- To the extent possible, constitutional provisions on budgeting should adhere to the principle of comprehensiveness, which requires that as little spending as possible escapes budget mechanisms and procedures.

Contingency funds

- The constitution should establish a contingency fund on which the executive may draw to cover an urgent or unforeseen need for expenditure, which no existing budget appropriation authorizes.
- The authority to determine whether an urgent or unforeseen need for expenditure has arisen should be conferred on the head of the executive (either the president or prime minister), the finance minister or a legislative committee that deals with finance. In addition, the executive officer could be required to act with the advice of a legislative committee to enhance oversight.
- The contingency reserve should be capped at no more than 3 per cent of the overall budget, in line with IMF recommendations.¹⁵⁴
- It should be a constitutional requirement that the executive place a supplementary estimate before the legislature as soon as practicable after drawing on the contingency fund, so that the legislature may ratify the spending and authorize the fund's replenishment.

Extra-budgetary spending

- The constitution should either prohibit off-budget spending and secret budget items, or make them conditional on prior legislative approval.

Budget amendment powers

- Constitution drafters can select from among three basic approaches: giving the legislature unlimited power to amend the budget as it sees fit; giving the legislature a moderate level of influence over the budget, while requiring it to respect broad budget parameters set by the executive; or permitting the legislature only to reduce expenditure. While international experience does not suggest that any one of these approaches is better, two general principles have emerged:

- If the constitution adopts a system which provides little to no scope for the legislature to amend the budget, particular care should be taken to bolster the legislature's *ex post* oversight capacity.
- The president should not be given a line-item veto over the budget.

Reversionary budgets

- If the constitution provides for reversion to the previous year's budget in the event that a new budget is not enacted before the start of the fiscal year, the constitution should also include a 'safety valve' provision to prevent executive abuse of the reversionary budget.
- Options include placing a non-renewable limit on the duration of the reversionary budget, or, in parliamentary and semi-presidential systems, setting the threshold for the passage of a no-confidence motion at such a level that the legislature can remove the government for persistently abusing the reversionary budget (an absolute majority would ordinarily suffice).

Ex ante and *ex post* budget scrutiny

- The constitution should set aside at least three months for legislative review of the budget proposal, in line with global trends.¹⁵⁵
- Consideration should be given to entrenching an independent fiscal institution in the constitution, guaranteeing not only its existence, but also its independence from government and its continued funding.
- If the constitution establishes a parliamentary system, consideration should be given to making it a constitutional requirement that parliament, once in session, should create a public accounts committee headed by a sitting member of the party or coalition with the second-largest number of seats at the most recent parliamentary elections. Cabinet ministers should be prohibited from serving on the PAC.



Disqualification from the legislature

- The constitution should provide that a person convicted of an offence involving fraud, dishonesty or misuse of public office is ineligible to sit in the legislature for a prescribed period of time (a common period is six months to one year).
- Given the potential for abuse, the constitution should not disentitle undischarged bankrupts or insolvents to a seat in the legislature.

Parliamentary inviolability and privilege

- If the constitution affords members of the legislature immunity from criminal process for the duration of their tenure, either a court of appropriate jurisdiction should have the power to lift the immunity for serious crimes (including corruption) on application of the prosecutor, or inviolability should not apply with respect to charges for offences carrying a prison term of a minimum of six months or a year.
- To encourage full and frank discussion of corruption-related issues on the floor of the chamber, the constitution should enshrine the principle of parliamentary privilege.

Questions, interpellation and impeachment

- If the constitution establishes a parliamentary system, consideration should be given to requiring that a question time take place at regular intervals when parliament is in session.
- Parliamentary and presidential frameworks should set out a process for interpellation and impeachment, respectively. Offences involving bribery or dishonesty should be grounds for impeachment.

2.6 Analysis of existing and proposed constitutional frameworks in the Arab region

2.6.1 Tunisia

The 2014 Constitution of the Republic of Tunisia establishes a semi-presidential system of government, in which executive power is divided between a popularly elected president

and a prime minister who leads the party or coalition that wins the largest share of seats in the Assembly of the Representatives of the People at a general election (articles 71, 89). The Constitution provides that the prime minister, as head of government, has exclusive competence to present a draft budget law to the Assembly (article 62). The government is held accountable before the Assembly (article 95). In addition, the state is under a constitutional obligation to 'ensure the proper use of public funds and take the necessary measures to spend it according to the priorities of the national economy, and prevent corruption and all that can threaten national resources and sovereignty' (article 10).

The Assembly's powers of budget amendment are rather limited. Article 63 provides that legislative proposals 'are not admissible if they affect the financial balances fixed in the finance law'. That said, articles 65 and 66 contemplate that the precise scope of the Assembly's amendment powers will be determined by an organic budget law. Since the majority of legislators will be affiliated to the government by party membership or a coalition agreement, it is possible that the Assembly would be disinclined to amend the budget even if it had substantial power to do so.

Under the Constitution, the Assembly is not guaranteed an adequate period of time for review of the budget proposal. The government must present the draft budget by 15 October at the latest, and the Assembly is required to ratify the budget by 10 December (article 66). If the government were to submit the budget proposal on 15 October, as the Constitution permits, the Assembly would have a little less than two months for review, which falls short of the minimum three months recommended by the OECD.

In the unlikely event that the Assembly does not enact the budget proposal by 31 December, 'the law can be implemented in terms of expenditure by renewable presidential order, in three-month tranches'. Revenues can continue to be collected according to the laws already in force (article 66). In theory, the government could operate under a reversionary budget indefinitely, because there is no maximum number of renewals. Because the decision to grant a renewal of the existing budget is invested in the president, the opportunities for the prime minister to abuse the budget process - over which the prime minister has exclusive control - are minimized. However, the danger is that the president will be able to abuse the reversionary budget. Moreover, the government can be removed from office following a vote of censure, which, as in the French Constitution, 1958, requires



only an absolute majority of votes to pass, together with the presentation of an alternative prime minister whose candidacy is to be ratified in the same voting process (article 97).

As to powers of investigation, the Constitution provides that each parliamentarian has the right to submit written or oral questions to the government in accordance with the Assembly's internal rules of procedure (article 96), but there is otherwise no provision for interpellation, apart from the confidence procedure already mentioned above.

The Constitution affords members of the Assembly ordinary parliamentary privilege, as well as immunity from arrest or criminal prosecution, unless that immunity is lifted. The Constitution does not contain any provisions regulating the lifting of immunity. In cases where a member of the Assembly is apprehended while committing a crime, he or she may be arrested, but the member must be released at the request of the Bureau of the Assembly (articles 68, 69). The Constitution is vague on whether or not a member of the Assembly who is arrested in the commission of a crime remains immune from criminal prosecution. Compared with most inviolability provisions, which do not apply at all in cases of *flagrante delicto*, the Constitution's inviolability provision is overly broad and reduces the likelihood that corruption in the Assembly will be properly investigated and punished.

2.6.2 Egypt

The 2014 Egyptian Constitution creates a constitutional framework for the proposal of the budget and its adoption by the legislature. The House of Representatives has a mandate to approve the state budget (article 101). It is the government's responsibility to draft the annual state budget law (article 167). The executive must lay the draft budget before parliament at least 90 days before the beginning of the fiscal year, which accords with OECD recommendations (article 124). The House of Representatives has broad powers of budget amendment, although it may not modify expenditures in such a way as to dishonour a 'specific liability' of the state. Where parliament's amendments would result in an overall increase in expenditure, it must 'reach an agreement with the government on the means to secure revenue resources to achieve a balance between them' (article 124). Except with parliament's approval, the government is prohibited from opening extra-budgetary accounts, spending in excess of appropriations, or moving funds from one chapter of the budget to another (article 124). For the avoidance of doubt, article 127

provides that '[t]he executive authority may not contract a loan, obtain funding, or commit itself to a project that is not listed in the approved state budget entailing expenditure from the state treasury for a subsequent period, except with the approval of the House of Representatives'. The Constitution does not appear to provide for a reversionary budget.

The Constitution also includes a variety of legislative oversight tools. The House of Representatives is empowered to establish a fact-finding committee, armed with coercive powers, to examine any administrative department, public agency or public enterprise (article 135). Furthermore, any member of the House of Representatives may submit questions to the prime minister and ministers on matters within their portfolio, and the prime minister or relevant minister must respond during the same term (article 129). Parliamentarians are entitled to seek briefings from the prime minister or ministers 'in relation to urgent matters of public importance' (article 134). In addition, any 20 members of the House 'may request the discussion of a public issue to obtain clarification on the government's policy' (article 132). The Constitution also allows every member of the House to address an interpellation to the prime minister or any minister, with debate on the motion occurring between seven and 60 days after its submission (article 130). If one-tenth of its members so propose after an interpellation, the House of Representatives can submit a motion to withdraw confidence from the government or a particular minister. A motion of no confidence requires an absolute majority to pass (article 131).

Because the Constitution creates a semi-presidential system, it also provides for an impeachment procedure. Only the president may be impeached, on a 'charge of violating the provisions of the Constitution, high treason or any other felony'. The impeachment provision makes no reference to corruption specifically. The initiation of impeachment procedures requires the support of two-thirds of the House of Representatives. The final verdict is delivered by a special court headed by the president of the Supreme Judicial Council, who sits together with the longest-service judges on the Supreme Constitutional Court and State Council and the two longest-serving presidents of the Court of Appeals (article 159).

Finally, the Constitution confers parliamentary immunity on members of the House of Representatives, as well as immunity from criminal prosecution (inviolability), except in the case of *flagrante delicto*. The immunity may only be lifted with the consent of the House of Representatives or, if parliament is not in session, the Bureau of the House of



Representatives (articles 112–13). Article 173 provides that ‘[t]he Prime Minister and members of the government are subject to the general rules organizing investigation and trial procedures, if they commit crimes while exercising the functions of their posts or because of them’. Presumably, these general rules include the immunity for which article 113 provides, although article 173 clarifies that ‘[t]he end of their term of service does not preclude the start or resumption of prosecution’.

2.6.3 Libya

The Constitutional Declaration of 2011 provides that ‘[t]he general budget of the State shall be determined by statute’ (article 27). The declaration is otherwise silent on fiscal matters, although it does envisage an ‘audit unit’, the functions of which are ‘to audit the total revenue and expenditure and all movable and immovable assets belonging to the State’ and to ‘ensure the appropriate use of funds and their preservation’ (article 28). The audit unit must periodically report to the interim government, rather than the popularly elected National General Congress. This suggests that the audit unit is an internal oversight mechanism and will thus not enjoy the same level of independence that an external or legislative oversight unit would.

2.6.4 Yemen

The fiscal provisions in Yemen’s 1991 Constitution, which remains in force, are seriously flawed. Although the House of Representatives has formal responsibility for approving the budget (article 62), the executive dominates the budget process. The House of Representatives may amend the budget proposal only with the government’s approval (article 88(a)). The Constitution provides limited time for parliamentary review of the budget – only two months, as compared with the OECD recommendation of at least three (article 88(a)). Parliament has little to no bargaining power, as the Constitution provides for automatic reversion to the previous budget if the House does not enact the executive’s proposal. The Constitution does not impose any time limit on the reversionary budget, potentially allowing the executive to govern without parliamentary approval of spending and revenue measures for an indefinite period (article 88(a)). The combined effect of these provisions is that the legislature’s only role in the budget process is to rubber-stamp the government’s budget proposal. The power of the purse resides in the executive, not the legislature.

3 Supreme Audit Institutions

A supreme audit institution is typically an independent government body, often established by the constitution, which oversees all expenditures authorized by the legislature and made by the executive. An SAI thus exercises external oversight, because it is institutionally distinct from the executive and the legislature.

3.1 Formation

Among the key tools that have emerged in order to fight official corruption are supreme audit institutions, which may serve as a crucial protection against government fraud and misuse of funds by acting as an external watchdog, to which the branches of government in charge of funds must be accountable. Like any corruption-fighting institution, SAIs will only be successful so long as they have an adequate degree of independence, sufficient funding and enough political power to act as a counterweight to official misuse of funds.

The concept of an SAI may be seen in various parts of the UN Convention against Corruption. Article 5 of UNCAC calls for signatory states to ‘develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability’. Article 6 of UNCAC in turn provides that states parties to the convention shall ‘ensure the existence of a body or bodies, as appropriate, that prevent corruption’ by implementing the policies referred to in article 5. The establishment of an SAI would fulfil the article 6 obligation to ensure the existence of a body capable of carrying out the commitments of article 5.

Article 9(2) and (3) of UNCAC go on to set out requirements that signatory states are obliged to adopt to protect against corruption in public finance:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:
 - (a) Procedures for the adoption of the national budget;
 - (b) Timely reporting on revenue and expenditure;

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- (c) A system of accounting and auditing standards and related oversight;
 - (d) Effective and efficient systems of risk management and internal control; and
 - (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.
2. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

The International Organization of Supreme Audit Institutions (INTOSAI) was formed in 1953 to act as an umbrella organization for the international audit community and to help promote an exchange of ideas among national SAIs.¹⁵⁶ The primary way in which SAIs communicate ideas and best practice with one another is through the *International Journal of Government Auditing*, which is published annually by the INTOSAI.¹⁵⁷ At present, there are 192 members and five associate members of the INTOSAI.¹⁵⁸ In 1977, INTOSAI issued the Lima Declaration, which stated that, through their auditing work, SAIs should pursue the following four objectives:

1. communication of information to public authorities and the general public through the publication of objective reports;
2. development of sound financial management;
3. proper execution of administrative activities;
4. proper and effective use of public funds.¹⁵⁹

3.2 Function

While the functions of SAIs vary by country, their general mandate is to improve government transparency and accountability through monitoring of government revenues and expenditures. In many cases, SAIs will review proposed uses of government funds to determine their efficiency and legality, and will also review a government's budget after the funds have been used. In most cases, the SAI will report its findings to the legislature, which is then in charge of enforcing the findings of the SAI. Auditing of public funds is

a key factor in combating official corruption, in that it provides for oversight of government officials' use of funds, and reporting mechanisms where there is illegal misuse. An effective auditing institution helps to uncover corruption in government, and – where effective mechanisms exist for the prosecution and/or punishment of corrupt officials – can discourage officials from engaging in corrupt practices.

Although there are a number of different types of audits that SAIs perform, they may be divided into three broad categories: financial auditing, compliance auditing and performance (or value-for-money) auditing.

3.2.1 Financial auditing

Financial auditing involves review of government accounts and disclosure of expenditures that government organizations make. Auditors, who are usually professional accountants, review government statements against the results of their own investigation into expenditure, in order to determine whether the government's financial statements accurately reflect government uses of public funds. Discrepancies between budgets and actual spending are usually an indicator of corruption and public misuse of funds. Based on their findings, auditors provide an audit report of the government organizations' financial disclosure, indicating whether or not there are discrepancies. These reports may provide the basis for further action against officials suspected of financial misdealing or corruption.

3.2.2 Compliance auditing

Compliance auditing involves assessing the legality of government action or, more specifically, whether government organizations have complied with the statutes and regulations that govern their activity. Auditors will review government organizations' use of funds, in order to verify that the organizations' income and expenditures have been authorized by law and are in compliance with any rules that regulate the use of funds. Where an official or organization uses funds in a way that is not contemplated in the legislation or regulations that empower the use of public funds, the official or organization will have acted unlawfully. Failure to spend public funds as the law requires or allows is thus itself illegal and moreover is often an indication that public funds have been diverted to corrupt activities.



3.2.3 Performance or value-for-money auditing

Performance or value-for-money auditing confirms whether the government has spent the taxpayers' money in an efficient way. Here, auditors will work with a team of subject-matter experts, who will advise the audit. The purpose of performance auditing is to ensure that the expenditures and administrative procedures adhere to sound financial and management practices and policies. While financial auditing looks at specific government transactions to ensure that they are in line with government budgets, performance auditing aims to ensure that government systems use their budgets efficiently. A performance audit may, for example, identify inefficiencies resulting from an overlap in responsibility between two government agencies. Performance auditing is related to systemic policy and practice. Although inefficiencies of this type are not necessarily related to corruption, the duplication of government services may be used as a cover for corruption, or as a way to funnel public funds to political patrons or party loyalists in other branches of government.

3.3 Models

The auditing needs of each country obviously vary, depending on the form of government that country has, its financial resources and the challenges that country's SAI faces. There are, however, three basic models that SAIs follow– the Westminster Model, the Board Model and the Napoleonic Model.

3.3.1 Westminster (Parliamentary) Model

The Westminster Model, so called because it was developed in the United Kingdom and was then exported to a number of Commonwealth countries and former British colonies, links the work of the SAI to the parliamentary system of accountability.¹⁶⁰ In this model, the SAI reviews the expenditures and revenues that have been authorized and implemented by the legislature.¹⁶¹ The SAI in this context will undertake both financial and compliance auditing, verifying that income and expenditures are accurately reported, and that all the necessary regulations and laws are complied with. The SAI reports back to the legislature.

Under the Westminster Model, the SAI is generally directed by a single officer, often called the auditor general (AG).¹⁶² As the singular head of the SAI, the AG is given a good

deal of responsibility in ensuring the financial health of a nation. In order to protect the auditor general from outside influence, it is necessary to insulate him or her in some way from government interference. An example of such protections may be seen in South Africa, where the Constitution of the Republic of South Africa, 1996, provides that the AG serves for a fixed, non-renewable term of between five and ten years (article 189). The AG must be appointed by the president, after nomination by a legislative committee composed proportionally of all the parties represented in the National Assembly and approval by a 60 per cent majority of the National Assembly (article 193(4)–(5)). Removal of the AG requires a finding by a committee of the National Assembly that he or she is guilty of misconduct or is incompetent or incapable, and a resolution supported by two-thirds of the National Assembly (article 194(1)–(2)). These protections have been helpful in ensuring the independence of South Africa's auditor general, and indeed no auditor general has as yet been removed from office.¹⁶³

A model similar to the Westminster system employs a comptroller, who exercises *ex ante* review of government expenditure. While the reviews by the SAI under the Westminster Model usually occur after government expenditures have occurred,¹⁶⁴ comptrollers are required to verify, before funds are appropriated from the central treasury to executive accounts, that those funds will be used for statutorily authorized purposes and that they will be used efficiently.¹⁶⁵ The office of the comptroller may be created by statute, or entrenched in the constitution, as is the case with the Constitution of Chile, 1980, article 98:

An autonomous organism with the name of the Office of the Comptroller General of the Republic, will exercise the control of the legality of the acts of the Administration, will control the revenues and the investment of the funds of the Treasury, of the municipalities and the other organisms and services determined by the law; will examine and judge the accounts of persons entrusted with assets of such entities; will perform [*llevar*] the general accounting of the Nation; and will perform the other functions entrusted to it by the respective constitutional organic law.¹⁶⁶

Key to the independence and integrity of the Westminster SAIs are their constitutional and statutory mandates. The auditor general in South Africa, for example, has existed since 1911, but was constitutionalized in South Africa's interim Constitution, 1994 (article 191). It is mandated by article 188 of the South African Constitution, 1996, 'to audit and report on the accounts, financial statements and financial management' of all



regional and national governments, all municipalities and any government agency. The Public Audit Act, 25 of 2004 formalized the structure of audits and created the Parliamentary Standing Committee on the Auditor General, which is meant to provide assistance, protection and oversight to the auditor general's office.

A Westminster-model SAI may be established in countries that do not have a parliamentary system of government, as in Mexico's presidential system. Article 79(I) of the Constitution of Mexico, 1917, provides that the Superior Financial Authority is required:

To scrutinize the accounting for revenues and expenditures already collected and spent; the management, custody, and allocation of the funds and resources of the Powers of the Union and federal public entities, as well to ensure that these funds and resources were spent in accordance with the stated objectives of the federal programs through reports which shall be issued in the terms provided by the law.

The functions of Mexico's Superior Financial Authority are further specified in the Law on Accountability and Control of Accounts of the Federation (Ley de Fiscalización y Rendición de Cuentas de la Federación).

Westminster SAIs may be funded directly by disbursements from the annual budget as approved by the legislature, or they may attempt to be self-sustaining. In South Africa, the AG does not rely on disbursements from the annual budget, but rather generates its own income from audit fees.¹⁶⁷ The Public Audit Act, 25 of 2004 sets out the financial and administrative arrangements of the auditor general in greater detail. While the auditor general is thus financially independent and less reliant on the government for funds, in many cases the non-payment or late payment of auditing fees to the auditor general leaves the institution with cash-flow difficulties.¹⁶⁸

In Uganda, by contrast, the auditor general's budget is approved by parliament each year and is then disbursed by the Ministry of Finance.¹⁶⁹ The auditor general of Uganda has observed that, while its workload has risen each year, its funding has stayed level. In Tanzania, the Cabinet determines the budget for the SAI.¹⁷⁰ This greatly compromises the efficacy of an SAI, since a corrupt government has an incentive to underfund the SAI and minimize the likelihood that its financial misdealing will be uncovered.

The Westminster Model relies on the legislature to implement the SAI's recommendations, and does not allow auditors to impose directives on the executive directly.¹⁷¹ One danger, which has emerged in Uganda and Tanzania, is that the SAI's reports will go largely ignored by members of the legislature because the specialist financial skills necessary for decisive action on the basis of an audit report are lacking among the members of the legislature.¹⁷²

A similar phenomenon can be observed when legislatures are dominated by the executive. In South Africa, a recent Parliamentary Ad Hoc Committee on the Review of Chapter 9 noted with concern the lack of parliamentary will to implement the changes recommended by the annual audits.¹⁷³ Similarly, although the AG has made recommendations to various government departments in audit reports, it is common that government departments take no action to implement those recommendations.¹⁷⁴ This has led to some members of the legislature calling for the auditor general to be given more power to enforce its decisions directly.¹⁷⁵ This has been particularly true in recent years, as evidence of government corruption at the local level has increased, and some auditors have reported being threatened by government officials for reporting fraud.¹⁷⁶

3.3.2 Board (Collegiate) Model

The structure of the Board Model is essentially the same as that of the Westminster Model, with a few key differences. The SAI conducts financial and compliance audits of the legislature's and the executive's activities, and then reports its findings back to the legislature. But rather than having an auditor general, the SAI has a 'board' of leaders who jointly audit and make decisions for the institution.¹⁷⁷ Commentators have noted that this may be an advantage over the Westminster Model, which centralizes much of the oversight authority in a single office – that of the Auditor General. In countries where government corruption is a problem, a single auditor general may himself or herself be more susceptible to corruption than a team or board of auditors.¹⁷⁸ The drawback is that spreading authority to make decisions among a larger group may make the SAI unable to act quickly or uniformly.¹⁷⁹

In countries employing the Board Model, the term and qualifications of board members is often set out in a statute. In the Republic of Korea, for example, the Board of Audit and Inspection Act notes that a board member (called a 'commissioner') must have been



a civil servant, attorney or judge, or university professor for at least eight years, or a corporate employee for at least five out of a twenty-year career.¹⁸⁰ Like the Westminster Model, the success of the SAI under the Board Model depends greatly on the willingness of the legislature to act on its recommendations, since it cannot impose its findings on the executive.¹⁸¹

Many countries employing the Board Model set out its mandate and function in the constitution or in legislation, or in both. In South Korea, the Constitution of 1948 and the Board of Audit and Inspection Act mention three major functions of the Board of Audit:

1. verification of the accounts of expenditure and revenue of the central government;
2. financial audits of the central and regional governments and publicly funded agencies; and
3. inspection of the performances of government officials of their official duties.¹⁸²

Articles 97–99 of the Constitution establish that the Board of Audit will have no fewer than five and no more than eleven members, with a chairman who is appointed by the president with the consent of the National Assembly. The chairperson may only serve one four-year term, and may be removed by the president if he or she is impeached by the legislature or if he or she is no longer physically capable of performing the duties of chairperson.¹⁸³

Like SAIs utilizing the Westminster Model, SAIs under the Board Model perform audits and report their findings to the legislature. Different countries also have different methods of reporting. In Korea, for example, the Board of Audit may issue requests for disciplinary action, correction or improvement by a government official who is failing to meet its standards.¹⁸⁴ However, as is often seen in Westminster Model SAIs, the effectiveness of the audits in Korea and other Board Model SAIs (such as Indonesia) depends on the willingness of the legislature to act on the SAI's recommendations. As with Westminster Model SAIs, a problem is the capacity of members of the legislature to internalize and understand technical audit reports: solutions include training members of the legislature in matters of financial auditing or establishing budget committees within the legislature to oversee the implementation of the Board's suggestions.¹⁸⁵

3.3.3 Napoleonic (Judicial) Model

The Napoleonic Model, so called because it was created in France and then exported to various countries, operates quite differently from the Westminster and the Board models. Under this model, the SAI operates independently of the legislature or the executive, and is instead a part of the judicial system.¹⁸⁶ This report refers to it as a court of accounts, after the French Cour des Comptes (CDC). On this model, the SAI is a court of law whose members are judges, and which may impose penalties or recommendations.¹⁸⁷

Under this system, officials of the Ministry of Finance are placed in various government ministries and agencies to act as public accountants. They are in charge of proper expenditure of funds and for drawing up expense accounts for the various ministries. These accountants then report on the expenses of the various ministries to the central SAI, which is composed of a number of specialized auditing judges. When there are shortcomings or fraudulent activity observed in the reports of the various ministries' accountants, they are held (often personally) accountable by the judges who review their reports.¹⁸⁸ In France, for example, the SAI is called the Cour des Comptes, and was established by Article 47-2 of the French Constitution.¹⁸⁹ Here, a public accountant (*comptable*) is placed in each ministry or spending agency and conducts financial and compliance audits of that ministry.¹⁹⁰ These accountants are personally responsible for the funds that they oversee, and may be penalized by the court.¹⁹¹

The CDC in France issues three reports a year: a report to the legislature on the execution of the Budget Law, an annual public report, and a report on the social security system.¹⁹² The report to the legislature will detail the activities of the *comptables*, and any penalties that have been imposed for improper expenditure. In France, the annual public report is submitted to the president, the National Assembly and the Senate and is made public.¹⁹³ The legislature may also impose penalties on individual accountants or other public officials on the basis of the report.¹⁹⁴

The effectiveness of the court of accounts depends on the institutional independence of the accountants in the various ministries, and of the judges to whom they report. The independence of the judges and accountants may be achieved by constitutional entrenchment alongside statutory protections. The Constitution of the Republic of Turkey, 1982, provides for an Audit Court in article 160, while the Law on the Turkish Court of Accounts, 2010, formally establishes the Turkish Court of Accounts (TCA).¹⁹⁵ The Constitution requires that



the security of tenure of the members of the TCA shall be regulated by law, while article 70 of the Law on the Turkish Court of Accounts provides that members of the TCA cannot be dismissed and cannot be retired before the age of 65 unless they so desire. Article 71 provides further that conviction for an offence which results in dismissal from public service will automatically entail dismissal from the TCA. Articles 13–16 provide for the appointment of the president of the TCA, the chairpersons of each of the eight chambers of the TCA and members of the TCA, by the Grand National Assembly of Turkey.¹⁹⁶

This form of SAI is necessarily very formal, focusing particularly on compliance auditing in systems where there are detailed laws and regulations for governments raising and spending money. This emphasis on formal procedures and rules may undermine attempts at performance auditing, as the judges may be less inclined to question the effectiveness of expenditure, so long as auditors act in compliance with the necessary regulations.¹⁹⁷ A recent study also found that, across a broad survey of countries, the levels of perceived corruption in countries with a Napoleonic Model tended to be higher than those with a Westminster or Board Model, even after controlling for factors like the country's wealth.¹⁹⁸ It has been suggested that this results from a lack of parliamentary involvement in the auditing process, which diminishes the public exposure to the auditing results, and limits the probability of electoral consequences of corruption.¹⁹⁹

3.4 What makes an SAI effective?

The effectiveness of an SAI depends on a number of factors, including whether the SAI is constitutionally or statutorily entrenched, the mandate the SAI is given, the independence of the SAI's personnel and the procedures for their appointment, adequate and secure funding, transparency of the SAI's audit process and effective reporting of audits to the legislature and the public.

These matters can be relatively easily provided for in a constitution or legislation. However, beyond these institutional and structural matters, SAIs must employ financial professionals who are capable of complex financial oversight, who are remunerated adequately, and who have adequate resources, such as space and electronic equipment, to fulfil their duties. These professionals must also be regularly trained in order to stay on top of current financial practices. Failure to equip and train auditing staff will result in an ineffective SAI, regardless of the constitutional or statutory rules that establish the SAI.²⁰⁰

3.4.1 Constitutional entrenchment

Section 5 of the Lima Declaration provides that “The establishment of Supreme Audit Institutions and the necessary degree of their independence shall be laid down in the Constitution; details may be set out in legislation.”²⁰¹ This requirement rests on the proposition that the SAIs will be more effective and insulated from government interference if provided for specifically within the constitution, as opposed to merely being given power through legislation. In many cases, as in Turkey and Mexico, a country’s constitution will provide for the creation of the SAI while leaving the details regarding its specific design to legislation. However, SAIs in countries with more detailed constitutional provisions regarding the SAI have proved to be more independent and effective than those in countries whose constitutions leave substantial details to legislation. The constitutions of Korea (1948), South Africa (1996) and Turkey (1982) serve as examples of constitutions that give a clear mandate outlining the responsibilities of their supreme audit institutions, and mechanisms for protecting the independence of the SAI, including procedures for appointment of auditors and term limits. Placing such information in the constitution, as opposed to leaving it open for legislation, contributes to the clarity of the SAI’s mandate, and protects its essential functions from government interference. Indeed, a recent INTOSAI peer review of Indonesia’s Board of Audit found that a complex statutory framework that ensured the independence of auditors had been effective in shielding them from executive or legislative interference.²⁰²

3.4.2 Clear mandate

It has been observed that a main factor contributing to the success of an SAI is the clarity of its mandate, including matters relating to the scope of audits (including who is audited and how often reports are issued), provision of an adequate budget, right to access records, specification of relationships with other government institutions, and the right to hire and dismiss SAI employees.²⁰³

Mandates that are vague may lead to SAI overreach, in that they run the risk of the SAI auditing too broadly, exceeding its mandate, and opening the SAI to political backlash. Vagueness may also cause harm in the opposite direction, in that vague or narrow mandates may lead to a reduction in the effective reach of the SAI. For example, the scope of a mandate that does not include expenditures related to national defence would allow of-



ficials to escape oversight of expenditure merely by earmarking it for national defence.²⁰⁴ This has been observed in Uganda, where a substantial number of budget items have been earmarked for national defence and classified for this reason, and thus shielded from audit.²⁰⁵ A similar problem was observed in Tanzania, where the SAI's narrow mandate, restricting oversight to a handful of government ministries, significantly weakened its capacity, until reforms in 2004 expanded the SAI's mandate and allowed it to audit all government expenditure.²⁰⁶ The SAI mandates in South Africa²⁰⁷ (Westminster), the Republic of Korea²⁰⁸ (Board) and Turkey (Court of Accounts)²⁰⁹ strike an appropriate balance, being both sufficiently broad and precise enough to allow for effective auditing.

3.4.3 Independence and appointment procedures

Independence may be the most important factor to an SAI's success. In 2007, INTOSAI issued the Mexico Declaration on Supreme Audit Institutions' Independence,²¹⁰ which set out eight principles for SAI independence:

1. the existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework;
2. the independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties;
3. a sufficiently broad mandate and full discretion in the discharge of SAI functions;
4. unrestricted access to information;
5. the right and obligation to report on their work;
6. the freedom to decide the content and timing of audit reports and to publish and disseminate them;
7. the existence of effective follow-up mechanisms on SAI recommendations; and
8. financial and managerial/administrative autonomy and the availability of appropriate human, material and monetary resources.

Many of these principles overlap with the other factors of SAI effectiveness discussed in this section. For example factor (1) goes to constitutional entrenchment, factors (3)–(7) go to mandate and factor (8) implicates funding. However, one of the most important determinants of an SAI's independence are the procedures for the appointment and removal

of auditors by the government. If such procedures are not defined by the constitution, or at the very least laid out in statute, the government may be able to appoint auditors who are sympathetic to the government and less likely to reveal financial misdealing. Similarly, if procedures for the removal or dismissal of auditors are not set out clearly, auditors that are active in revealing official corruption may be easily dismissed or dissuaded from revealing corruption for fear of dismissal.²¹¹

In general, the independence of the SAI is enhanced when its members are not appointed by the executive alone, but are appointed by a majority or a supermajority of the legislature, with the participation of, or on the recommendation of, a legislative committee or members of the executive. The process set out in article 193 of the Constitution of the Republic of South Africa, 1996, for the appointment of the auditor general is a good example.

Similarly, the dismissal of members of the SAI should not be in the hands of the executive alone, if dismissal is possible at all. Legislatures should be able to dismiss members of the SAI only by a vote supported by a supermajority of the members of the legislature. In South Africa, this threshold is two-thirds of the National Assembly (Constitution of the Republic of South Africa, 1996, article 194). The reasons for dismissal should be clearly set out, and are usually confined to misconduct, incapacity or incompetence.

Independence also implies a degree of insulation from the executive when performing audits or issuing auditing reports. Many countries declare the independence of the SAI in the constitution and in statute, but this declaration must be borne out by institutional arrangements that protect the SAI from interference. In South Korea, for example, the Board of Audit and Inspection Act prohibit members of the SAI from engaging in political activities or holding political offices that might compromise their independence.²¹²

3.4.4 Funding

Tied to the idea of SAI independence is the subject of SAI funding. A survey of SAIs in sub-Saharan Africa found that SAIs were less effective in cases where they did not have sufficient independence from government interference. SAIs following the Napoleonic or Judicial models were particularly ineffective, because they were not financially independent of the common judiciary. Increasingly, there is a movement in African countries to separate courts of audit from the general judiciary and to provide for a separate budget line.²¹³



In many other countries, SAIs are dependent on the government departments and agencies they are mandated to audit for funding. This creates a perverse incentive, as members of the government may be less inclined to fund the operations of an institution that could reveal their corruption or financial incompetence.²¹⁴ Similarly, SAIs dependent on these executive bodies for funding may choose not to censure those executive bodies for fear that their source of funding will be cut in retaliation.

Even in the absence of government interference, inadequate funding continues to be one of the principal challenges facing SAIs, particularly in developing countries.²¹⁵ This leads to a lack of resources for auditors, including a lack of resources to provide sufficient training for auditors. Experts have recommended that for SAIs to be effective, they must employ ‘qualified staff, remunerate them adequately, emphasize continuous improvement and encourage subject-matter expertise.’²¹⁶ The efficient use of funds by the SAI itself would help to increase its efficiency: although SAIs are tasked with overseeing the budgets and expenditure of various government entities, it is often the case that SAIs are not subject to the same principles of financial accountability and efficiency.²¹⁷

3.4.5 Enforcement

While courts of audit or SAIs that follow the Napoleonic Model usually have some power of enforcement as courts, Westminster or Board Model SAIs often rely on the legislature or the executive to enforce their recommendations or to act on their reports. One solution would be to allow other independent institutions, such as the prosecuting authority, to act on the SAI’s reports and ensure that officials suspected of corruption or abuse of public funds are fully investigated and punished, where appropriate.

3.4.6 Transparency and reporting

A number of countries require the SAI’s findings to be published for the general public to read.²¹⁸ The CDC in France, for example, publishes its annual public report so that voters and civil society organizations can learn of any spending abuses committed by public auditors, and whether or not the legislature has done anything about them.²¹⁹

This contributes to a culture of transparency, in which governments must be accountable not only to other government institutions, but also to the public generally. In countries that follow the Westminster and Board models, the SAI is required to report to parlia-

ment, but has no obligation to publish reports for the general public.²²⁰ Without public pressure or the likelihood that the public will punish members of the legislature in coming elections, there is no incentive for the legislature to act on the SAI's reports or recommendations.²²¹

3.5 Options for the Arab region

Constitutional entrenchment

- The constitution should create the supreme audit institution, outline its duties and functions, specify its membership and identify procedures for the appointment and removal of its leaders.
- Some aspects of the SAI's operation may be left to legislation, and this should be specified in the constitution.

Mandate

- The SAI should have a clear mandate, which clearly lays out the scope of the auditing responsibilities – including who is audited and how often reports are issued, the provision of an adequate budget, the right to access records, specification of relationships with other government institutions, scope of investigative powers, and the right to hire and dismiss SAI employees.
- The mandate will ideally be entrenched in the constitution. The constitutional mandate may be supplemented by legislation.

Training and capacity

- Many SAIs lack a fully trained staff, capable of running complex audits of government expenditure. Funding of the SAI should be sufficient to hire a qualified staff large enough to carry out its duties effectively.
- The SAI should perform regular training of its members to ensure that they have up-to-date understanding of auditing techniques.
- In many cases, even when reporting mechanisms are working effectively, those in charge of implementing the recommendations of the auditors (often the legislature)



do not properly understand the reports or how to implement them. SAIs should regularly conduct training sessions with those in charge of implementing their recommendations.

Independence

- It is essential for the functioning of the SAI that it is free from interference by the legislature or the executive. The constitution and enacting legislation must create a variety of safeguards to protect the independence of the SAI.
- Security of tenure for heads of SAIs should be secured by the constitution or statute.
- SAIs should have the right and obligation, provided by statute, to report on their work and to make it public.

Funding

- The constitution or implementing statute should provide for adequate funding for the SAI and mechanisms for funding increases to keep pace with the SAI's increasing responsibilities and workload.
- The institutions and entities that SAIs audit should not have the power to determine or alter the budget and funding of the SAI. Rather, the source of the SAI's funding should be set out in the constitution or statute.
- The capacity of the SAI should not be limited by a lack of necessary resources, such as computers, office space, and so on. The budget granted to the SAI should be sufficient to fund the necessary materials for auditors.

Enforcement authority

- The constitution should give SAIs the authority to enforce their recommendations, or provide some mechanism by which their recommendations will be taken seriously. For countries following the Napoleonic Model, this should include the ability of the judges to hold auditors responsible for shortfalls or fraud. In other systems, it should be provided in the constitution or by statute that a special prosecutor (either directly connected to the audit office or designated an anti-corruption prosecutor) follow up the reports of the SAI to ensure government compliance with them.

Transparency and reporting

- The constitution, or implementing legislation, should provide specific mechanisms for the publication of the SAI's findings, both to the relevant law-making body and to the public at large.

3.6 Analysis of existing MENA frameworks

3.6.1 Tunisia

In Tunisia, the SAI has traditionally been known as the Court of Accounts, and has followed the Napoleonic Model. Article 117 of the 2014 Constitution of the Republic of Tunisia creates a Court of Audit. Regarding its mandate, the Court of Audit has the power to 'oversee the sound management of public funds in accordance with the principles of legality, efficiency and transparency', and is mandated to 'rule on the accounts of public auditors ... assess accounting methods and sanction errors and failings that it discovers'. This is essentially in line with the mandates and responsibilities of other SAIs following the Napoleonic Model.

Regarding publication and transparency, the Court of Audit must prepare a general annual report to be submitted to the president of the republic, the speaker of the Chamber of Deputies, the prime minister, and the president of the Supreme Judicial Council. This report is also to be made available for the public to inspect. It may also prepare 'special reports' from time to time.

Regarding independence, the Constitution does not specify the working relationship between the Chamber of Deputies and the Court of Audit, but it does prohibit political interference in the functioning of the general judiciary (article 109). The Constitution establishes the Supreme Judicial Council as a body to ensure the 'sound functioning of the justice system and respect for its independence' (article 114). The Supreme Judicial Council prepares its own budget and enjoys 'administrative and financial independence' (article 113).

Finally, article 117 provides that the 'organization, mandate and procedures of the Court of Audit as well as the status of its judges are regulated by law'. This leaves many of the specific details of the operation of the Court of Accounts to further legislation. The extent to which the constitutional commitment to an independent and effective SAI is realized



will depend to some extent on how these matters are spelled out in the implementing legislation.

3.6.2 Egypt

Article 219 of the Constitution of the Arab Republic of Egypt, 2014, provides:

The Central Auditing Organization shall be responsible for monitoring the funds of the State, the funds of the State public and independent legal persons and other authorities as specified by Law; as well as being responsible for monitoring the implementation of the State budget and independent budgets and for auditing its final accounts.

Prior to the ouster of President Mubarak, the operation of the Central Auditing Organization (CAO) was governed by Law No. 144/1988. Since article 219 of the Constitution still provides that ordinary legislation will specify the detail of the operation of the CAO, this law remains important. The law suggests that the CAO will function as an internal oversight institution, operating within the boundaries of the executive, rather than as an independent and external oversight institution. While this by itself is not fatal to the success of the CAO, the existing law does not provide it with a great deal of independence, even as an internal oversight institution: first, the independence of the head of the Central Auditing Organization is compromised by the fact that the president or his Cabinet can remove him or her at will.²²² Second, the law provides that internal regulation of the CAO is to be determined by the minister of administrative development.²²³ Third, historically none of the publications of the CAO have been published for the public to scrutinize, but instead given to the president and the legislature, with the result that it has been impossible to determine whether the CAO has been effective in uncovering corruption within the government.

A recent survey of the perceived corruption index of 177 countries gave Egypt a low score, 32 out of a possible 100. New legislation is needed, under the provisions of article 219, to replace the outdated, authoritarian-era legislation that established a SAI heavily in the government's favour.

4 Specialized Anti-corruption Agencies

4.1 *Establishing an ACA*

While SAIs combat corruption by performing financial audits, specialized anti-corruption agencies have a mandate to investigate and prosecute a wider range of corrupt practices. ACAs come in various forms, ranging from small commissions dedicated solely to the investigation of corruption to large multi-purpose organizations with educative, investigative and prosecutorial functions. The choice of model depends on local circumstances, history, resources, the role played by existing anti-corruption institutions, and political will. ACAs engage in one or more of three main activities:

1. investigating corruption and prosecuting corrupt individuals;
2. addressing structural weaknesses, legal loopholes and incentives that give rise to corruption; and
3. public education through annual reports, advertising, conferences and raising awareness of corruption among the public service.

These functions can be centrally located in one ACA, or they can be spread across multiple agencies that coordinate policy with each other. Notwithstanding the variation among ACAs, a number of characteristics are common to all ACAs:

1. an exclusive anti-corruption mandate;
2. distinctiveness from other enforcement agencies;
3. preventive or repressive anti-corruption measures;
4. durability of existence;
5. powers to centralize, collect, store and process information;
6. a centre of interface between multiple anti-corruption actors;
7. production of knowledge into corrupt practices;
8. rule of law or checks and balances;
9. their existence is known and accessible to the public at large.



While ACAs have historically been created by statute, a more recent international trend is to entrench ACAs in the constitution. Namibia's Constitution, 1990, provides that an Act of Parliament shall establish an anti-corruption commission, the director and deputy director of which shall be appointed by the National Assembly after nomination by the president (article 94A(2) and (5)). The Constitution of Thailand, 2007, outlines the powers of the ACA in greater detail and also sets out procedures for appointing its members (article 279). Kenya's Constitution, 2010, directs parliament to 'enact legislation to establish an independent ethics and anti-corruption commission' (article 79).

Constitutionalizing the ACA solidifies its existence, but also reduces its capacity to respond to changing needs and circumstances. A solution to this problem is to establish the ACA in the constitution, but leave its constitutional mandate broad, to be specified further by legislation. As with the Kenyan Constitution, 2010, the Namibian Constitution, 1990, confers a broad mandate on the ACA, providing that 'the state shall put in place administrative and legislative measures necessary to prevent and combat corruption' (article 94A(1)). A broad constitutional mandate has the advantage of later institutional flexibility, because it is relatively easy to amend an enabling statute, whereas enumerating an ACA's functions in the constitution may have the unintended effect of constraining the ACA within constitutional provisions that are difficult to amend.

International consensus on the value of ACAs is embodied in international instruments. The Council of Europe's Guiding Principles for the Fight against Corruption focuses on specialized law enforcement and anti-corruption legislation. Article 6 of the UN Convention against Corruption encourages states to create specialized anti-corruption bodies to aid in the detection of corruption and the enforcement of anti-corruption legislation. Regional treaties follow this trend: see, for example, the Inter-American Convention against Corruption (6 March 1997) and the African Union Convention on Preventing and Combating Corruption (11 July 2003).

While there is no single institutional model for an ACA, a handful have been highly successful. Singapore's Corrupt Practices Investigation Bureau (CPIB) has the power and means to launch and conduct investigations, including covert operations, search and seizure, and arrest without warrant.²²⁴ The CPIB has a relatively lean but highly trained staff of 150, and is financially and institutionally supported by a government and population that have little tolerance of corruption. Hong Kong's Independent Commission against Corruption (HKICAC) has broader functions, over 1,000 members of staff and a large

budget.²²⁵ Given the success of both institutions, they have been widely copied around the world. Apart from Botswana and Madagascar, the exportation of the Hong Kong and Singaporean models to African countries has been largely unsuccessful in curbing corruption, often for reasons specific to the very different contexts of these countries.²²⁶ For example, the HKICAC-inspired Prevention of Corruption Bureau in Tanzania has foundered because it relies on the government for its operational budget and is perceived as being ‘too close to the Government to investigate major political corruption with sufficient commitment.’²²⁷

An ACA’s ability to combat corruption depends on a complex of factors, including the available institutional mechanisms, resources, expertise and political support.²²⁸ Moreover, the lacklustre performance of some ACAs is not simply due to internal factors. A 2006 United States Agency for International Development (USAID) report noted that a successful ACA requires a set of background conditions that do not often obtain in transitional states, including:

macroeconomic stability; political stability; confidence that an attempt to challenge corruption would not lead to violence; public order; absence of crippling distortions (such as widespread famine or conflict, recent genocide, large populations of Internally Displaced Persons); [and] an environment where corruption is not entrenched in the whole system.²²⁹

One example of measured success is Botswana, where a small multi-purpose ACA was established in 1994 in response to scandals in primary school funding. While the Directorate on Corruption and Economic Crime (DCEC) lacks skilled manpower and resources, and the caseload per officer is two and a half times the international norm, it nevertheless succeeded in securing an average of 11 convictions per year from 2009 to 2011. It has also produced a code of ethics for the private sector, launched regional cooperation initiatives, and made anti-corruption education available throughout the country.²³⁰

The success of Botswana should be seen in context: it has a relatively strong economy and a functioning multi-party democracy. An ACA is much more likely to flourish under such circumstances. In contrast, conditions in Zimbabwe, where provision was made for an ACA in articles 254–257 of the Constitution of Zimbabwe, 2013, are less favourable. The Zimbabwean ACA is unlikely to have an impact on combating corruption in circumstances where it must rely on the police to investigate cases of suspected corruption and on the prosecuting authority to try cases of corruption. In President Robert Mugabe’s



Zimbabwe, the police and prosecuting authority are as likely to be tainted by corruption as any other official body. Furthermore, the ACA power is seriously compromised by the president's constitutional power to appoint its chairperson and membership (articles 254–255). To put that constitutional design feature in context, Mugabe has been personally implicated in grand corruption, along with senior members of the ruling Zanu-PF party.²³¹ Indeed, Zimbabwe's ACA has existed since 2004, but was able to complete only four cases during 2006.²³²

When circumstances do not favour the establishment or proper functioning of an ACA, the ACA may serve only to create another layer of ineffective bureaucracy, divert attention and resources from existing institutions, and create jurisdictional conflicts.²³³ The further possibility exists that an ACA that is not sufficiently independent or insulated from political manipulation may be abused to target a ruling party's political opponents using trumped-up allegations of corruption.

4.2 Functions

Fighting corruption is a complex process that requires a strategy and a comprehensive approach which combines two broad functions: (a) investigation and prosecution of corrupt actors, and (b) developing a national anti-corruption strategy and minimizing opportunities for corruption in government processes. A third function does not deal with corruption directly, but involves educating the public about the dangers of corruption and building public support for the activities of an ACA. These three functions need not be carried out by the same institution, but all three are relevant to a comprehensive anti-corruption strategy. The failure to include any one of them may undermine anti-corruption efforts.

4.2.1 Detecting, investigating and punishing corrupt actors

The paradigmatic anti-corruption activity is the investigation and prosecution of corrupt public officials, which requires significant powers and resources. In Hong Kong, for example, a 24-hour hotline receives complaints related to corruption, and the HKICAC responds to them within 48 hours.²³⁴ Dealing efficiently with complaints is an integral part of an ACA's function, as members of the public must have an outlet to voice their grievances to an institution in which they have confidence. This is a particularly important role in post-authoritarian democracies, like those in the MENA region, where there are historically low levels of trust in the institutions of state.

After a complaint is filed, if a more comprehensive investigation is warranted, an ACA must proceed with secrecy, dispatch and professionalism to gather evidence in diverse ways, including examining bank accounts, customs documents and tax records, and engaging in forensic accounting. Where any of these investigative tasks are performed by institutions other than the ACA (e.g. the police), cooperation between the different institutions becomes important. After the completion of an investigation, if wrongdoing is found, the ACA must have the resources and power to prosecute corrupt officials itself, or to direct the relevant prosecuting authority to institute criminal proceedings.

One of the most successful ACAs was the South African Directorate of Special Operations (DSO). The DSO investigated organized crime and corruption and was empowered to institute criminal prosecutions on the basis of its investigations. Part of its success was due to the competency of its staff, its wide investigative powers, prosecutorial authority and public support. The DSO conducted investigations into the nation's deputy president, Jacob Zuma, as well as prominent members of the African National Congress. The high conviction rate (over 90 per cent) was indicative of its success. The DSO was eventually disbanded as an independent unit and incorporated into the police service. The South African Constitutional Court, asked to consider whether the new unit was sufficiently independent to meet international and constitutional obligations to combat corruption, held that, while an ACA housed within the police does not necessarily lack independence for that reason, the specific provisions incorporating the ACA into the police in this case deprived the ACA of sufficient independence.²³⁵

4.2.2 Preventive: developing a national anti-corruption strategy

A national anti-corruption strategy is central to preventing corruption,²³⁶ and the UN-CAC encourages the development of a national anti-corruption strategy (article 5). In 2013, the United Nations Office on Drugs and Crime organized a meeting of national anti-corruption authorities from around the world. The proceedings of the meeting produced the Kuala Lumpur Statement on Anti-corruption Strategies.²³⁷ A national strategy coordinates government efforts and monitors and evaluates progress. Any strategy must take into account the country's context and the main anti-corruption challenges, and must be backed by political will. Transparency International suggests that a good national strategy will include national ownership or a committed leadership and broad participation of social and political actors, and will be based on research and knowledge.



It highlights the 2012 Romanian national anti-corruption strategy as a model, especially for its identification of areas most prone to corruption. The Romanian strategy was developed over the course of a year with the input of over 500 individuals from both public and private sectors. It outlines national objectives of anti-corruption measures, sets out 'detailed action plans' for their achievement, and identifies the institutions responsible for achieving them.²³⁸

Not all ACAs are established after careful deliberation and research. The establishment of an ACA is often the product of donor pressure, the requirement of an international treaty, or a hasty response to a corruption scandal, which is not to say, however, that an ACA established after a corruption scandal is necessarily doomed to failure, as the case of Botswana shows. Given the complexity of fighting corruption, however, ad hoc measures are more likely to fail than succeed, often damaging the cause of anti-corruption.

The development of a national anti-corruption strategy does not involve simply an examination of institutional capacity. It is also necessary to pay particular attention to areas where conflicts of interest may exist across the government as a whole, including, for instance, in the procurement processes. A national strategy may establish ethical guidelines or a code of conduct for government officials, setting out both specific matters, such as the declaration of assets held by government officials, and general matters, such as a standard of conduct that should be upheld (although failure to uphold that standard would not necessarily amount to criminal conduct). Finally, prevention also involves establishing norms of transparency across all sectors of government. Transparency International has provided a number of guidelines for good practice, including transparency in public sector employment and procurement, integrity promotion in the judiciary, and the involvement of civil society.

Beyond the development of a national strategy, preventing corruption involves the development and integration into governmental processes of mechanisms specifically designed to minimize and prevent corruption. The HKICAC provides a good example of these mechanisms. Because of the danger of corruption in government infrastructure projects, HKICAC assigned a special task group of construction professionals to conduct regular reviews of the procedures adopted by agencies for the procurement of consultancy agreements, paying particular attention to opportunities and incentives for corruption. On large-scale infrastructure projects, HKICAC members sit as observers on tender assessment panels and act as expert advisers where appropriate.²³⁹ During the process they also

implement integrity workshops to maintain proper ethical standards and awareness of the need to prevent corruption. Such activity reduces the opportunities for corruption and entrenches norms of integrity across government.

4.3 What makes an ACA effective?

While real change is difficult to bring about, international standards and best practices for the primary requirements of successful ACAs are beginning to evolve. The most important of those standards are outlined below.

4.3.1 Specialization

Specialization refers both to institutional specialization, insofar as the ACA is dedicated wholly to anti-corruption, and to the expertise of the ACA's personnel. Fighting corruption is, by its nature, difficult; and it becomes increasingly so as technological advances allow for sophisticated methods to defraud the public. An ACA must recruit and retain a staff with a specialized skill set in fields as diverse as finance, economics, forensic accounting, civil engineering, database mining and social sciences.²⁴⁰ Often staff members must have expertise in, or experience of, a particular industry, such as infrastructure and public works, in order to understand how loopholes within that sector permit and incentivize corruption, and where it is most likely to occur. This specialization needs to be acquired through adequate recruitment, adequate salaries and specialized training. Hong Kong, for instance, has an initial two-year training programme for new employees that includes training in 'computer forensics, financial investigation skills, [and] cognitive interview techniques.'²⁴¹ In addition, an ACA with significant institutional prestige is likely to find it easier to attract more skilled and experienced personnel.

4.3.2 Independence and autonomy

As a general matter, independence from undue interference is necessary for an ACA to carry out its mandate effectively. Independence means a sufficient measure of operational autonomy, which shields the agency from undue influence or direct political interference. An ACA's autonomy can also be effectively removed by 'mandate-stripping' or 'jurisdiction-stripping', whereby empowering legislation is amended to reduce the scope of an institution's operational mandate or authority. In addition, the efficacy of an ACA can be compromised if it depends for funding on the very organs of government that it is mandated to scrutinize for corruption or misconduct. Financial independence is key to an ACA's political independence and autonomy.



Independence is further influenced by (a) the internal organization, including hierarchies and reporting requirements, and (b) procedures for the appointment and dismissal of staff. Both are considered below.

Organization, hierarchy and reporting requirements

Undue influence can manifest itself in the small, but extremely important, details of institutional organization: hierarchical structures, reporting requirements, clearance protocols, inter-agency consultation requirements, and approval by political officers. In Botswana, for example, the DCEC must receive clearance from the attorney general to prosecute. While the DCEC has done good work so far, this requirement has led to a large backlog of cases and has given rise to complaints that the DCEC's work is politically constrained.²⁴² Insulating an ACA from political influence is especially important when corruption exists in the highest echelons of power, since the higher the corrupt agent, the more likely it is that he or she will be able to sabotage investigations, intimidate investigators and hide evidence, reducing the likelihood that corruption will be brought to light or effectively punished.

Appointment and dismissal

One of the most crucial considerations is the appointment of senior management, as 'appointment and recruitment procedures and budgetary independence are the most sensitive areas in which ACAs can be exposed to political pressure.'²⁴³ Appointment processes that are open, fair and combine multiple levels of decision makers are most likely to result in a greater degree of independence and autonomy in an ACA's personnel. Appointment by one or a small group of decision makers is not good practice. Appointment committees that incorporate the opposition ensure broad participation in anti-corruption efforts. Moreover the appointee's tenure in office should be fixed. A single term without the possibility of reappointment is also possible. Single terms encourage directors to be politically independent, as they do not need to curry favour. Thailand's ACA, for instance, has a single-term head.²⁴⁴

The leadership of anti-corruption personnel should also be shielded from unfounded dismissal. The Thai system provides that, if a complaint against a member of the anti-corruption commission is made by one-fifth of the members of the Senate or the House, on the grounds that he or she has acted unjustly, has become inordinately rich or has committed an offence,

the complaint must be reviewed judicially. During the pendency of the complaint, the commissioner is not permitted to perform his duties, and if the number of commissioners is reduced by more than four, then the president of the Supreme Court of Justice appoints interim commissioners.²⁴⁵ This institutional solution has the advantage of subjecting the commission to legislative oversight, but it has the disadvantage that a minority in the legislature can essentially render ineffective any commissioner it disagrees with, and, in collusion with the president of the Supreme Court, can appoint commissioners more favourable to it. The deficiencies in the Thai system could be remedied by increasing the number of members of the legislature needed to lodge a complaint against a member of the ACA.

A final but critical element of independence is the physical protection of ACA personnel and whistleblowers from intimidation and violence. Extra-legal pressure and intimidation is frequent in authoritarian countries or in countries with high levels of corruption. Protection may include relocation, security details, high levels of secrecy, and measures for identity change.²⁴⁶

Independence is also required for anti-corruption departments and units that are housed in other agencies, such as special prosecutor units housed within a larger legal department, an anti-corruption task force within an audit agency, or an investigative unit within a police force. When anti-corruption units are housed within a larger agency, the risk of undue influence is substantially higher, since the anti-corruption units may need to report to department heads who may not share their objectives. One way to insulate anti-corruption units from undue influence is to make ACAs subject to different hierarchical structures and rules, with reporting of cases only to competent prosecutors. It is even better if a specialized anti-corruption unit housed within an agency is empowered to bring its own prosecutions and conduct its own investigations.

4.3.3 Adequate resources

Setting up an effective ACA is expensive, but far less so than allowing corruption to go unchecked. Resource limitations tend to emerge when an ACA bears a broad mandate but is not provided with commensurate resources. The Constitution of Uganda, 1995, expanded the mandate of the Inspectorate of Government (IG), conferring wider powers of investigation, arrest and prosecution, and the responsibility to enforce an ethical code of conduct (articles 223–232). The IG's budget was not correspondingly enlarged,



however, resulting in inadequate staffing and sub-par performance.²⁴⁷ Adequate resources are necessary to attract and maintain competent and adequate personnel, and to cover the costs of thorough investigations and prosecutions. In addition, the remuneration of such officials needs to be generous enough for them not to be tempted to accept bribes in exchange for turning a blind eye to corruption (see section 5.3.2).

In order to counter shortfalls in resources and funding, ACAs should be able to propose their own budgets, and the legislature, rather than the executive, should oversee the ACA's budget. The ACA head should also be given the discretion to hire and dismiss staff, rather than have personnel foisted on him or her. The Constitution of Thailand, 2007, reflects best practice in this regard, providing in article 251 that '[t]he Office of the National Counter Corruption Commission shall have autonomy in its personnel administration, budget, and other activities as provided by law'.

4.3.4 Adequate powers and clear functions

To be successful, ACAs require extensive powers. In general, an ACA must be guaranteed the institutional powers or competences necessary to discharge the functions allocated to it by the constitution or statute (see section 4.2). Specifically, an ACA must enjoy powers to request documents, conduct inspections, summon and interrogate persons, and bring prosecutions or cause prosecutions to be brought. Since corruption involves the illicit and secretive transfer of funds, ACAs must have the power to follow the money flow by combing through private bank accounts and gathering information on individuals, including high-level government officials, without their knowledge. If the agency is to be created anew, at the stage of constitutionalization, these powers should be granted in the constitution, in order to prevent easy jurisdiction-stripping.

4.3.5 Transparency and accountability

Because ACAs need to be vested with extensive powers, they should themselves be subject to oversight. There are two primary elements of oversight: the first is the transparent administration of the ACA itself, and the second is accountability to other branches of government.²⁴⁸ It is the role of ACAs to foster an accountable government by promoting transparent practices; but it must itself follow transparent practices, respecting both the rule of law and relevant human rights standards, such as due process. The public should have easy access to its work. Its reports should be published through accessible forums,

such as the Internet, on a regular basis – at least annually – and there should be internal ethics rules and disciplinary procedures that govern investigations and prosecutions.

In addition to transparent practices, ACAs should be subject to checks and balances by other branches of government. This is difficult to arrange without subjecting the ACA to undue political influence. One option is to subject the ACA to review by an external committee staffed by representatives of different state bodies, such as parliament, the judiciary and even the private sector. The Constitution of Thailand, 2007, takes a different approach, assigning oversight of the body to the legislature; as outlined above, if one-fifth of the members of the legislature lodge a complaint against a member of the ACA, the complaint is reviewed.²⁴⁹ If the centre of corruption is historically in the executive, it may be wise to subject an ACA to legislative oversight. In parliamentary systems, requiring an ACA to report to a parliamentary committee composed of both majority and opposition members of the legislature may also be advisable.

4.3.6 Inter-agency and international cooperation

Anti-corruption work cannot be accomplished by one institution alone. Crimes of corruption are often committed alongside other financial and criminal activities that may fall within the jurisdiction of other government departments and institutions such as SAIs and other financial oversight boards, or justice and police departments. Multiple departments also share competences and often have access to different information. Therefore, good working relations between government departments are necessary to combat corruption effectively, while a lack of cooperation may inhibit effectiveness.²⁵⁰ As a response, a country may wish to implement special multidisciplinary coordinating commissions that are mandated through special legal provisions on cooperation and exchange of information, or governed by special agreements or memoranda of understanding.

International cooperation is also increasingly important, given that illicit monetary transfers take place overseas and across jurisdictions. International anti-corruption cooperation is still relatively young, but a fairly robust network of regional and international organizations now exists to foster cooperation: for example, the OECD Working Group on Bribery and its law enforcement officials' meetings; the Council of Europe's Group of States against Corruption (GRECO) and the Committee of Experts on the Evaluation of Anti-money Laundering Measures and the Financing of Terrorism (MONEYVAL); and the UN's Mechanism for the Review of Implementation of the United Nations Conven-



tion against Corruption. There are also regional efforts: the OECD/Asia Development Bank Anti-corruption Initiative for Asia and the Pacific, and the Regional Anti-corruption Initiative convened under the Stability Pact for South Eastern Europe.

In the Arab region, the MENA–OECD Initiative on Governance and Investment for Development, jointly supported by UNDP, is intended to promote broad reforms to ‘enhance the investment climate, modernize governance structures and operations, strengthen regional and international partnerships, and promote sustainable economic growth throughout the Arab region.’²⁵¹ Also in the Arab region is the Arab Anti-corruption and Integrity Network (ACINET), established in Amman in July 2008. ACINET brings together 44 ministries and government agencies from 17 Arab countries, in addition to non-governmental actors. ACINET’s regional support unit is based in the office of the UNDP’s Regional Project on Anti-corruption and Integrity in the Arab Countries (UNDP-ACIAC). The Network functions with the support of the UNDP, the UNODC, the OECD and the League of Arab States. The overall objective of ACINET is given in the constitutive document:

[T]o provide a permanent forum for Arab governmental bodies that are concerned with promoting integrity and anti-corruption, with a view to enabling the exchange of knowledge, expertise and experiences and providing a strategic platform to support the implementation of Arab and international anti-corruption instruments and conventions, especially the United Nations Convention against Corruption.²⁵²

4.4 Models

There are three general models of ACAs: the multi-purpose model, the law enforcement model and the preventive model. This report focuses on the first two of these.

4.4.1 Multi-purpose model

The multi-purpose model is the most prominent. It combines all three functions described above: investigation, prevention and public educational outreach. Prominent examples include Hong Kong’s ICAC, the Independent Commission against Corruption in New South Wales, Australia, and Botswana’s Directorate on Corruption and Economic Crime. The Special Investigation Service in Lithuania and other institutions in Latvia, Poland, Uganda, South Korea, Thailand, Argentina and Ecuador are also examples.²⁵³

Most multi-purpose agencies take their inspiration from Hong Kong. The Hong Kong mandate was very simple: all allegations of bribery would be investigated with a view to prosecution; systems and procedures would be examined in order to eliminate from them any opportunities for corruption; and the public would be educated about the evils of corruption and persuaded to support the fight.²⁵⁴ The three anti-corruption functions are performed simultaneously, as part of a comprehensive strategy. Singapore's CPIB is also considered a multi-purpose institution, but is smaller than Hong Kong's and engages in far less public outreach. Doing less public outreach, the CPIB's budget is smaller (the HKICAC spent 16 million USD on education and outreach), but it risks lower visibility and lower public support for its work.²⁵⁵

4.4.2 Law enforcement model

The law enforcement model, or the investigative model, carries out investigations into corrupt activities and actors. The law enforcement model is the approach most widely adopted in OECD countries, where a long-standing tradition of multi-party government and the separation of powers led to the dispersal of anti-corruption functions to a number of different agencies. The law enforcement model is adopted in Norway, Spain, Croatia, Romania, Hungary and Malta.²⁵⁶

The law enforcement model has a number of permutations. It can include detection, investigation and prosecution bodies, or merely investigation and prosecution. To carry out those tasks, these bodies are often given the power to conduct covert surveillance, intercept communications, conduct undercover investigations, access personal financial data and monitor financial transactions.²⁵⁷ To engage in such activities, a wide variety of expertise is needed, not all of which need be immediately housed within the ACA. However, an ACA may choose to house the relevant specialties. Romania's National Anti-corruption Directorate, housed in the National Prosecutor's Office, contains a number of judicial police officers or investigators that specialize in different fields. These agents are, in essence, loaned to the ACA for a period of six years from other offices in the finance ministry, police force and customs, among others.²⁵⁸ In-house specialists in economics, banking, accounting, IT and other fields accompany them.

Often the law enforcement model includes elements of prevention. As with the multi-purpose agency, varieties exist in terms of jurisdictional mandates. Some bodies, such as the defunct South African DSO, investigated organized crime and human trafficking, in addition to political corruption. Other agencies, such as Spain's Special Prosecutor's



Office against Corruption and Organized Crime (ACPO), a small unit with a staff of 30 housed within the larger State Prosecution Service, deal primarily with economic and other offences committed by public officials in the exercise of their official duties.²⁵⁹ When an investigative anti-corruption unit is housed within a broader prosecutorial agency, questions arise as to reporting hierarchy and clearance to investigate and prosecute.

4.5 Options for the Arab region

Before the Arab Spring, small, largely cosmetic efforts were made to combat corruption in the region, often through unenforced legislation and through small and ineffective committees or commissions. There is now greater recognition across the region that the fight against corruption must be serious and sustained. But given the absence in the region of the background requirements for a successful multi-purpose ACA – including a stable regime and the political will to create and fund an agency with broad enforcement powers – the creation of a strong multi-purpose ACA may fail to meet expectations of drastically curbing corruption. An ACA with a narrower, more tailored mandate, such as the development of a national anti-corruption strategy, or an ACA unit housed within the police force and backed by a dedicated prosecutor and specialized courts (see Chapter 5), may be the more appropriate response.

The following list of options for the MENA region should be seen in the light of these prefatory remarks.

Establish an ACA as part of a national anti-corruption strategy

- Establish an anti-corruption agency as part of a comprehensive national anti-corruption strategy, rather than as a kneejerk response to a sudden surge in corruption or a specific corruption scandal.
- Vest the ACA with investigative, prosecutorial and educative functions, or some combination thereof. The agency's precise mandate will depend on a number of variables, such as the scale and extent of corruption, the work being done by other anti-corruption institutions (if any), and available resources and expertise.

Protect the ACA's operational and financial autonomy

- Consider guaranteeing the ACA's existence and continued funding in the constitution itself.

- Establish clear procedures for the appointment and removal of members of the ACA, providing expressly for the participation of the political opposition in both procedures.
- Consider allowing the ACA to draft its own budget, rather than having its budget carved out of allocations to other, larger law enforcement agencies. The legislature, rather than the executive, should be given the power to approve the ACA's proposed budget, ideally through a multi-party legislative committee.

4.6 Analysis of existing and proposed MENA frameworks

4.6.1 Egypt

Before the Arab Spring uprising, Egypt had established an Administrative Control Authority, an Illicit Gains Authority, a Public Funds Investigative Unit, a Transparency and Integrity Committee, and a Central Auditing Organization (CAO), but each of these institutions lacked sufficient distance from the government. The CAO, for example, frequently brought high-profile cases of corruption to Mubarak's attention. But because the decision to take action against senior officials lay with the president himself, only low- or mid-level perpetrators were ever brought to book.²⁶⁰ At the same time, the government sat on reports by the Illicit Gains Authority and the Public Funds Investigative Unit, both of which identified corruption, waste and procurement irregularities. An investigator with the Ministry of the Interior was so disillusioned by the government's lax attitude to corruption that he sought asylum in Zurich in 2005.²⁶¹ In the months prior to the uprising, the prime minister established the National Coordination Committee for Combating Corruption, although the Committee did not meet until May 2013.²⁶² Since the fall of the Mubarak regime, Egyptians still perceive Egypt to be corrupt. In the most recent Transparency International survey, respondents identified the police and state media as the most corrupt institutions, followed closely by political parties, the civil service, medical and health services, the parliament and the education system.²⁶³

Egypt's 2014 Constitution takes few concrete steps to improve the situation. The preamble recognizes that the Constitution attempts to 'close the door on any corruption and tyranny'.²⁶⁴ Article 218 requires oversight bodies to cooperate to fight corruption and to develop a national strategy to fight corruption. Anti-corruption efforts are supplemented by the Central Auditing Organization (article 219) and a Financial Supervisory Authority (article 221). Although welcome, these anti-corruption bodies lack any real powers of prosecution, which may have the effect of undermining the anti-corruption objectives set



out in the Constitution; however, the Administrative Control Authority does appear to be functioning, at least to some degree. In February 2014, it arrested the chief accountant of the Bank of Development and Agricultural Credit over charges of corruption.²⁶⁵

4.6.2 Tunisia

Tunisia established its Anti-Corruption Commission after the fall of the Ben Ali regime. It has uncovered a number of corrupt practices, including the grant of concessions, licences and public contracts to favoured parties, the privatization of state-owned enterprises by non-competitive bidders, and the misclassification of public property.²⁶⁶ The Commission is still young, but one concern is whether it will be adequately staffed and funded in future. The Commission has since been entrenched in the 2014 Constitution. Its responsibilities include ‘monitoring cases of corruption within the public and private sectors’, carrying out ‘investigations into these cases’ and ‘submitting findings to the competent authorities’ (article 130). The submission of investigations to other agencies will be effective only if those agencies are committed to the anti-corruption effort. In Tunisia, over a 100 cases have been referred to the prosecutor, but very few have come to trial; and of those that have, many have been dismissed by the judiciary. The recent decision to refer cases to a team of judges trained in financial investigation, working closely with the central bank’s money-laundering investigators, is a positive step. The Constitution also provides that members of the Commission are appointed for a single six-year term, but does not establish procedures for the appointment and removal of Commission members.

4.6.3 Other MENA countries

Other countries in the MENA region have an opportunity to redouble their anti-corruption efforts. Transparency International ranks Libya 172 out of 178 countries on its corruption perception index, trailed only by North Korea, Afghanistan, Somalia and Sudan.²⁶⁷ It is unlikely that Libya will be able to create a fully fledged multi-purpose ACA, given the entrenchment of corruption in Libyan society, mass unemployment and widespread poverty. In early 2013, Prime Minister Ali Zeidan announced new measures to fight corruption, including close cooperation with the Audit Bureau, the establishment of a central bidding committee to ensure transparency in contract awards, enlisting the help of the secret service in investigations, and new measures to prevent irregular recruit-

ment of government employees.²⁶⁸ One challenge that Libya's auditors face is recouping the billions of dollars stolen from Libya by the Gaddafi regime.²⁶⁹

Morocco and Jordan have made some strides in the fight against corruption. The former established a relatively weak ACA in 2008, in an effort to comply with the UNCAC, but it lacked investigative and punitive powers. Morocco also initiated a two-year anti-corruption plan in 2010, attempting to identify areas of weakness, including protection for whistleblowers and asset declarations. Morocco also established an inter-ministerial committee to oversee government action against corruption. All of these efforts have produced only meagre results, due to lack of implementation. In its review of Morocco's anti-corruption efforts, the UN Convention against Corruption Civil Society Review noted that the country's poor performance is attributable to its lax enforcement. According to the review, 'decisions on prosecution are subject to the executive power and the independence of judges is not guaranteed.'²⁷⁰ Suggested priorities for Morocco include stronger enforcement mechanisms, giving the Central Agency for the Prevention of Corruption extra resources and powers, passing and enforcing a law for the protection of whistleblowers, and ensuring that the Court of Audit's adverse findings are backed by prosecutorial action.

The last few years in Jordan have seen high-profile corruption cases in which a former finance minister, Adel Al-Qudah, a wealthy businessman, and the prime minister's economic adviser were sentenced to three years' imprisonment over allegations that they illegally invested in the expansion of Jordan's largest oil refinery.²⁷¹ Investigating such high-level agents was unthinkable only a short time ago and is an encouraging sign of progress. Symbolic legislative gestures and short-staffed inter-ministerial committees that draft action plans will have little impact on curbing corruption. Jordan is still coping with problems of bribery, nepotism and cronyism. In 2013, it launched a new national anti-corruption strategy, with a heavy emphasis on enhancing judicial integrity.²⁷² The newly developed national anti-corruption strategy is well planned, but execution, as always, is of the utmost importance.



5 Anti-corruption Courts and Prosecutors

An effective judiciary is an essential component of any comprehensive anti-corruption programme.²⁷³ Indeed, successful prosecutions of corrupt officials require an effective judicial system and a prosecutorial service with the capacity, skill and integrity to pursue charges against persons in positions of power. This chapter considers whether and to what extent corruption-specific courts and prosecutors provide any distinct advantages over the ordinary criminal justice process.

5.1 Models

Different countries deploy courts and prosecutors in different ways in the fight against corruption. There are three basic models. The first is the all-purpose prosecutorial model. Under this model, which is the most prevalent, a country prosecutes corruption cases in its ordinary judicial system and makes no special institutional or procedural arrangements for cases concerning corruption. Given that the all-purpose prosecutorial model offers no distinct advantages over the general criminal justice system in most countries, this report does not discuss it at any length.

The second type of institutional arrangement is the specialized court model. Under this model, a country designates a specific court, or a special branch within the judiciary, to deal exclusively with corruption cases, which are initiated by either an all-purpose prosecutor or a specialized prosecutor. This section refers to such courts as anti-corruption courts (ACCs).

Finally, under the specialized prosecutor model, which may be combined with the specialized court model, a country vests a standalone prosecutor or a unit within the general prosecutorial office with exclusive responsibility for the prosecution of corruption-related offences. Specialized anti-corruption prosecutors can be, and often are, regarded as a law enforcement type of anti-corruption agency (ACA). The key distinction between specialized prosecutors and ACAs more generally is that the former *necessarily* exercise investigative and prosecutorial powers. On the other hand, many ACAs lack such functions, limited as they are to an educative or investigative role. Hence, while the discussion on ACAs in chapter 4 is equally applicable to specialized anti-corruption prosecutors, they receive more specific treatment in this chapter.

5.2 Formation and function

5.2.1 Specialized anti-corruption courts

As noted above, anti-corruption courts are not courts of general jurisdiction, but are limited to trying cases against corrupt public officials, or the offences created by an anti-corruption statute. The reasons for creating an ACC are twofold. First, a specialized court system ensures that corruption cases do not languish in the busy docket of the general judicial system. Second, and more important, ACCs may prove useful when corruption is endemic across the judiciary as a whole. This is often the case in transitional states with judiciaries that comprise holdovers from the previous regime. When corruption is so entrenched in the judicial system, a statute – or even the constitution itself – can take corruption cases out of the hands of unreliable judges and entrust them to specialized anti-corruption courts, the members of which can be screened for honesty and a commitment to combating corruption. In Kenya, for example, one of the catalysts for the formation of the specialist magistracy was the pervasiveness of corruption within the judiciary at large.²⁷⁴

Anti-corruption courts are almost always creatures of statute. The Philippines ACC is a rare exception. The Philippines Constitution, 1987, specifically provides for the continued existence of the ‘anti-graft court’ (Sandiganbayan) that pre-dated the Constitution (article XI(4)). Even here, however, the Constitution leaves the details of the Sandiganbayan’s operation to legislation. The Kenyan anti-corruption court is a more typical example of the specialized court model. The Anti-corruption and Economic Crimes Act, 3 of 2003, which established the Kenya Anti-corruption Commission (KACC), also provides for the appointment of ‘special magistrates’ to try corruption-related crimes specified in the Act (section 3(1)). These magistrates are appointed by Kenya’s 11-member Judicial Service Commission (JSC), which includes among its number the chief justice of the Supreme Court and the attorney general (Constitution of Kenya, 2010, articles 171(2), 172(1)(c)). Under the Act, the only individuals eligible for appointment as special magistrates are chief magistrates, principal magistrates and advocates of at least ten years’ standing (section 3(2)). The Ethics and Anti-corruption Act, 22 of 2011, disbanded the KACC and replaced it with the Ethics and Anti-corruption Commission (EACC), contemplated by article 79 of the 2010 Constitution. However, the new Act retains the system of special magistrates.



The idea of quarantining specialized anti-corruption courts from a corruption-ridden judiciary is sound. However, countries that are considering establishing ACCs should ensure that the appointment process does not engender corruption within that body itself, as that would defeat the purpose of segregating these courts from the ordinary judiciary. The Kenyan experience underlines the importance of creating an appointment procedure that is immune to manipulation by the ruling party. In Kenya, the Constitution provides for the involvement of the attorney general, a political appointee, in the process of appointing judges to sit on the country's ACC. If the government were determined to shield itself from corruption investigations, the attorney general could use his or her vote on the JSC to appoint judges who, the government knows or suspects, will be inclined to rule in the government's favour. On the other hand, the attorney general's ability to influence appointments to the special magistracy is limited, because the JSC also includes judges from all tiers of the judiciary, two advocates of at least 15 years' standing, a Public Service Commission nominee, and two members of the public. In addition, the judicial appointment process is otherwise transparent and independent.²⁷⁵ In practice, the risk of politicized appointment is low because the chief justice of Kenya has the most influence in the appointment of special magistrates.²⁷⁶

5.2.2 Specialized anti-corruption prosecutors

As with ACCs, specialized prosecutors are usually established by statute. Several European states have adopted the specialized prosecutor model. One of the best-known agencies is the Spanish Special Prosecutor's Office against Corruption and Organized Crime (ACPO). ACPO's creation followed several corruption scandals in the early 1990s and the entry of the issue into mainstream political debate. Established by an organic law in 1995, ACPO is located within the State Prosecution Service, for which article 124 of the Spanish Constitution, 1978, provides.²⁷⁷ The agency has a statutory mandate to investigate and prosecute corruption crimes of 'special importance', defined as economic crimes and offences committed by public officials in the performance of their duties.²⁷⁸ The offences of most concern to ACPO are embezzlement, fraud, extortion, trading in influence, bribery, negotiation forbidden to public officials, bankruptcy involving criminal negligence or malpractice, alteration of prices in public tendering, and money laundering, among others. The ACPO is a prosecutor of last resort: it takes over corruption-related prosecutions only when, in the opinion of the prosecutor-general, the offence is of 'special

significance'; and even then the crime must be of such complexity and magnitude that it warrants ACPO's intervention. Investigations are commenced either on ACPO's own motion or after it receives a private complaint. However, the decision as to whether ACPO may commence or intervene in a particular prosecution rests with the prosecutor general, a constitutional officer from whom the chief prosecutor of ACPO must obtain approval. The prosecutor general, in turn, is appointed by the monarch on the recommendation of the government (Constitution of Spain, 1978, article 124).²⁷⁹ ACPO's effectiveness and institutional set-up are discussed in section 5.3.2.

Romania established a specialized anti-corruption prosecutor in response to the limited success that a patchwork of different national bodies had achieved in curbing corruption, which continues to be a major problem in the country. The National Anti-Corruption Directorate (DNA), established in 2000, forms a part of the Prosecutor's Office and is attached to the High Court of Cassation and Justice. Prosecutors within the DNA supervise pretrial investigations by judicial police seconded to the agency, and prosecute corruption offences in court. Like Spain's ACPO, the DNA is specifically charged with the prosecution of grand corruption. The architects of the DNA sought 'to streamline its activity to the most relevant and complex corruption cases, instead of risking that the specialized prosecutors are overloaded with numerous small cases that have no impact on society'.²⁸⁰ For this reason, the DNA prosecutes only 'high and medium level corruption cases'.²⁸¹ The criteria for determining whether a crime falls within the DNA's mandate include the damage caused by the offence, the value of the bribe involved, whether the crime involved a commercial undertaking in which the state is a stakeholder, and the perpetration of the crime by parliamentarians, members of government, high-level officials in the central and local administration, mayors, police, customs officials, judges or prosecutors.²⁸²

5.3 What makes courts and prosecutors effective?

5.3.1 Specialized anti-corruption courts

Like other courts, an ACC will be successful only if its judges are protected from government interference, and if its procedures and jurisdiction enable it to address corruption effectively. ACCs are less successful when governments are able to exert influence over their prosecutorial arm or the investigative process.



The experience of the Ugandan ACC is instructive in this regard. Uganda established an Anti-corruption Division of the High Court by statute in 2008, following ‘public demand for a specialized court to try high profile corruption and related offences.’²⁸³ Convictions of high-level officials have proved difficult to secure because of resource constraints, bribery and intimidation. As there is no legal or constitutional obligation on ministers to step aside for the duration of any investigation into their conduct, politicians and senior bureaucrats can use the powers of their office to insulate themselves from accountability.²⁸⁴ In 2013, Human Rights Watch (HRW) reported that, in some prosecutions of ‘well-connected individuals’ before the ACC, senior public officials have ordered prosecutors to delay going to trial in order to buy extra time in which to bribe witnesses, or else to try a case with insufficient evidence, so that the defendant is virtually guaranteed an acquittal. Compounding the problem, the Ugandan ACC lacks the institutional safeguards that might otherwise enable it to resist attacks on its independence. Prosecutors do not enjoy security of tenure and are tempted to accept bribes because of their low salaries, which are often paid late.²⁸⁵ Similarly, judges, investigators and witnesses are routinely threatened with violence and targeted for bribery.²⁸⁶

According to Human Rights Watch, of the 88 first-instance judgments delivered by the anti-corruption court since its inception, 68 per cent resulted in a conviction. However, these figures do not tell the full story. The HRW report notes that ‘these convictions are concentrated among low-level, local government workers’, and the average amount of money involved in a prosecution is just 1,300 USD.²⁸⁷ These paltry amounts strongly suggest that while the ACC has achieved modest success in combating petty corruption, it has failed to address grand corruption. In 2010, the head judge of the ACC acknowledged as much when he remarked during the sentencing of a low-level official that the Court was ‘tired of trying tilapias when crocodiles are left swimming’.²⁸⁸

The Ugandan case illustrates the fact that anti-corruption courts, if inadequately protected, can actually become an instrument for abuse of power. According to one prosecutor with the ACC, President Museveni’s National Resistance Movement government uses the threat of corruption charges to enforce loyalty among political cadres.²⁸⁹ On one of the few occasions when corruption charges were brought against a high-level official in the ACC, local media speculated that the defendant, the Hon. Mike Mukula, had been targeted for prosecution because of his ambitions to run against Museveni in the 2016 presidential elections. Only when Mukula publicly disclaimed any intention of running

for the presidency was his conviction quashed on appeal.²⁹⁰ The Ugandan experience suggests that ACCs might become complicit in politicized prosecutions unless judges, prosecutors and witnesses are fully insulated from political pressure.

A study comparing the anti-corruption courts in Indonesia and the Philippines casts further light on the institutional design choices that can maximize the effectiveness of anti-corruption courts.²⁹¹ In Indonesia, when the government created its specialized anti-corruption body (the KPK), it also set up a specialized anti-corruption court designed solely to adjudicate cases dealing with official corruption (TIPIKOR). The thinking was that the KPK would be ineffective in combating corruption if courts were also corrupt, as they were widely perceived to be.²⁹² The TIPIKOR has been, by and large, successful in combating corruption in Indonesia. Surveys have found that more than half of corruption cases that were tried in the public courts (as opposed to the TIPIKOR) were dismissed, and the sentences imposed on conviction were generally light.²⁹³ In the TIPIKOR, by contrast, there was a 100 per cent conviction rate for the 51 cases brought up to 2008, and the average sentence was four years in prison.²⁹⁴

The success of the TIPIKOR is due partly to the fact that the statute that created both the KPK and the TIPIKOR sets a specific, expedited timeline for the adjudication of cases brought in the anti-corruption courts.²⁹⁵ The maximum length for cases brought by the KPK is eight months. This feature of the system ensures that corruption cases are resolved quickly, instead of languishing in the traditional courts, which often have a large backlog of cases.

The study mentioned above contrasted the effectiveness of the TIPIKOR with the specialized anti-corruption courts in the Philippines, the Sandiganbayan, which take an average of seven years to complete cases brought by the anti-corruption authorities.²⁹⁶ This difference is partly due to onerous trial procedures in the Philippines, and the absence of any laws providing for expedited trials of corruption cases.²⁹⁷ It may also be due to a lack of prosecutorial resources. The former ombudsman of the Philippines, who was charged by statute with bringing prosecutions in the Sandiganbayan based on public complaints, has blamed the delays on the inadequacy of the resources of the ombudsman position to address the number of corruption cases that must be prosecuted.²⁹⁸ Such delays can be detrimental to the government's case, as over time witnesses lose interest or may be intimidated, prosecutors and judges may be replaced, and evidence may go missing.²⁹⁹



Another reason for the different results in Indonesia and the Philippines may be the different jurisdictional reach of each ACC. The TIPIKOR's jurisdiction is broader than that of the Sandiganbayan, in which cases may be brought only by the ombudsman and only against government officials in the executive branch. Members of the judiciary and legislature may only be removed by impeachment in the Philippines.³⁰⁰ The anti-corruption courts in Indonesia, by contrast, have much broader jurisdiction to hear cases brought by the KPK against members of the legislature and the judiciary. However, it should be noted that the KPK may investigate, but not prosecute, members of the military.³⁰¹

5.3.2 Specialized anti-corruption prosecutors

As with ACCs, specialized prosecutorial offices are acutely susceptible to bribery. For precisely this reason, the wages of investigators and prosecutors attached to the Anti-corruption Department of the Azerbaijan Prosecutor-General's Office are higher than those of ordinary prosecutors and officials in other law enforcement agencies.³⁰² Similarly, Moldova's National Anti-corruption Strategy for 2011–15 identifies the need to pay 'salaries which are proportional to the responsibilities of the [Centre for Fighting Economic Crimes and Corruption] representatives, [the] Anti-corruption Prosecutor's Office and judges,' with a view to reducing their vulnerability to temptation.³⁰³

An additional problem is that prosecutors, as nominal officers of the executive, are vulnerable to political influence. In Spain, the statutory requirement that ACPO's chief prosecutor obtain clearance from the prosecutor-general before commencing prosecutions has the potential to limit ACPO's independence and deny the agency meaningful prosecutorial discretion. Although the government is prohibited from issuing specific instructions to the prosecutor-general, it may 'draw the attention of the Prosecutor-General to relevant legal steps to be taken.'³⁰⁴ This, combined with the prosecutor-general's power 'to give instructions to the individual prosecutors working on specific cases, including the ACPO prosecutors,' creates a channel through which the government can interfere in ACPO's prosecutorial independence.³⁰⁵ In addition, ACPO prosecutors are appointed by the government on the recommendation of the prosecutor-general, and the agency's budget is not separated from that of the State Prosecution Service.³⁰⁶ In spite of these institutional shortcomings, ACPO has managed to secure convictions against a former secretary of the minister of the interior, a former member of the Supreme Council of the Judiciary, and a former secretary of security, all on charges involving grand corruption.³⁰⁷

In terms of institutional design, the Romanian DNA reflects best practice in several respects. Unlike Spain's ACPO, the DNA enjoys a degree of financial autonomy. Although the DNA's budget, like ACPO's, is carved out of the Prosecutor's Office's budget, funds are 'distinctively earmarked' for the DNA, and the agency is financially independent by law.³⁰⁸ In addition, the DNA's investigative process is self-contained in a way that limits opportunities for improper outside influence. Judicial police are seconded to the DNA for six-year terms and take exclusive direction from the DNA's chief prosecutor, who has the power to appoint the officers who will serve as judicial police. For the duration of their tenure, judicial police are forbidden by statute from taking orders from the Ministry of the Interior.³⁰⁹ The DNA's chief prosecutor also has the power to requisition economic, banking, customs and information technology specialists from other government departments, where relevant to the agency's prosecutorial functions.³¹⁰ The agency's autonomy has enabled it to indict parliamentarians (14), current and former ministers (10), directors of state agencies (11), mayors (87), high-ranking army officers (24), judges (14), prosecutors (26), customs officers (110) and police officers (395). The DNA has brought 3,678 defendants to trial in the past five years, of whom 789 have been convicted.³¹¹

5.4 Options for the MENA region

Specialized anti-corruption courts

- Countries in the MENA region that are experiencing a backlog of cases, as well as countries that are burdened with a corrupt judiciary, should consider creating specialized anti-corruption courts that are legally, financially and operationally quarantined from the existing judicial system.
- Judges in anti-corruption courts should be protected from improper outside influence to the greatest extent possible. Judges should be afforded security of tenure, and their salaries should be set at a level that minimizes the risk of bribery.
- Anti-corruption courts should adopt specific procedures for expediting corruption cases. To this end, the enabling legislation should prescribe specific time periods within which corruption cases must come to court.
- The jurisdictional reach of corruption courts should not be limited to certain branches of the government or certain offences, but should extend to any member of the



government suspected of corruption. Corruption involving misuse of public funds in the private sector, as well as instances of petty corruption, should fall within the jurisdiction of the corruption courts.

Creation of specialized anti-corruption prosecutors

- MENA countries should consider establishing a specialized anti-corruption prosecutor either as a complement to an anti-corruption court, or as a standalone agency that institutes corruption prosecutions in ordinary courts of criminal jurisdiction.
- The anti-corruption prosecutor should be given a specific mandate to prosecute instances of grand corruption involving high-ranking public officials, law enforcement officials, public contracts and bribes of significant value. Petty corruption should be left to the ordinary prosecutorial authorities.
- It should be arranged for police to be seconded to the anti-corruption prosecutor, to have the director of the agency granted the power to select the secondees, and to prohibit the secondees from taking outside instruction. This is to limit the risk that investigators with divided loyalties might sabotage corruption prosecutions.
- Investigators and prosecutors in the employ of specialized anti-corruption prosecutors should be better paid than their counterparts in ordinary law enforcement agencies, in order to remove any temptation for these officials to accept bribes.
- Separate provision should be made in the budget for the funding of the specialized anti-corruption prosecutor.

5.5 Analysis of existing Arab frameworks

5.5.1 Egypt

The Constitution of the Arab Republic of Egypt, 2014, does not specifically provide for anti-corruption courts, but it does entrench the Office of Administrative Prosecution, originally established by statute in 1958 (Law 117/1958), as an ‘independent judicial organization’ tasked with ‘investigations into financial and administrative violations, and also those referred to it’ (article 197). These cases are brought before the State Council, a special adjudicatory body that adjudicates administrative suits and disciplinary suits and appeals there-

from (article 190). At present, it does not appear that any specialized anti-corruption courts have been created within the State Council. Furthermore, the recent report of the Central Auditing Office alleged mass corruption among the judiciary in Egypt.³¹²

The Constitution allows for prosecution of public officials, including the prime minister, should they be suspected of committing crimes.³¹³ The prosecutorial service is enshrined in the Constitution, which states that '[t]he Public Prosecution is an integral part of the judiciary' and 'is responsible for investigating, pressing charges and prosecuting all criminal cases except what is exempted by law' (article 189). The 'exempted by law' provision allows parliament to circumvent what, at first glance, looks like a prosecutorial service with a high level of discretion and autonomy. Indeed, under the provision as drafted, parliament could forbid the prosecutor general from bringing corruption-related cases to court, were it so inclined.

5.5.2 Tunisia

Tunisia does not have any specific provision in its constitution concerning anti-corruption courts. The Constitution does, however, create the Commission for Good Governance and Anti-Corruption,³¹⁴ which acts as the country's anti-corruption agency, investigating allegations of public corruption and submitting its findings to authorities.³¹⁵ Previously, corruption cases were brought by public prosecutors in Tunisian courts of first instance. Apart from the high-profile corruption trial of Ben Ali and his family, in absentia, the head of Tunisia's anti-corruption commission has lamented that the judiciary and public prosecutor routinely ignore cases referred to them.³¹⁶ However, a recent influx of judges with specific training in anti-corruption law (and who are not remnants of the Ben Ali era) has enhanced the Commission's prospects of success.³¹⁷



6 Disclosure and Transparency

6.1 Remuneration of high-level public officials: disclosure laws

Corruption is often the product of conflicts of interest on the part of political decision makers to whom discretion has been granted. Most democracies require high-level public officials to disclose their assets, sources of income and liabilities in a register of interests of some type. Typically, the public officials who are required to furnish such information are those whose positions put them at the greatest risk of succumbing to improper influence. Included in this group are judges, tax officials, customs officers, police and members of tender boards.³¹⁸ In some countries, public officials are also required to disclose the assets, incomes and liabilities of members of their immediate families. For convenience, this section refers to all such obligations as disclosure requirements.

Disclosure requirements serve three purposes related to anti-corruption efforts. First, the very fact of compulsory disclosure conveys a positive message about the government's commitment to transparency and accountability.³¹⁹ Second, a functioning system of disclosures should put the authorities on notice of public officials who appear to be leading lifestyles or holding assets that cannot be explained by their legitimate sources of income. In theory, such information should better facilitate the detection and prevention of corruption. Third, and perhaps most important, disclosure laws can remove legal barriers to the effective prosecution of corrupt public officials. As is discussed in the introduction to this report, many countries have created an offence of illicit enrichment, defined in article 20 of UNCAC as 'a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income'. The offence of illicit enrichment, when coupled with a legal obligation for public officials to declare their assets and incomes, can be an effective weapon in a prosecutor's arsenal. A sudden and inexplicable increase in a public official's wealth raises a presumption that he or she has engaged in corrupt activities, even if, as is often the case, the exact nature of those activities cannot be ascertained.³²⁰

Increasingly, disclosure requirements have found expression in constitutions. As part of Ghana's transition to democracy in 1992, public office holders came under a constitutional duty to declare their assets and liabilities. Article 286 of the Constitution of Ghana, 1992, requires a public officer holder to 'submit to the Auditor-General a written decla-

ration of all property or assets owned by, or liabilities owed by, him whether directly or indirectly —(a) ... before taking office; ... (b) at the end of every four years; and (c) at the end of his term of office.’ Paragraph 5 specifies which public officials are subject to the disclosure requirement. Among their number are the president of the republic, the vice-president, the speaker, members of parliament, the chief justice, the heads of government ministries, the heads of public corporations, and ‘such officers in the public service and any other public institution as Parliament may prescribe’. Declarations must be produced for a court of competent jurisdiction or a commission of inquiry, on demand. Failure to declare, or knowingly making a false declaration, triggers an inquiry under article 287, which provides for an investigation of alleged contraventions by the commissioner for human rights and administrative justice. The list of public officials subject to the disclosure requirement was expanded by the Public Office Holders (Declaration of Assets and Disqualification) Act, 550 of 1998.

The Constitution of Uganda, 1995, also mandates the declaration of assets by public officials. Article 233 requires that parliament establish a ‘Leadership Code of Conduct for persons holding such offices as may be specified by Parliament’. Paragraph (2)(a) further provides that ‘[t]he Leadership Code of Conduct shall ... require specified officers to declare their assets, incomes and liabilities from time to time and how they acquired or incurred them, as the case may be’. The Inspectorate of Government is tasked with enforcement of the Leadership Code, including the disclosure requirement (Constitution of Uganda, 1995, article 234). To comply with the constitutional directive, the Ugandan parliament passed the Leadership Code Act, 17 of 2002. Under the Act, anyone occupying a position of ‘leadership’ must fully disclose his or her assets. The class of persons subject to the disclosure requirement is extremely broad, encompassing the president, presidential aides, diplomats, politicians, judges at all levels, the national executives of political parties, civil servants, members of tender boards, all members of the armed forces and police officers (Leadership Code Act, Second Schedule). Section 4(1) of the Act further expands the scope of the disclosure requirement by imposing a disclosure obligation on the spouses, children and dependants of leaders. The Code’s coverage is so broad that in 2003, approximately 10,000 ‘leaders’ were issued with disclosure forms.³²¹

The regularity with which leaders have flouted their obligations under the Code highlights the importance of effectively policing compliance with a disclosure law. In 1998, the Inspector-General of Government (IGG) reported that five cabinet ministers, 123



parliamentarians and 12 judges had not complied with the Code's disclosure requirement.³²² When the Code was finally amended in 2002 to impose harsh penalties for non-compliance, including the possibility of dismissal and the loss of one's seat in parliament, the level of compliance with the disclosure requirement rose to 88 per cent.³²³ Such harsh sanctions comport with the United Nations recommendation that, 'to be effective, sanctions against non-disclosure or against false reporting must be approximately as severe as those against the underlying corruption.'³²⁴ Otherwise, '[a]n official who has enriched himself unjustly will be motivated to conceal the criminal proceeds in any reporting document because the consequences of non-disclosure would be significantly less painful than those of disclosure.'³²⁵

A question that countries with disclosure regimes have had to confront is whether to extend the obligation to disclose to the immediate family members of high-level public officials. On one view, the spouses and children of such officials have a legitimate expectation of privacy, notwithstanding the fact that they stand in close relation to a public official, and it is therefore inappropriate to subject them to a disclosure requirement. On the other hand, it is widely acknowledged that corrupt public officials will often hide ill-gotten gains in the name of their spouse, children and extended family. Indeed, the Ghanaian disclosure requirement has been criticized precisely because it does not extend to family members of public officials, even though '[e]xperience has shown that some public officials in [Ghana] do hide some of their property in the names of other persons, especially relatives, children and spouses.'³²⁶

A point of contention is whether the public should be given access to information held in a register of interests. Some countries, such as the UK, grant unrestricted access to the register; in others, only a monitoring body has access to the declarations.³²⁷ In countries where disclosure obligations extend to public officials' families, public access is usually limited to declarations of public officials only.³²⁸ As part of the 2002 reforms to Uganda's Leadership Code, the contents of declarations were made publicly available on request to the IGG's office. In Uganda, where the number of officials required to declare can be up to 10,000 in any given year, the reclassification of asset declarations as public information was motivated as much by pragmatism as by a desire for transparency. The head of the IGG implored 'members of the public [to] help [his] office in verifying [whether] what a leader has declared is true or not.'³²⁹ As the Ugandan case demonstrates, making asset disclosures freely available can alleviate the administrative burden on agencies tasked with

verifying the disclosures, by harnessing the manpower of the public at large. At the same time, open access gives the public a direct stake in the fight against corruption.

The overall experience with disclosure laws in Africa and elsewhere suggests that adequate coverage of high-risk public officials and effective enforcement mechanisms may hold the key to their success. In some countries, disclosure obligations do not extend to those holding important offices at the sub-national level. In Tanzania, the only sub-national officers required to disclose are district and regional commissioners.³³⁰ Similarly, in Ghana and Uganda, chief administrative officers and presiding members of district assemblies, respectively, are required to disclose their assets and liabilities, but other regional office holders are not.³³¹ Furthermore, under some disclosure regimes, certain classes of public officials are exempted altogether. In Ghana, officers in the armed forces are not among those required to disclose their assets and liabilities, either under the Constitution or the Public Office Holders Act.³³² By contrast, the Tanzanian and Ugandan regimes extend to high-ranking military officers.³³³

Another problem with existing disclosure regimes is that the enforcement procedures are often weak. As already noted, in Ghana, violations of the declaration requirement trigger a mere investigation by the commissioner for human rights and administrative justice, who ‘may take such action as he considers appropriate in respect of the results of the investigation or the admission’ (article 278). Problematically, the Constitution does not elaborate on what action the commissioner may take and whether it includes, for example, the power to dismiss or recommend the prosecution of a demonstrably corrupt official.

6.2 Freedom of information laws

Almost all liberal democracies have enacted freedom of information laws that entitle citizens to access information held by government, and as many as 90 states now recognize a constitutional right to information.³³⁴ One of the rationales for creating a statutory or constitutional right of access to information is that public officials will be deterred from engaging in corruption if information regarding their activities is available for inspection.³³⁵ Furthermore, where corruption does occur, it is more likely to come to light if citizens, as well as government bodies, are given the legal tools to expose maladministration and wrongdoing. Indeed, the recent ‘expenses scandal’ in the United Kingdom has



shown that effective use of freedom of information legislation can expose corruption on a vast scale, even in democracies regarded as stable and relatively free of corruption. In 2011, records obtained after a four-year long freedom of information request revealed that British members of parliament had systematically misused expense allowances to subsidize lavish lifestyles for themselves and their families.³³⁶ This section analyses the use of freedom of information laws in historically corrupt countries, as well as the recent trend in favour of constitutionally entrenching the right to information.

A recurring criticism of freedom of information laws is that the categories of information exempt from production are so numerous and nebulous that it is almost always possible for public officials to deny access to requested information without a legitimate reason. International best practice indicates that exemptions should be narrowly drawn and drafted in such a way that they cannot be used as a pretext for the concealment of wrongdoing or information that merely embarrasses the government. One of the most misused exemption categories is national security. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995) counsel that security-related restrictions on the right to information should only ever be put in place when they have the ‘genuine purpose and demonstrable effect of protecting a legitimate national security interest’, as distinct from ‘interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest’ (principle 2).

In 2005, India enacted a robust freedom of information regime in response to growing concerns over corruption and dissatisfaction with both the Official Secrets Act, 19 of 1923, and the Freedom of Information Act, 5 of 2003, which had hitherto placed tight restrictions on access to government information.³³⁷ The predecessor Freedom of Information Act was riddled with exemptions. It permitted public officials to refuse requests not only because of the sensitivity of the information concerned, but also because disclosure would necessitate ‘unreasonable diversion of the resources of a public authority’ (section 9(a)). The Right to Information Act (RTI Act), 22 of 2005, overhauled the entire regime and abolished the worst of the exemptions. The Act declares in its preamble that ‘democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed’. Under the RTI Act, any citizen can

request information from a 'public authority', which is defined broadly to include not only public agencies, but also private bodies 'substantially financed' by the central or state governments (section 2(h)). Information is also defined in broad terms to encompass documents, records, notes, extracts and electronically stored data (section 2(j)). Central and State Information Commissions have the power to impose a financial penalty of 250 rupees per day on public officials who unjustifiably refuse to grant access to requested information (sections 19(8)(a)(c), 20(1)). Unlike most other freedom of information laws, the RTI Act does not include open-ended grounds for refusing access. Exemptions are limited to information the disclosure of which would impinge on national security or sovereignty, information suppressed by court order, trade secrets and commercially confidential information, information that would impede ongoing criminal investigations, and a few other narrowly drawn exemptions (section 8(1)). Furthermore, even with respect to exempted information, public authorities have the discretion to release information 'if public interest in disclosure outweighs the harm to the protected interests', and almost all exemptions are automatically lifted after 20 years from the date of the event recorded in the information (sections 8(2)–(3)). In addition, insofar as information held by intelligence and security agencies pertains to allegations of corruption and human rights violations, such information is not subject to exemption (section 24(1)).

The RTI Act is one of the most progressive freedom of information laws on the statute books of any country, and the emerging data suggest that it has already succeeded in reducing corruption to a significant extent. According to a recent study of the RTI Act's impact on 20 Indian states over the three-year period 2005 to 2008, the Act, after controlling for extraneous factors, has led to a statistically significant reduction in both the actual level and the perception of corruption in the states concerned.³³⁸ The authors concluded that 'the RTI Act explains approximately 62% of the actual decline in corruption in Bihar over the period 2005–2008' – a particularly striking finding, given that Bihar is reportedly one of the most corrupt states in India.³³⁹ The RTI Act has been so successful in part because it encourages ownership of the corruption issue at the grassroots level, by handing even indigent citizens the power to compel the production of information at no cost. Although the Act allows public agencies to charge a modest fee for access to information, it prohibits them from doing so if an applicant can prove that he or she is below the poverty line (section 7(5)).



Some countries have elevated the right to information to the constitutional level. The South African Constitution, 1996, creates a broad-based right of access to information, the inclusion of which signalled a break with the claustrophobic secrecy of the former apartheid regime.³⁴⁰ Article 32 provides that '[e]veryone has the right of access to —(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.' The article further provides in paragraph 2 that '[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state'. The relevant enabling legislation is the Promotion of Access to Information Act, 2 of 2000 (PAIA). The Act creates a statutory right of access. Like the Indian Act, the PAIA creates a right of access to records held by private bodies, except that the right is tied to whether the retrieval of the record is required for the exercise or protection of rights by any person, rather than the private body's funding by government (section 50(1)). Furthermore, the Act provides for external (judicial) as well as internal appeals against decisions refusing access to information (sections 74–82).

Constitutionally entrenching the right to information, while symbolically significant, will not by itself empower the citizenry to expose corruption. In South Africa, although the Constitution creates a generous right to information, the right has been undermined by the mixed results of requests for information lodged under the PAIA. A 2013 report on the Act's effectiveness found that 66 per cent of requests for information lodged by civil society organizations were refused that year. The most common grounds of refusal were that the records did not exist or could not be found (44 per cent), that disclosure would compromise the mandatory protection of third-party commercial information (36 per cent), and that the request was 'manifestly frivolous or vexatious' or would, if granted, result in a 'substantial and unreasonable diversion of resources' (12 per cent). Worse, some departments did not respond to initial requests for information or appeals against decisions refusing access.³⁴¹

6.3 Analysis of existing Arab frameworks

6.3.1 Tunisia

The Tunisian Constitution of 2014 provides for the compulsory declaration of assets by certain high-ranking public officials. Article 11 provides:

All those who assume the roles of President of the Republic, Head of Government, member of the Council of Ministers, or member of the Assembly of the Representatives of the People, or member of any of the independent constitutional bodies or any senior public position, must declare their assets according to the provisions of the law.

As is apparent from the provision, the precise details of the disclosure regime have been left to ordinary legislation. Accordingly, it is for the Assembly to decide on the exact nature, extent and frequency of disclosure, as well as the procedure for declaring assets and the punishment, if any, for non-compliance. Because members of the Assembly are themselves subject to the disclosure requirement, this puts them in the awkward position of deciding how forthcoming and transparent they will be regarding their own financial profiles. In addition to circumscribing its own disclosure obligations, the Assembly can limit the range of officials to whom the law applies. Article 11 states that the disclosure obligation is borne by the occupants of 'any senior public position', but apart from referring specifically to members of 'independent constitutional bodies', the article does not provide any criteria for determining who fits that description. Presumably, the article leaves that contentious point to the Assembly to decide. Another feature worthy of note is that article 11 refers only to asset disclosures. It does not expressly require that the named public officials disclose their liabilities or unofficial sources of income, even though this information is equally relevant in determining whether public officials are susceptible to bribery or have illicitly enriched themselves. Finally, the law may prove easy to circumvent because it does not impose a disclosure requirement on the family members of senior public officials.

The Tunisian Constitution also enshrines a 'right to information', but provides little guidance as to its scope or content. Article 32 provides: 'The state guarantees the right to information and the right of access to information and communication networks'. The Constitution does not elaborate on what type of information falls within the scope of the right, the procedures for obtaining access to information held by government agencies, or how, if at all, the right can be limited. The scope of the constitutional right to information is made even less certain by article 49, which provides that '[t]he limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence', and that limitations may be imposed 'based on the requirements of public order, national defence, public health or public morals'. Given the breadth of the limitations clause, it is likely that a great deal of information relevant to the discovery of corruption will fall outside the scope of the right to information.



6.3.2 Egypt

The Egyptian Constitution of 2014 imposes disclosure obligations on a limited range of public officials. Article 145 obliges the president to ‘submit a financial estate disclosure upon taking office, upon leaving it, and at the end of each year of service’. Article 166 imposes the same requirement on the prime minister and members of government. In addition, members of the House of Representatives are required to submit ‘financial estate disclosures’ on taking their seats, at the end of each year, and at the end of their terms (article 109). The Constitution further requires that, in the case of the president, the prime minister and members of government, all disclosure statements must be published in the Official Gazette. In each case, the relevant constitutional provisions provide that the estate disclosures ‘shall be regulated by Law’. These provisions are under-inclusive. Problematically, they do not reach the many public officials whose line of work makes them acutely vulnerable to bribes and illicit enrichment. Furthermore, it is unclear why the Constitution does not require the estate disclosures of ordinary legislators to be published in the Official Gazette, together with those of the president and cabinet ministers.

Article 68 provides that ‘[i]nformation, data, statistics and official documents are the property of the People and the disclosure thereof from their various sources is a right guaranteed by the State for all citizens’. Further, ‘[t]he State is committed to provide and make them available to citizens in a transparent manner’. However, as with the constitutional provision on the disclosure obligation, article 68 provides that ‘[t]he Law shall regulate the rules for obtaining them and terms for their availability and confidentiality; the rules for their deposit and storage; and the rules for and the filing of complaints against the refusal to provide them’. The deferral of such matters to legislation gives the legislature free rein to impose the kind of open-ended exemptions, prohibitive fees and burdensome access procedures that can frustrate the purpose of a freedom of information regime.

6.3.3 Morocco

Article 158 of the Moroccan Constitution of 2011 provides that:

Any person, elected or appointed, assuming a public office must make, in accordance with the modalities established by the law, a written declaration of assets and credits held by them, directly or indirectly, from the commencement of functions, in the course of service and at the cessation of it.

The Moroccan Constitution leaves the details of the disclosure requirement to subsequent legislation. As was discussed above in relation to the Tunisian and Egyptian provisions, deferring the details of a disclosure requirement to legislation is problematic, because it creates uncertainty regarding such pertinent details as the scope of the requirement, whether the obligation to disclose will apply to family members, and how regularly public officials must declare. On the other hand, the language of the provision is slightly more expansive than that of its Tunisian counterpart. It applies to ‘any’ elected or appointed public official, without any specification as to seniority. However, like the Tunisian provision, article 158 does not compel the declaration of liabilities and extraneous sources of income, and nor does it mandate public access to disclosure statements.

Article 27 provides a limited right of access to information:

The citizens [feminine] and citizens [masculine] have the right of access to information held by the public administration, the elected institutions and the organs [organismes] invested with missions of public service.

The right to information may only be limited by the law, with the objective of assuring the protection of all which concerns national defence, the internal and external security of the State, and the private life of persons, of preventing infringement to the fundamental freedoms and rights announced in this Constitution and of protecting the sources and the domains determined with specificity by the law.

Although the provision makes a commendable effort to narrow the range of permissible reasons for refusing access to information, the final part of the article, which envisages the refusal of access for the purpose of ‘protecting the sources and the domains determined with specificity by the law’, contemplates a much broader range of exclusions than those previously enumerated.

6.4 Options for the Arab region

Disclosure requirements

- Consideration should be given to imposing a constitutional requirement on specified public officials to declare their assets, liabilities and unofficial sources of income, as well as those of their immediate family members, on a recurring basis.

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- Consideration should be given to granting limited or full public access to the disclosure statements of public officials. Legitimate privacy concerns may justify restrictions on public access to the disclosure statements by family members.
 - A constitutional minimum standard should be set for the content of asset declarations; those public officials to whom the disclosure requirement applies should be specified, as should the frequency of disclosure and the sanctions for non-compliance. Punishment for non-compliance with disclosure requirements should be comparable to the sanctions imposed for corruption itself.
 - A disclosure regime should be created that extends not only to legislators and high-level executive officers such as cabinet ministers, the prime minister and the president, but also to public officials whose duties put them at high risk of corruption. The class of high-risk public officials includes, but is not limited to, judges, revenue officials, customs officers, police officers, officers in the armed forces and officials involved in public procurement.

Freedom of information laws

- Consideration should be given to entrenching a right of access to information in the constitution and to mandating the enactment of a freedom of information law to give effect to the right.
- Open-ended exemptions should be omitted and public officials prohibited from refusing disclosure.
- Indigent individuals should be exempt from having to pay access fees.

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Comparative constitutional law is at the heart of democratic development. Legal scholars, policy makers, constitutional drafters, judges and advocates all over the world have looked to other jurisdictions for ideas on how their own challenges can be addressed and to better understand which reforms are likely to be successful in their own countries. Since 2011, at least 10 countries in the Middle East and North Africa have either replaced, reformed or reconsidered their constitutional frameworks. In that context, national, regional and international institutions have contributed to the legal scholarship that already existed by bringing the knowledge that has been developed in other jurisdictions closer to the region.

This report, which was produced by the Center for Constitutional Transitions, International IDEA and the United Nations Development Programme examines what more can be done by national constitutions to improve anti-corruption frameworks, in particular by exploring how national institutions should be coordinated to reduce the opportunities for corruption. The report studies existing frameworks within the region, including some of the new constitutions that were drafted since the uprisings began in late 2010, as well as a large number of comparative examples from other jurisdictions, to determine what lessons exist for the broader region.

International IDEA
Strömsborg
SE - 103 34 Stockholm
Sweden
Tel: +46 8 698 37 00
Fax: +46 8 20 24 22
Website: www.idea.int

Center for Constitutional Transitions
School of Law
University of California, Berkeley
Boalt Hall
Berkeley, CA
94720
USA
Website: constitutionaltransitions.org

United Nations Development Programme
2 Hegaz Street
Heliopolis, Cedare Building
Cairo – 11737
Heliopolis Bahary, Egypt
Tel: +20 22 45 35 603
Fax: +20 22 45 35 602
Website: www.undp.org