

ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

ANTI-CORRUPTION CLAUSES IN CONSTITUTIONS

QUERY

Could you provide examples of countries that have integrated anti-corruption clauses in their constitution and provide examples of such provisions?

PURPOSE

Egypt is in the process of drafting a new constitution and we would like to know what anti-corruption measures could be advocated for.

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SUMMARY

There is a broad consensus that the constitutional design of a country can either promote or hinder anti-corruption reforms. Corruption can be addressed implicitly in the constitution by setting up a well-functioning governance framework that provides for the rule of law, separation of power and fundamental freedoms, among others.

In addition, corruption can also be addressed explicitly by including corruption specific clauses in the constitution. Such provisions can refer to integrity and the primacy of public interest as governing principles of the state, explicitly proscribe corruption and mandate the state to combat it and/or cover issues relating to the integrity and accountability of public officials. Some constitutions also provide for the creation of a specialised anti-corruption body.

There is a growing trend towards introducing specific anti-corruption constitutional clauses and constitutions from countries like the Philippines, Thailand, Singapore, Kenya, and Pakistan. Uganda and Nepal deal with corruption of high officials through constitutional measures.

1 INTEGRATING ANTI-CORRUPTION CLAUSES IN CONSTITUTIONS: OVERVIEW OF ISSUES

While there are different views on whether corruption should be dealt with as a constitutional issue, there is a broad consensus in the literature that the constitutional design can positively or negatively affect the success of anti-corruption reforms (Jing 2007). For example, a comparative analysis of the institutional and constitutional designs of Hong Kong and mainland China argues that the constitutional framework is an important factor that contributed to the success of Hong Kong's anti-corruption agency – along with the agency design and the anti-corruption strategy – especially in terms of promoting the rule of law and protecting civil liberties (Manion 2004).

In principle, the constitution is generally understood as a general framework that limits state power through the separation of powers and the protection of fundamental rights and leaves the solution of specific social problems to the legislative process (Sajo). Therefore, traditionally, anti-corruption measures are left to legislation.

In addition, in countries where constitutions adhere to a set of fundamental principles and provide for well-functioning governance mechanisms, corruption can in principle be effectively prevented and addressed by the overall governance framework set out in the constitution. Such a framework typically includes provisions ensuring the rule of law, an effective separation of powers, an independent judiciary, accountability and transparency of the state, control mechanisms of the various branches of the state, and basic political freedoms and civil rights, such as freedom of expression and association, freedom of the press, access to information and participation, among others (Olaya and Hussmann 2013).

It also establishes the primacy of public interest as a governing principle of the state and public powers. In such countries, as corruption is implicitly addressed by organising the state through a constitutional structure that tackles incentives for corruption, some authors argue that is not always necessary to include explicit provisions to prohibit and combat corruption (Olaya and Hussmann 2013, Ackerman).

However, as corruption of public officials (in the

broader sense of abuse of entrusted power for private gain) can undermine rule of law and efforts to establish democracy, as well as the ability of public officials to serve the public interest, there is a growing trends towards introducing explicit anti-corruption related clauses in recent constitutions (Sajo). In addition, as corrupt officials may have few incentives to pass and implement strong anti-corruption laws, the constitution could include provisions covering corruption of high-level officials, for example under a general section on public integrity.

While few constitutions explicitly address the issue, constitutions that have been enacted in the last two decades in developing countries have provisions that are closely related. There is no best practice in this regard, as the constitutional experience is context specific and not easily transferable from country to country. There are several options for addressing corruption in constitutional provisions, through explicit or implicit anti-corruption provisions. For example (Olaya and Hussmann 2013; Sajo):

- Some countries like Nigeria explicitly commit the state to combatting corruption by including provisions such as “the state shall abolish all corrupt practices and abuse of power”. However, such an approach of explicitly proscribing corruption is used less frequently than other approaches.
- Other countries such as Colombia and Argentina include a broad reference to integrity and the primacy of public interest as governing principles of the state.
- Kenya and the Philippines have a special section covering integrity and accountability of public officials and related issues.
- In other countries such as Pakistan and Nepal's constitutions create institutions to monitor and investigate public integrity/corruption matters.
- Other countries like Bolivia's constitution includes a duty for all citizens to report corruption (Olaya and Hussmann 2013).

Overview of relevant implicit constitutional anti-corruption provisions

General principles and values

General principles outlined in the constitution set the

ground for creating an ethical public environment. Corruption relevant guiding principles include (Olaya and Hussmann 2013):

- The primacy of public interest
- Principles governing the public administration, referring to values of effectiveness, efficiency, transparency, impartiality, accountability and integrity, among others
- Principles and values for citizens, including participation, transparency and accountability

Separation of powers

A well-developed system of separation of powers (check and balances) is also a fundamental aspect of the governance framework for preventing corruption. This can include establishing independent supervisory and oversight bodies and institutions, special procedures of impeachment in case of crimes (including corruption) or constitutional violations by chief elected officers, special tribunals, parliamentary investigative committees and accounting bodies (auditor, controller, supreme audit institution, etc.). A strong judiciary also contributes to effective separation of powers and is a fundamental aspect of a sound governance system for preventing corruption.

A review of the April 2013 draft Tunisian constitution makes specific recommendations on the institutional arrangements to ensure independence and accountability of the various institutions and branches of the state including the executive, the legislature (and the sensitive budget process), the judiciary, audit and other independent oversight and control bodies that can be relevant to other contexts (Olaya and Hussmann 2013).

More generally, the principle of separation of powers can be enshrined in the constitution in different ways – which are not mutually exclusive (Olaya and Hussmann 2013):

- This can be set by an explicit mention of the separation of powers as a principle governing the functioning of the state, which can provide guidance and serve as a reference for reviewing the constitutionality of specific measures.
- The separation of powers can also be guaranteed *de facto* in designing the structure of the state, with explicit definition of the functions

and responsibilities of each branch of the state; election, designation and nomination procedures for the heads of the main state institutions; and funding and financial management to ensure independence of the various institutions.

- Constitutional provisions of most democratic countries also introduce rules of incompatibilities and ineligibilities as a way to safeguard the underlying democratic principle of separation of powers. For example, the constitution of countries such as the US, Switzerland, Portugal and Brazil prohibit performing several political functions simultaneously, such as concurrent membership in the government and parliament (Venice Commission 2012). Similar restrictions exist for judicial posts.
- The inclusion of legitimate mechanisms for dissent and opposition can also support effective separation of powers, through control mechanisms exercised via participation. This can include citizens' participation beyond voting rights and the existence of multiple political parties and their legitimate right to express alternative views.
- It is also important to ensure constitutional control of all acts of all state branches to ensure that constitutional principles are effectively enforced.
- Legitimate constitutional reform mechanisms should be established, including providing for participatory mechanisms to validate changes with citizens.

Immunities, pardons and amnesties

Special immunities and privileges are granted to guarantee the necessary level of independence to the various branches of power and avoid the arbitrary use of the law to impede public officials in exercising their functions. However, when immunities are abused, they can also limit accountability and fuel impunity of high-level officials. To strike a balance in this regard, there is a growing consensus that immunity should not be absolute, and that a regime of exceptions and the possibility of waiving immunity should be considered (Ogbodo 2011). There are several options in this regard (Olaya and Hussmann 2013; Sajo):

- Restrict the duration of immunity, usually to the term in office and forbid lifetime immunity.
- Provide exceptions to immunity, particularly for

crimes against humanity. If corruption (and other criminal activities) is a major danger to society, the constitution might provide for mandatory loss of political rights if guilt is established.

- Introduce mechanisms to avoid abuse, whereby for example, lifting the immunity of high-level officials can be issued by another branch of the state.

Similarly, pardons and amnesties are usually mentioned in the constitution but can be abused by those who grant them (“self-pardoning”). Banning pardons for corruption related crime could be considered (Sajos). In any case, any form of pardon should be transparent and granted for reasons determined by the law (Olaya and Hussmann 2013).

Fundamental rights

As already mentioned, there are fundamental rights that contribute to strengthening the anti-corruption set-up of a given country, including (Olaya and Hussmann 2013):

- The right to access to information and the duty of public authorities to provide such information. While limits can be set, they should be clearly determined in the law and justified by clear and transparent criteria.
- Freedom of association and freedom of expression are important to expose corruption, and should be guaranteed in the constitution, with a set of explicit criteria to determine legitimate limitations and the opportunity to challenge restrictions of these rights.
- The right of participation of all citizens.
- The freedom of the press.
- Equality and non-discrimination in all its forms, including gender equality.

Specific anti-corruption provisions

As already mentioned, in addition to specific anti-corruption clauses that explicitly proscribe corruption and commit the state to combat it, some constitutions may include specific clauses governing the integrity of public officials, the integrity and transparency of political processes, and/ or establish specialised anti-corruption bodies.

Integrity and transparency of public officials

At the constitutional level, public interest should be

the underlying principle governing the duty of public officials. Mechanisms of transparency and integrity should be applicable to all public officials in all branches of the state, including the president, ministers, members of parliament and court officials, as required by the UNCAC (Olaya and Hussmann 2013). A number of mechanisms can be envisaged in this regard:

- Declaration of assets by officials and their immediate and extended family members at regular intervals, when entering and upon leaving office, or on a yearly basis is common practice in many countries (Olaya and Hussmann 2013, Sajo).
- In some countries, the constitution also foresees the adoption of codes of conduct for all public officials, and mandates an independent agency to enforce compliance. For example, the 1999 Nigerian constitution mandates public officers to observe and conform to the code of conduct (Ogbodo 2011).
- Conflict of interest provisions can be envisaged to prevent undue influence of vested interests on public officials’ dealings, and ensure that the public interest prevails over private interests in the exercise of public functions. This can include restrictions on simultaneously performing sensitive public or private sector activities, or imposing disclosure requirements of private interests and/ or recusals from specific public activities (e.g. voting, participating in debates or committees, etc.) on issues where there may be a conflict of interest (Venice Commission 2012).
- Explicit inclusion of certain types of corruption as grounds for impeachment of the head of state and government, supreme court justice and other high officials can also be considered (Sajo).
- Establishing full transparency of public spending and revenue, including through the publication of all government accounts, independent audits and free access to public records can also be required by the constitution (Sajo).

Integrity and transparency of political life

As already mentioned, the constitution should establish constitutional mechanisms for enabling political opposition to express dissenting opinions, including freedom of expression and the right to join and establish political associations. Some countries

guarantee political opposition by imposing the appointment of representatives of the opposition in certain positions, such as oversight institutions and parliamentary committees, among others (Olaya and Hussmann 2013).

In addition, as corruption in elections and of political parties may undermine political processes, special constitutional measures may be included to ensure transparency and integrity of political life, including rules governing the electoral process and party system and the establishment of an electoral body (Olaya and Hussmann 2013). This can include provisions relating to the regulation and monitoring of the funding of political parties and campaigns, public funding of campaigns or imposing public disclosure or contributions.

The constitution may also make it mandatory that elections resulting from corrupt practices be voided and that the people involved in such practice be ineligible for re-election a period of time (Sajo). While banning parties involved in corruption is extremely harsh, denial of public funding as determined by the law in countries that opt for public funding of parties may be an option.

The constitution should also guarantee the independence of the electoral oversight body, with appropriate mechanisms in terms of appointment, tenure and replacement.

Anti-corruption institutions

The creation of a specialised anti-corruption body is not necessarily the best option, especially if the constitution provides for strong, independent and accountable control and oversight institutions, such as supreme audit institutions, auditor general and parliamentary committees, as well as for a strong, independent and accountable judiciary. However, the constitution can also provide for the establishment of a specialised anti-corruption agency (Sajo) and foresee the creation of special tribunals, constitutional or high court empowered to try high officials. For example, Nepal provides for a constitutionally mandated body.

Irrespective of the institutional set-up selected for control and oversight bodies, there should be special requirements for staffing and operations of such bodies to ensure competence, transparency and

independence as well for preventing abuse of special anti-corruption measures (e.g. abuse of anti-corruption agencies as political tools). In particular, special attention should be given to ensuring (Olaya and Hussmann 2013):

- A clear and explicit mandate, especially with regard to functions such as monitoring/reviewing assets declarations, promotion of public ethics, guidance and oversight of conflicts of interest, coordination of anti-corruption programmes and strategies, among others. If the mandate of the institution is to investigate and prosecute corruption, it should not clash or overlap with other law enforcement institutions.
- A clear and transparent appointment process, status and (fixed) tenure of the head of the institution, specified in the constitution and preferably not coinciding with the political cycle of government.
- Transparent, merit-based appointments of officials.
- Transparency of budget and operations.
- Accountability for results and use of resources.

2 COUNTRY EXAMPLES OF CONSTITUTIONAL ANTI-CORRUPTION PROVISIONS

A number of countries like the Kenya, Pakistan, the Philippines, Thailand, Uganda and Singapore deal with corruption through specific constitutional measures.

The 2010 Kenyan constitution

Recent anti-corruption reforms in Kenya have been centred around the “new” Kenyan constitution which was adopted in 2010 as part of the government’s governance reform and has integrated a number of implicit and explicit anti-corruption related clauses.

In terms of the separation of powers and the protection of fundamental rights, a number of provisions in the constitution decentralise government and allow for stronger checks and balances to curb corruption. For example, the new constitution deepens the separation of the executive and legislative branches of government by making parliament more accountable, increasing scrutiny over state finances, prohibiting MPs from serving as

cabinet ministers and allowing parliament to exercise independent oversight of the executive branch. The power of the executive is constrained by a system of checks and balances that can overrule the decision of the president.

In terms of fundamental freedoms, the [constitution](#) explicitly guarantees freedom of the press and freedom of expression, as well as freedom of association and assembly. It also grants citizens access to information held by the state. In terms of political rights, citizens are free to make political choices, which include forming or participating in political parties' activities and have the right to free, fair and regular elections based on universal suffrage.

Chapter VI of the constitution explicitly covers leadership and integrity related issues. Among other provisions, this chapter sets principles and ethical and accountability standards for all state and public service offices and officials and enumerates conduct required from public officials, including objectivity and impartiality, selfless service based on sole public interest, declaration of conflicts of interest, and allows for dismissal/ disqualification from holding any other state office of state officials found in contravention of these rules. The new constitution also offers certain guidance regarding gifts and hospitality.

Article 79 also calls for the establishment of an Ethics and Anti-corruption Commission responsible for enforcement of the integrity in leadership chapter of the constitution, ensuring a legal basis and access to resources as a constitutional body.

The full text of the Kenyan Constitution can be accessed [here](#).

The 2007 Thai constitution

The current constitution of the Kingdom of Thailand was drafted by a committee established by the military junta that abrogated the previous 1997 constitution, and was adopted in 2007.

The 2007 constitution provides for fundamental freedoms and liberties with provisions on the freedom of expression, the press, assembly and association. The constitution also encourages public participation in the determination of public policies and entails

provisions about access to public information.

Chapter XI on constitutional organisation provides for the establishment of a number of control institutions, including an independent electoral commission, the State Audit Commission, three ombudsmen, the National Human Rights Commission and the National Counter Corruption Commission (NCCC). Among other duties, the NCCC has the power to investigate cases of unusual wealth involving politicians and state officials. It is responsible for verifying the accuracy and actual existence, as well as changes of assets and liabilities of political office holders, and supervising and monitoring the morals and ethics of persons holding political positions.

The Thai constitution also includes a number of specific corruption related clauses under the chapter XII on inspection of the exercise of the state powers. In particular, office holders of key positions have to declare particulars of assets and liabilities of themselves, their spouses and children to the National Counter Corruption Commission upon taking or vacating office. The constitution also includes conflict of interest provisions for members of the House of Representatives, senators, the prime minister and ministers. Parts 3 and 4 of chapter XII allow for the removal from office and criminal proceedings of public officials, in particular in the case where the prime minister, a minister, member of the House of Representatives, senator or other political official among others has been accused of becoming unusually wealthy, corruption, malfeasance in office or a dishonest act in performing his or her duties.

Chapter XIII of the constitution sets ethical standards for persons holding political positions, government officials or state officials, in accordance with the established code of ethics. It calls for a mechanism and system that ensures the effective enforcement of the codes and provides for punishment procedures for each degree of violation. It also establishes the merit-based appointment of public officials, including the transfer, promotion and elevation of the salary scale and punishment.

The full text of the Thai constitution can be accessed [here](#).

The 1987 Philippines constitution

Article XI of the 1987 Philippine constitution explicitly covers accountability of public officers, and states that “public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty and efficiency, act with patriotism and justice, and lead modest lives.”

The president, vice-president, members of the constitutional commissions and the ombudsman may be removed from office on impeachment for bribery and graft and corruption.

The constitution mandates the anti-graft court known as the *Sandigan-bayan* to continue to function and exercise its jurisdiction, while creating the independent Office of the Ombudsman.

Public officers are required to submit a declaration under oath of their assets, liabilities, and net worth. In the case of the president, the vice-president, the members of the cabinet, the congress, the Supreme Court, the constitutional commissions and other constitutional offices, and officers of the armed forces with general or flag rank, these declarations are disclosed to the public. No loan, guarantee, or other form of financial accommodation may be granted by any government-owned or controlled bank or financial institution to the president, the vice-president, the members of the cabinet, the congress, the Supreme Court, the constitutional commissions and the ombudsman, during their tenure.

The state is also entitled to recover properties unlawfully acquired by public officials or employees.

The 1987 Philippines constitution can be accessed [here](#).

Examples of anti-corruption provisions in MENA constitutions

Morocco

Article 36 of the July 2011 constitution mandates the state to prevent and sanction conflicts of interest and financial related violations with an explicit mention of the use of public resources, public procurement, and management of public institutions. It also established an anti-corruption agency, which is responsible for the coordination, monitoring and implementation of

anti-corruption policies.

A full chapter of the constitution is dedicated to good governance. It sets values and principles guiding public officials, including accountability and independence of good governance institutions. Public officials are required to declare their assets, but there is no mention of a review mechanism.

The Moroccan constitution can be accessed [here](#).

Algeria

The 1996 constitution modified in 2002 and 2008 also contains corruption related clauses. Article 8 requires the creation of institutions mandated to protect the national economy from any form of embezzlement or misappropriation, illegitimate monopolising or seizure. Other provisions forbid nepotism, abuse of power, or using public institutions for private gain or as a source of enrichment.

The 1996 Algerian constitution can be found [here](#).

Egypt

Article 11 of the 2012 constitution mandates the state to safeguard ethics, public morality and public order, among others. The constitution also establishes a number of independent bodies, with common provisions on independence, reporting, appointment of heads, appointment and dismissal of personnel. In particular, Article 204 creates the National Anti-Corruption Commission, which has the mandate to combat corruption, deal with conflicts of interest, promote and define the standards of integrity and transparency, develop and implement the national anti-corruption strategy in coordination with other independent bodies and supervise the concerned agencies.

The 2012 Egyptian constitution can be found [here](#).

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