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Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

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Zaid Al-Ali (International IDEA) & Richard Stacey (Center for Constitutional Transitions)

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**Egyptian Constitutional Reform
and the Fight against Corruption**

Zaid Al-Ali & Michael Dafeel

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Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

This Working Paper Series, “Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia”, stems from the constitution building processes in Egypt and Tunisia in the wake of the Arab Spring. As one of the primary international institutions supporting constitution building in both countries, **International IDEA** commissioned leading international experts to produce research papers on specific issues of constitutional design on the agenda of the constitutional assemblies of Tunisia and Egypt.

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“Egyptian Constitutional Reform and the Fight against Corruption”

Abstract

This paper addresses the question of how a constitutional text can contribute to a commitment to prevent and eliminate corruption. It was originally prepared as part of the Egyptian Constitutional Drafting Manual presented to members of the Egyptian Constitutional Assembly during 2012. Its purpose, in that context, was to provide members of the Constitutional Assembly with an overview of the deficiencies of the 1971 Egyptian Constitution in establishing an anti-corruption framework. The paper has since evolved, as the Constitutional Assembly completed its work in November 2012 and the new Constitution for the Arab Republic of Egypt went into force in December 2012. The paper’s focus is now an investigation of the strengths and weaknesses of the 2012 Constitution, as compared to both the 1971 Constitution and Egypt’s experience under it, and international constitutional trends in the fight against corruption. The paper draws its comparative examples from the Middle East, Africa, and India. It offers an initial assessment of the 2012 Constitution by detailing the advantages and disadvantages of the various approaches reflected in these international examples, the 1971 Constitution, and the 2012 Constitution. In particular, the paper focuses on (i) state budget procedures, (ii) the public procurement system, (iii) the legislature’s oversight of the executive and oversight of the legislature itself, (iv) the Supreme Audit Institution, (v) the independence of the judiciary, (vi) the independence of the prosecuting authorities, (vii) an anti-corruption ombudsman, and (viii) human rights and corruption.

Authors

Zaid Al-Ali is Senior Adviser on Constitution-Building in the Arab region at **International IDEA**, and is based in Cairo. He was previously a legal adviser to the United Nations Assistance Mission to Iraq and to the United Nations Development Programme (Iraq Office), where he advised on constitutional, parliamentary, and judicial reform. Mr. Al-Ali has written extensively on constitutional reform in the Arab region. His publications include: *The Struggle for Iraq’s Future: After the Occupation, Fighting for Iraqi Democracy* (Yale University Press, New Haven 2014, forthcoming); *The Iraqi Constitution: A*

Contextual Analysis (Hart Publishing, Oxford 2014, forthcoming, with Jörg Fedtke); “Constitutional Drafting, National Uniqueness and Globalization”, in Thomas Fleiner, Cheryl Saunders and Mark Tushnet (eds), *Handbook on Constitutional Law* (Routledge, London 2012, with Arun Thiruvengadam); “Constitutional Drafting and External Influence”, in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, Cheltenham 2011); and “Constitutional Legitimacy in Iraq: What role local context?”, in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford 2011).

Michael Dafeel is a legal researcher at the South African Institute for Advanced Constitutional Law at the University of Johannesburg, South Africa. He acted as a research fellow at **International IDEA** in Cairo, Egypt, a fellowship sponsored by **Constitutional Transitions**. His research focus during this period was the decentralization of power, the independence of the judiciary and anti-corruption frameworks, in the context of the constitutional transformation of the Middle East and North Africa region.

Egyptian Constitutional Reform and the Fight against Corruption

Zaid Al-Ali & Michael Dafel

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Part I: Introduction and overview

1. Introduction

Corruption weakens a constitutional democracy. It obstructs the enjoyment of political and social rights, and it undermines the principles upon which democratic and free societies are based. It is for this reason that constitutional drafters should determine how best to insulate a constitution from corrupt government practices; and, because constitutions are not self-executing, it is imperative that drafters provide sufficient constitutional protection to the institutions that are responsible for its enforcement and protection.

The Arab Spring, and the 25th of January Revolution that ended Hosni Mubarak's authoritarian hold over power in Egypt, presented the Egyptian people with a rare opportunity to design a constitutional order from the ground up. Power was transferred from Mubarak to the military on 11 February 2011, following weeks of protests and demonstrations in Tahrir Square and around Egypt. The military leadership suspended the 1971 Constitution two days later. A Constituent Assembly was assembled to draft a new constitution for Egypt, and despite complaints about its composition and interruptions from the Supreme Constitutional Court, the Constituent Assembly completed its work and voted to approve a draft Constitution on 30 November 2012. After popular approval at a referendum held on 15 and 22 December (64 per cent voting in favor, with a 33 per cent voter turnout), President Mohamed Mursi promulgated the new Constitution of the Arab Republic of Egypt on 26 December 2012 (the 2012 Constitution).¹

The 1971 Egyptian Constitution serves as a prime example of how a constitution can be undermined by corrupt practices if the mechanisms that are responsible for its protection are weak and susceptible to political influence. There is little question that the 25th of January Revolution was caused in no small part by the corruption that took place during the period in which the 1971 Constitution was in force. Given the demands of the 2011 uprising, it is unsurprising that the drafters of a constitution for a post-authoritarian Egypt would seek to establish a constitutional framework for the prevention and elimination of corruption. Indeed, the Preamble to the 2012 Constitution refers to the rejection in Tahrir Square of "plunder, corruption and monopoly".

The purpose of this paper is to present an initial assessment of the anti-corruption measures established in the 2012 Constitution, and in particular to compare these measures to those included in the 1971 Constitution and to locate the 2012 Constitution's anti-corruption framework in Egypt's political and historical context. The paper is comparative in another sense too, setting out options for, and approaches to, anti-corruption mechanisms adopted in a selection of post-authoritarian and post-colonial constitutions, spanning the Middle East (Turkey (1982) and Iraq (2005)), Africa (South Africa (1996) and Kenya (2010)), and India (1949). These Constitutions were selected owing to (i) Egypt's geo-political connections to countries in the region; (ii) their relatively contemporary nature (apart from India); and (iii) the fact that they each incorporate relatively modern anti-corruption frameworks.

Constitutions need not contain specific provisions relating to corruption. In most constitutional democracies, the anti-corruption framework consists of provisions located in different parts of the constitution, including sections governing policy formation and implementation, oversight, judicial independence, and so on. The 2012 Egyptian Constitution takes this approach, with principles and mechanisms bearing on combatting and controlling corruption included in the Preamble and a handful of discrete provisions throughout the text.

Of course, the important elements of a constitutional anti-corruption framework can be arranged and structured in numerous ways to provide transparent, accountable and fair government. This paper is primarily intended to highlight the similarities and differences between the arrangements of the 2012 Egyptian Constitution, and those in constitutions elsewhere in the world. While this paper will point out

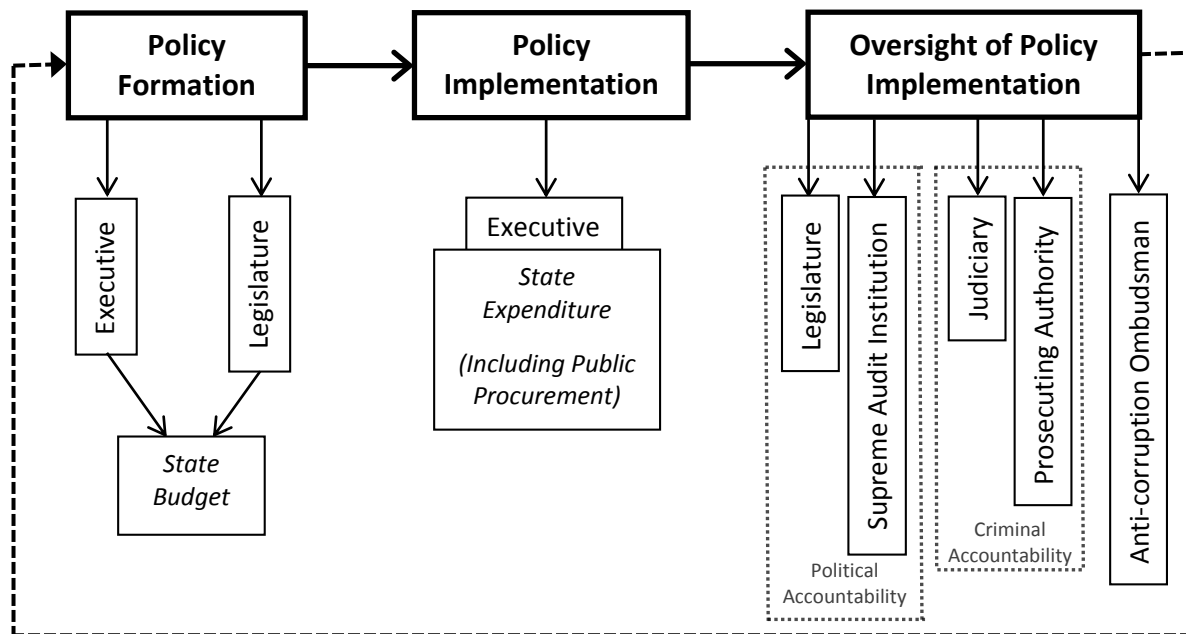
where the specific arrangements chosen in Egypt depart notably from international best practice or raise cause for concern, it is difficult to predict whether these arrangements will deliver the Preamble's emphatic rejection of corruption or not. It is worth noting, however, that the 2012 Constitution reproduces verbatim a number of provisions of the 1971 Constitution.² As with the old Constitution, success under the new Constitution will depend to a large degree on the extent to which public officials are committed to the principles of transparent, fair and accountable government, and the enthusiasm with which public officials, private individuals and the press bring the Constitution's anti-corruption measures to bear on those guilty of graft and greed.

2. Constitutional framework for the oversight of policy: Overview

Broadly stated, constitutions adopt a three-stage process relating to the formulation and implementation of policy:

- (i) The first stage is the formulation of state policy. This exercise is usually led either by the council of ministers, the prime minister's office, or by the ministry of planning, depending on the country in question. After the government draws up its policy for the coming year, that policy must be reflected in the annual state budget law (which is drafted by the ministry of finance), which dedicates specific resources to specific projects. As soon as the draft law is approved, it is submitted to the legislative branch of government, which is required to review, debate and amend the draft (to the extent that it is allowed to do so by the relevant constitutional framework) and finally to approve it;
- (ii) Thereafter, the executive is responsible for the implementation of the approved policy. This is done principally through the expenditure of public funds, which is itself regulated by a number of mechanisms and laws to prevent waste and fraud. For example, in situations where the government is required to retain the services of private sector service providers (for example in relation to the construction or management of a public institution), public procurement laws will determine the manner in which contracts should be awarded;
- (iii) Finally, a number of institutions are responsible for overseeing the implementation of policy, with a view to ensuring that it is done efficiently and with as little graft as possible.

The purpose of this process is to encourage the establishment of a responsive and accountable government. Oversight can and should be used to improve the formulation of future policy, and it also reinforces political and criminal accountability. The following diagram seeks to capture the entirety of that process:



Combating corruption is thus not exclusively, or even primarily, a function of establishing anti-corruption mechanisms. This paper recognizes that eliminating corruption is, in addition, a function of achieving the goals of transparent, fair and accountable government. In this light, the paper does not focus only on mechanisms for the prevention or elimination of corruption, but investigates the broader constitutional context in which policy is formulated and implemented, and how public officials responsible for doing so are overseen and held to account for their actions. The discussion is accordingly organized into the three sections that follow: Part II looks at processes of policy implementation and formulation, noting that the process should entail a transparent, accountable and participatory approach particularly during the formulation of the state budget. At the implementation stage, the paper discusses public procurement and the need to ensure state contracts are awarded in a fair and transparent manner. Part III looks at oversight mechanisms, discussing four institutions that are responsible for overseeing executive and legislative conduct: the legislature, with the assistance of an audit institution, ensures that the executive is politically accountable for their decisions and conduct; and the judiciary, with cases initiated by a prosecuting authority, ensures criminal accountability within both the legislature and the executive. Finally, Part IV discusses the role of institutions that are not necessarily part of the traditional three branches of government. The paper discusses the advantages and disadvantages of an independent anti-corruption ombudsman in Egypt's anti-corruption framework. Part IV concludes by briefly indicating how human rights can assist in improving the oversight of policy implementation.

Part II: Policy formulation and implementation

1. Procedures for the approval of the state budget

A country's annual state budget is more than just a law, and is more than a series of numbers. It reflects the government and therefore the state's policy for the coming year, and is designed to allocate available resources to allow for the implementation of that policy. The budget law is therefore one of the more important pieces of legislation that any state (including the Egyptian state) will pass in any given year. In

practice, the drafting of the annual state budget law is almost always led by the government and in particular by the ministry of finance. The manner in which the ministry manages that process is dictated either by tradition, government regulations, law or sometimes even by the constitution, depending on the country.

As a result of the process's importance and the potential for abuse, most modern constitutions include specialized procedures for the approval of the annual state budget. These procedures are largely motivated by a desire to promote a transparent, accountable and participatory approach for the approval of a state budget. This section compares the advantages and disadvantages of a complex and entrenched approach, on one hand, or a relatively flexible approach that defers the regulation of the procedure to an institution, such as the legislature, on the other hand. This discussion flows into an assessment of the 2012 Constitution: but first, an overview of the previous Constitution's regulation of the budget is needed.

The 1971 Egyptian Constitution stated that the People's Assembly had the legislative power to approve the state budget (Art. 86), and the Assembly was provided with some procedural safeguards to exercise this power. Article 115 required the budget to be presented to the legislature at least 3 months before the commencement of the next fiscal year. In theory, the impact should have been to provide parliamentarians with sufficient time to study the draft budget law, to debate its provisions, to consult with their constituents and to suggest changes. Article 115 also stipulated that both the legislature and the executive had to agree on the source of revenue to account for an increase in expenditure. The rationale was that such a measure would help to prevent deficit spending, an important goal given Egypt's perennially strained public finances. Furthermore, Art. 121, with the aim of controlling public debt, required that the executive had to obtain the approval of the legislature if it intended to obtain a loan. Given that the Egyptian parliament was dominated by the National Party, which was also in control of the government, the requirement that the legislature provide its approval was largely a formality.

These safeguards were, however, limited to the legislature's approval of the budget. Article 115 concluded by stating that the method for preparing the budget should be regulated by law. In practice, prior to 2011, this resulted in the monopolization of the drafting process by the Ministry of Finance. There are seemingly two reasons for this, and it is important to note that it was not necessarily due to a conscious decision motivated by the Finance Ministry's desire for control. First, there was limited inter-governmental interaction with respect to the preparation of the budget as individual budgets were usually created without other ministries being thought of or consulted. Second, although ministries were required to submit ministerial budgets, many ministries did not have the capacity to produce reasonable expenditure requests based on a review of previous budgets and the forecast of future projects.³ They often made unrealistic requests which in turn caused the Finance Ministry to take control of the process. The result was a deeply centralized and opaque policy formation process. This contributed to the inefficiency of public resources in Egypt over a period of decades.

In theory, the process established in a constitution for the approval of a state budget could be as simple as the passing of an ordinary bill, or it could be made more complex by adding requirements of public involvement, the creation of monitoring bodies/committees, the participation of all organs of state, timing, the procedure for the preparation of the annual budget, and the form of debate that must occur in the legislature before the approval of a budget. A survey of constitutions reveals a wide continuum of available options:

South Africa	Kenya	Turkey
<p>Sections 214-215 adopt a deferential approach by requiring that legislation be enacted to regulate the entire procedure. It does, however, stipulate that the budget should be allocated on an equitable basis and proceeds to indicate which factors must be considered to ensure equitability.</p>	<p>Sections 215-216 and 220-221 adopt a more process-entrenched approach by not only requiring that certain procedures be followed, but also requiring the creation of a commission tasked with reviewing the state budget to ensure that revenue is fairly distributed.</p>	<p>Article 162 requires the establishment of a specialized parliamentary committee to review the budget. All political parties that are in the Grand National Assembly must be represented in the same proportion in the committee, although the ruling party will at a minimum be allocated 25 of the 40 seats.</p>

The tendency in modern constitutions is to impose additional requirements and safeguards during the drafting of the annual state budget law to promote a more accountable and fair process. The importance of distributing public revenue equitably almost demands it. The entrenchment of these procedural safeguards can serve an additional purpose when the political landscape is dominated by a single political party. Such entrenchment ensures that the procedure cannot be easily amended in favor of the ruling political party, and that minority parties will at least always have a platform to publically raise concerns. Enshrining specific procedures in the constitution itself underlines the importance of that process and instills in the political culture a sense that the procedure should be respected and not subjected to ordinary political pressures.

The disadvantage of including specific provisions in the constitution is that processes become inflexible and are therefore not easily adaptable to changing circumstances. This is particularly concerning in countries that are either in transition, that regularly experience political deadlock or have limited qualified personnel to manage complex bureaucratic procedures. For example, the 2005 Iraqi constitution provided that over 60 laws should be passed on key issues (including on how the judicial sector should be organized and how the second chamber of parliament should be composed). Very few of these laws have been passed. Some states, particularly in highly divided societies that suffer from ineffective governance frameworks, fail to draft budget laws year after year either because of a lack of consensus between political forces or as a result of a failure to satisfy whatever initial requirements are imposed by law. The impact is that constitutional legitimacy is damaged: because the political process or the state is incapable of meeting the constitution's requirements, its provisions are no longer considered to be completely binding and can be set aside whenever it is considered convenient to do so.

The 2012 Constitution lies towards the less prescriptive end of the continuum of constitutional rules for budget approval, leaving some important procedural matters to be regulated by law and leaving some other procedural matters unclear. Article 115 of the 2012 Constitution states the general principle that the legislature's lower house, the Council of Representatives, "is responsible for approving the state's general policy, the public plan for economic and social development and the annual state budget law". Article 116 is somewhat prescriptive as to the content of the budget law, stipulating that the budget must include "all revenue and expenditure without exception"; but allows also that "the provisions of the budgets of institutions, public bodies, and their accounts" may be defined by law. It is not clear the extent to which laws passed in terms of the latter clause may affect or frustrate the requirement that all revenue and expenditure be reflected on the budget.

In regard to procedure, Art. 116 requires the draft budget law to be introduced 90 days before the beginning of the next financial year, and requires chapter-by-chapter approval in the Council of Representatives. The Council may modify expenditures (except those intended to honor a specific debt), and need only seek the agreement of the government when modifications result in an increase of total expenditure. It is not clear how this agreement is to be reached, or what the procedural rules are for determining when agreement has been reached. For example, must the government vote, and if so, what majority of the government is needed? Does the Prime Minister or the Minister of Finance make the decision? Must the President countersign such agreement? Further, it is not clear whether the details of the agreement between the legislature and the government are covered by the clause in Art. 116 which states that “the method of budget preparation” is “defined by law”.

Article 101, setting out legislative procedure generally, requires that every bill be referred to a “specialized committee of the Council of Representatives, which studies it and submits a report to the Council”. Presumably this is the case with the draft budget law as well. Further, Art. 102 provides that no draft law can become law unless passed by both the Council and the upper chamber, the Shura Council. Each chamber must be given an opportunity to study each bill passed by the other chamber. Again, these provisions presumably apply to the draft budget law; but the provisions in Art. 116 that the budget is not considered in effect unless approved by the Council of Representatives leaves it open to interpretation as to whether only the Council of Representatives need approve the budget, or if approval by the Council of Representatives is a necessary, but not sufficient, condition of budget approval. In any case, it would seem that the Shura Council enjoys none of the powers to amend or modify the budget that the Council of Representatives does, and may at most only vote to approve or reject the draft budget law.

While Art. 116 deals with the approval of the annual budget for the coming fiscal year, Art. 121 establishes provisions for submitting the final account of the previous fiscal year to the Council of Representatives. The final account must be accompanied by the annual report of the Central Auditing Organization (see below, Part III, § 2), and the Council votes chapter-by-chapter whether to approve the final account.

The procedures and rules established in these articles of the 2012 Constitution are substantially the same as those established by the 1971 Constitution. Under the 1971 Constitution, however, the policy formation process in Egypt fell far short of the ideals of democratic, fair, accountable and transparent government. It seems a mistake to simply adopt the same provisions and the same procedures. At the same time, however, there is wisdom in refraining from entrenching too many detailed procedures and firm rules in the Constitution, given that Egypt remains in transition and that much remains uncertain, particularly the manner in which the coming political process will function in practice. The model that the 2012 Constitution constructs may be flexible enough to allow adaption to fluctuations in Egypt’s political system, yet constitutionally entrenched in a way that does not allow manipulation or centralized control of the state budget.

Perhaps the largest contributors to policy failure under the 1971 Constitution were not so much the Constitution’s rules for budget approval as the pervasive lack of transparency and accountability in government and the lack of access to state information. The budgetary process should not be seen in isolation from the rest of the constitutional system, and the extent to which state finances are protected from corruption and manipulation will depend, in addition, on rules for political opposition and public scrutiny of the government’s budgetary decisions, oversight, and monitoring processes.

2. The state's public procurement system

Public procurement is a vital component of any country's ability to successfully implement policy. States, and in particular developing countries, will not always have the resources and capacity to implement a project, and sometimes it is more cost-effective to outsource implementation. The awarding of public contracts is, however, always susceptible to corruption. These two features should require drafters of any constitution to contemplate the regulation of public procurement to curb the improper awarding of state contracts.

The 1971 Egyptian Constitution did not deal specifically with public procurement, but did require that public expenditure be regulated by law (Art. 120). In that context, Law 88/1998 creates what appears in theory to be a strong framework for public procurement. The law requires that the awarding of contracts should be based on the principles of "rationality, equal opportunity, and free competition". It sets further rules, including: (i) a requirement that public contracts be awarded by means of public bidding, local auction, or direct contract – although there are exceptions that must be fully justified by the department invoking the exception; (ii) prohibitions on the state negotiating a bid once the tender process is opened; (iii) requirements for the public disclosure of reasons if a bid is cancelled; and (iv) mechanisms for monitoring the personal assets of officials involved in procurement processes. Additionally, a specialized committee was established with the task of supervising the implementation of state-awarded contracts (Law 89/1998). A significant shortfall of Law 88 is that it does not set time limits for selection committees to meet, make decisions and announce them.⁴ Despite these laws, public procurement in Egypt was riddled with corrupt practices. This is owing to a variety of reasons including: (i) a general lack of transparency in the awarding of state contracts; (ii) a culture of not investigating allegations of corruption; (iii) the persecution of whistle-blowers and journalists; and (iv) the difficulty in gaining access to state information that details corruption.

Thus, despite a relatively solid legal framework on public procurement, corruption can nevertheless thrive. The question is therefore what should be done to tighten the screw on corruption. Many modern constitutions have taken to including guiding principles from which the state's public procurement system may not derogate. Section 217 of the South African Constitution requires the system to comply with the values of fairness, equitability, transparency and cost-effectiveness. Section 227 of the Kenyan Constitution repeats similar qualities, but also allows the state to provide preferential treatment to certain categories of people and impose sanctions when contractors fail to perform adequately. These two Constitutions opt for a flexible approach which allows legislative discretion to choose procedural requirements based on need and capacity. In theory, a constitution could also adopt a more concrete approach by establishing procedural requirements to safeguard the state contracting system. This could include requirements relating to advertising, timing, the composition of the selection personnel, and monitoring committees.

On the basis of these international experiences, two broad options are available in regulating public procurement:

- (i) One possibility is to elevate specific procedures traditionally included in ordinary legislation to the level of a constitutional principle. For example, the constitution provides that public contracts must be awarded by means of a public bidding process, except in certain specific circumstances that are set out in the constitution. The disincentive to this approach is that including specific procedures in a constitution introduces inflexibility to the system. If the constitution is overinclusive, it could result in certain provisions being violated routinely, damaging the constitution's legitimacy.

- (ii) Another possibility is to adopt a value-oriented approach, as in South Africa and Kenya. This approach has the impact of guiding any future attempt at regulating public procurement by parliament or government. It is however not a panacea. Legislators and courts are left with the responsibility of interpreting general constitutional procedures and translating them into specific procedural steps. The result is far from certain.

Owing to the threat of corruption in a public procurement system, Egypt would have done well to consider a combination of these two approaches. In this area too, however, Egypt's Constituent Assembly has merely re-enacted the provisions of the 1971 Constitution. Article 118 of the 2012 Constitution provides that the "basic rules for collection of public funds and the procedures for their disbursement is regulated by law". Article 120 reproduces Art. 121 of the 1971 Constitution in providing that the executive cannot "commit itself to a project entailing expenditure from the state treasury for a subsequent period" except with approval from the Council of Representatives. It would seem that Law 88/1998 and Law 89/1998, or something like them, will continue to play the most significant role in regulating and controlling public procurement in Egypt going forward. A great deal would thus seem to depend on how willing the legislature is to impose on government a legislative scheme that reduces opportunities for personal enrichment through procurement, the extent to which such contracts are overseen by independent bodies, and the controls that the Constitution sets up over the personal accounts and finances of members of both the executive and the legislature.

3. Finances

The 2012 Constitution departs from the 1971 Constitution in a significant respect, in setting out guidelines for the management of the finances of the president, the members of the government and members of the legislature.

Article 138 provides that the President's finances will be stipulated by law, and imposes strict limitations on the other sources of income and remuneration the President may receive. Similar prohibitions are given in Art. 88 with respect to members of both chambers of the legislature and Art. 158 with respect to the government. This much was included in the 1971 Constitution (Arts. 80-81), but no more. Article 138 of the 2012 Constitution goes on to provide that the President "must submit to the Council of Representatives a financial disclosure upon taking office, upon leaving it, and at the end of each year". Further, if the President receives cash or in-kind gifts, they are transferred to the state treasury. Similar provisions are laid out for the Prime Minister and the members of government (Art. 158) and the members of the legislature (Art. 88).

These provisions are a welcome addition to the constitutional framework for the prevention and elimination of corrupt practices. They make it far easier for the Council of Representatives to scrutinize the financial affairs of the President and the members of the government, as well as members of the legislature itself. A common form of corruption is in government procurement of goods and services from commercial enterprises in which members of the government or legislature have an interest. These provisions should help to ensure that procurement is not used as a tool of personal enrichment by public office-bearers.

Nevertheless, there is some cause for concern in the fact that all three of these sections provide in their final clause that "the foregoing is organized by law". The 2012 Constitution does not make it clear, for example, whether the reports submitted to the Council by the President, ministers and members of the legislature must be made public. Allowing this important element of a system of financial disclosure to be regulated by law may allow the legislature to ensure, wittingly or unwittingly, that government corruption

goes unnoticed and unpunished. The terms of Art. 120, further, state that the executive cannot commit itself to a project entailing expenditure without the approval of the Council of Representatives. This provision is intended to allow the Council of Representatives to ensure that no state funds are improperly disbursed, and it stands as a good protection against corrupt expenditures as long as the details of public officials' financial interests are publicly available. Were a member or members of the Council of Representatives to have interests in companies with which the government was contracting, those members would face a conflict of interest when asked to approve those contracts. Without public disclosure of those interests, however, the provisions of Art. 120 become less meaningful.

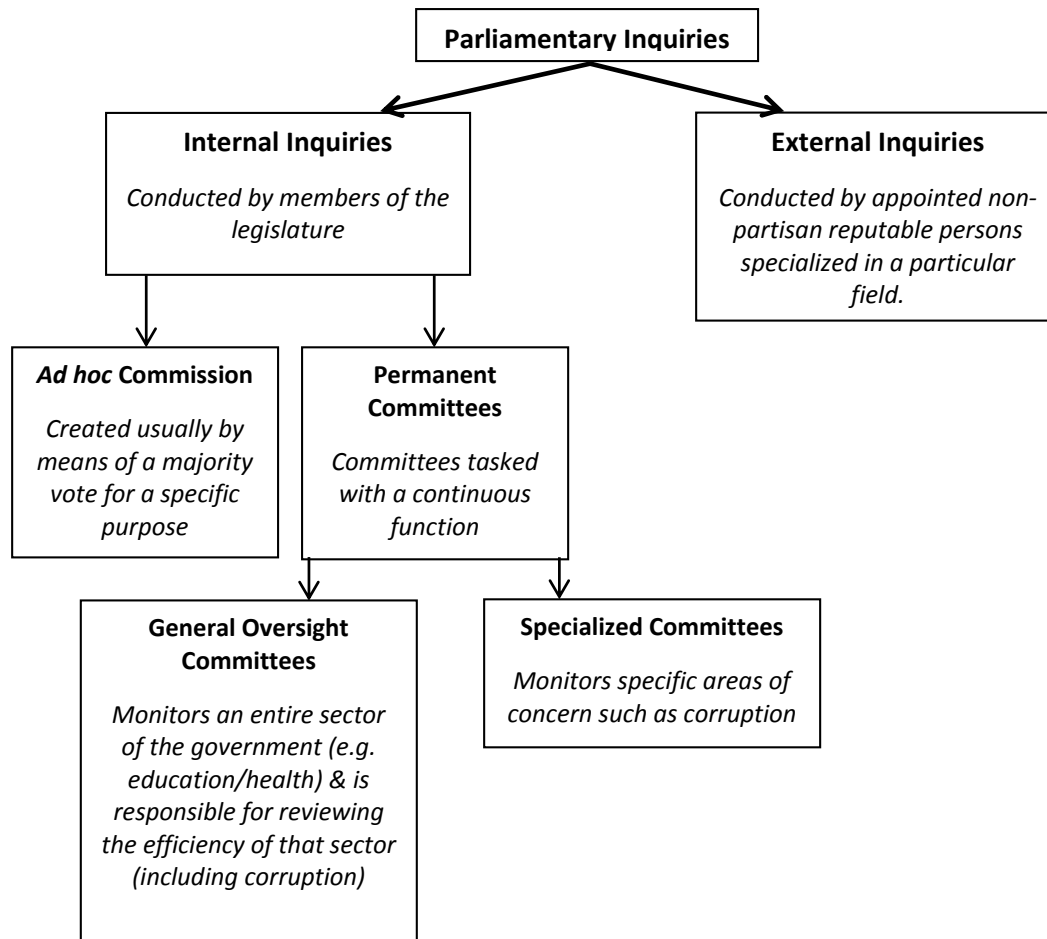
Part III: Oversight

1. Increased oversight by the legislature

The ability of a legislature to effectively monitor and control the conduct of the executive is a prerequisite in a constitutional democracy. Various procedures have developed worldwide, but the most common means of control include: (a) the legislature's power to approve government policy; (b) the ability to remove the president or cabinet ministers through a vote of no confidence; (c) procedures for the dissolution of parliament; (d) providing an adequate platform for minority views; and (e) the power of the legislature to investigate executive conduct. This section focuses on the last of these processes. A legislature's ability to exercise political accountability, including accountability for corrupt government practices, is contingent on its capacity to obtain informed and reliable information on the government's activities.

Prior to the 2011 uprising, Egypt had been dominated for many years by a one-party state. As would be the case in any country, this affected the legislature's control mechanisms over the executive. In Egypt, this was exacerbated by the fact that the semi-presidential system was tilted in favor of the President. Article 86 of the 1971 Constitution stated that the role of the legislature was to "exercise control over the work of the executive authority in the manner prescribed by the Constitution". A significant legislative function in this regard was the discretionary power to initiate parliamentary inquiries into the executive's conduct. Article 131 allowed the formation of *ad hoc* commissions or the utilization of an existing committee to monitor the economic, financial, or administrative aspects of an administrative department, administrative institution, or administrative or executive organ for purposes of reporting back to the People's Assembly. Unsurprisingly, as a result of the fact that the parliament was dominated by the same party that dominated the executive, parliamentary inquiries had close to no impact on curbing corruption.

There are various options available for implementing a legislature's powers to investigate the executive. The diagram below seeks to broadly illustrate these options.



Comparative experiences illustrate the various options that are available. Section 125 of the Kenyan Constitution provides the legislature with an unrestricted power to investigate the executive. It states that either house of Parliament or any of the committees in either house has the power to call any person to appear before a committee to either give evidence or provide information. In Tunisia, the current Rules of Procedure of the Tunisian National Constituent Assembly mandate the creation of the Administrative Reform and Anti-Corruption Committee. Rule 72 states that the Committee is tasked with considering issues relating to financial and administrative corruption, the redemption of stolen public funds, and the monitoring and updating of managerial development techniques.

The respective advantages of *ad hoc* and permanent parliamentary committees are set out below:

Advantages of <i>ad hoc</i> committees (including external commissions of inquiry)	Advantages of permanent parliamentary committees
<ul style="list-style-type: none"> ▪ Membership could be selected based on specific expertise in the area that is being investigated. ▪ Financial and other resources are only required when the commission is established. ▪ Their creation is subject to thresholds, which prevents frivolous investigations. 	<ul style="list-style-type: none"> ▪ These committees are not only concerned with after-the-fact inquiries, they are also engaged in preventative strategies. ▪ Their composition could be constitutionally regulated which could include rules relating to minority party representation and the removal of members. ▪ Their permanent nature is less susceptible to political influence. ▪ Their creation is not subject to political will (a majority vote in the legislature is not required if a particular committee is mandated by the constitution). ▪ There is a build-up of knowledge and skills.

Some constitutions also require additional procedures when the conduct of certain high ranking governmental officials is investigated. For instance, section 100 of the Turkish Constitution indicates that, when investigating the Prime Minister and ministers, the majority of the Grand National Assembly must approve the investigation which will in turn establish a 15 member parliamentary investigatory committee (drawn by lot, but proportionally representing the political parties in the Assembly). The committee's investigations are presented to the Assembly, and an absolute majority vote will result in the relevant Minister being brought before the Supreme Council.

The 2012 Constitution describes powers that both chambers of the legislature possess. These are listed in Arts. 105-109, and include members' rights to propose a topic for discussion to the Prime Minister or member of the government, and the right of 20 members of the Council of Representatives or ten members of the Shura Council to request "clarification of the government's policy". Both chambers can request the presence of the Prime Minister or the government, presumably through a resolution supported by a majority of the chamber concerned. The members of the government are obliged to attend if so summoned by either chamber.

The Council of Representatives is specifically empowered to form special investigative committees from its membership or entrust its existing committees to investigate the activities of administrative departments, institutions or public enterprises (Art. 122). Such a committee is given wide powers to collect evidence and call individuals to answer questions. Article 122 provides further that "[a]ll executive and administrative bodies respond to demands by the committee and put under its disposal all the documents and evidence required." Articles 123-125 establish procedures and rules by which the Council of Representatives can submit questions to the Prime Minister or the members of the government, request an urgent briefing or statement from the Prime Minister or the government in relation to matters of public importance, or address "interrogations" to the Prime Minister or the government, which is to be followed within seven days by a debate in the Council of Representatives. It is perhaps telling that Art. 126, which follows these provisions, sets out the procedures for the withdrawal of confidence from the

government. This is the legislature's ultimate sanction against the government, and an important mechanism by which it can hold the government to account. There are no similar provisions governing the relationship between the Shura Council and the government. It seems that the Council of Representatives will bear the primary responsibility for government oversight under the terms of the 2012 Constitution.

While the 2012 Constitution thus contemplates a handful of mechanisms that the legislature can use to investigate the conduct of public officials, these mechanisms are all internal to the legislature, relying on legislative committees and members of the legislature. The lack of opportunities for external, independent investigation of the government's activities may undermine the Constitution's effectiveness in exposing corruption.

A further concern is that the 2012 Constitution does not clearly set out how these committees' investigations are to be initiated. It seems that committees must first be charged with a specific investigatory mandate, by a decision or resolution of the entire Council of Representatives. Investigations into the executive can be done easily if a constitution allows committees to establish investigations on their own accord. Adding legislative thresholds, in the form of the need for formal Council resolutions before existing committees can investigate government conduct or for the establishment of *ad hoc* commissions, makes the initiation of inquiries more difficult. However, there are benefits to these thresholds. These safeguards protect against frivolous investigations that are motivated by a desire for political gain. Also, the constant threat of a parliamentary inquiry could inhibit the proper functioning of the executive.

Egyptian constitutional tradition has always called for a strong executive that is virtually unaccountable to the legislature. The provisions detailed above are largely consistent with the corresponding provisions of the 1971 Constitution. While measures intended to allow legislative oversight should be balanced by the need to prevent political gridlock and allow the government to continue implementing its policy regardless of any specific investigations, it seems unlikely that the provisions of the 1971 Constitution provide a good model for striking this balance.

2. Central Auditing Organization

Although parliaments are almost always constitutionally obligated to oversee the government's performance, parliamentarians themselves do not have the capacity to carry out this work on their own. Governments, particularly in Egypt, consist of hundreds if not thousands of departments and units that a few hundred parliamentarians (who in any event are already busy legislating and meeting with their constituents) could not possibly hope to cover. Parliaments the world over are therefore forced to rely on other institutions to provide them with information which they can use to challenge government. The media can sometimes play an important role, but to rely exclusively on the media to carry out parliamentary oversight is to invite controversy, given that the media is often subject to specific and special interests. As a result, parliaments tend to rely on a supreme audit institution (SAI) which, significantly, is the only institution in the policy overview process that not only has automatic access to public revenue and expenditure accounts, but also has the necessary knowledge and skills to effectively review state expenditure. The legislature's capacity to effectively monitor and control the executive is therefore directly dependent on the SAI's ability to provide informed and truthful audited reports on the activities of the executive. Importantly however, it is also dependent on the constitutional and legal framework that is in place in the country: often SAIs are required to report not to the legislature but to the executive, which reduces their capacity to effectively audit the government's performance. Getting the framework right is vitally important to ensuring effective parliamentary oversight of the government.

The Central Auditing Organization (CAO) served as Egypt's public auditor under the 1971 Constitution. This body was not constitutionally entrenched or protected, and its mandate and powers were determined by ordinary legislation. Egyptian law stated that the CAO was to be an independent and transparent organization, but the CAO has proved susceptible to political influence and control. The legal framework reflects that the body is subordinate to the President, and the legislature has very little oversight of the functioning of the CAO. Furthermore, the President was entitled to extend the term of the Auditor-General (Law 157/1998, section 20), audited financial statements did not comply with international standards, and reports of the CAO were usually not made public as they were submitted only to the President, and to the legislature only if the legislature made a request to a specific department.⁵

Egyptian constitutional tradition is out of step with international best practice on this point. The inclusion of the Central Auditing Organization among the "Independent Bodies and Regulatory Agencies" in Part IV of the 2012 Constitution – and indeed the creation of independent and regulatory bodies at all – is a timely and welcome addition to the Egyptian constitutional framework. This being said, Art. 205, which pertains to the Central Auditing Organization, is exceedingly brief. It states only: "The Central Auditing Organization has control over state funds and any other body specified by law". The implication here is that, while the existence of the CAO is safeguarded by its constitutionalization, most of the details of its operation are still left to be determined by ordinary law.

Articles 200-203 deal generally with the independent bodies and regulatory agencies, and provide some detail of how they should be managed in practice. Article 200 states that the CAO and the other institutions defined in Part IV "have legal personality, neutrality, and technical, administrative and financial autonomy". The article goes on: "These independent bodies and agencies are consulted about draft laws and regulations that relate to their fields of operation". Article 202 is far more concerning: it provides that "[t]he President of the Republic appoints the heads of independent bodies and regulatory agencies upon the approval of the Shura Council". Given that the President appoints ten per cent of the Shura Council's members as per Art. 128 of the Constitution, the President has been given unfair and unjustifiable leverage over the appointment process of all independent agencies, including the CAO. Given that each of these agencies, particularly the CAO, is designed to oversee the executive's work, it is both inappropriate and worrisome that the executive should have so much power to interfere in their work.

A preferable approach would be to place the CAO, or another SAI, under the authority of the legislative branch or to require the judicial branch to approve all audited statements. Section 181 of the South African Constitution provides that the Auditor-General is an independent institution which is accountable only to the legislature, and all organs of state are prohibited from interfering with its functioning. Section 194 provides the legislature with limited means to exercise accountability by establishing high thresholds for removal of the Auditor-General. The Auditor General is appointed for a non-renewable period of between five and ten years (section 189). The Turkish Constitution adopts a different approach. Article 160 establishes a specialized Audit Court in the judicial branch that is responsible for approving audited statements.

Regardless of which branch of government the SAI is accountable to, it is imperative that a certain degree of autonomy is provided to the SAI to render the institution sufficiently insulated from political forces. Most modern constitutions establish a relatively autonomous SAI by explicitly setting out (i) the SAI's mandate, (ii) security of tenure for the head of the SAI, and (iii) a requirement for the public disclosure of the reports of the SAI. The 2012 Constitution fails to meet the standards that international constitutional experience has set on each of these measures.

3. Increased independence of the judiciary

The proper functioning of any independent judiciary results in an effective system of checks and balances. This includes serving as a monitoring body of policy implementation on selected issues. The powers of the judiciary include invalidating public contracts that were awarded improperly and holding criminally accountable government officials who use their positions to unfairly enrich themselves or others. It is therefore essential that the constitution regulates the judiciary in a manner that enables them to exercise their function without fear or favor. Below, the shortcomings of the 1971 Egyptian Constitution are discussed and compared to the provisions of the 2012 Constitution.

Under the 1971 Egyptian Constitution, the judiciary was regulated by a few relatively short articles. The 1971 Constitution proclaimed the independence of the judiciary and provided a few safeguards for this. For instance, it stated that judges may never be removed from office and that all judicial proceedings and judgments must be done in public, unless public order or morality required otherwise (Arts. 168-169). Despite these safeguards, the 1971 Constitution by no means sufficiently protected the judiciary. This can be seen in Art. 167, which stated that the “law shall determine judiciary authorities and their functions, organize the way of their formation, [and] define conditions and procedures for the appointment and transfer of their members”. The problems stemming from the failure to adequately regulate this branch of government were apparent. First, the 1971 Constitution did not, apart from the Constitutional Court, detail the structure and competencies of each court. Second, it failed to insulate the judiciary from political forces. The appointment, regulation and discipline of judges were subject to ordinary legislation and easy amendment. Until 2006, the Minister of Justice, heading the Judicial Inspection Committee, was responsible for overseeing the judiciary (Law 46/1972). This situation improved when a law was enacted that required the judiciary to be accountable to the executive only in respect of administrative matters (Law 142/2006). Disciplinary proceedings against judges were until recently, however, still carried out in secret (Law 46/1972, Arts. 117 and 120).

In theory, two approaches are available in seeking to exercise control over the judiciary. A constitution can either:

- Create an independent judicial regulatory body that forms part of the judiciary; or
- Allow the executive and/or the legislature to exercise limited control over the judiciary.

The appeal in the creation of an independent judicial regulatory body lies in the fact that the judiciary will be completely insulated from political forces. In essence, the appointment and removal of judges will never be contingent on political desire. However, the complete removal of the judiciary from the executive-legislature-judiciary matrix does not result in a system of checks and balances upon which a system of constitutional governance is based. The complete insulation of the judiciary creates a completely self-regulated system accountable to no one. Elected and accountable officials will not be able to intervene when ill-will and incompetence enter the judiciary.

A review of constitutional approaches around the world reveals that a wide variety of mixes of these two extremes are employed in attempting to gain the advantages of both systems, while attempting to prevent against the disadvantages. Section 178 of the South African Constitution establishes the Judicial Service Commission, which is chaired by the Chief Justice and further composed of senior judges, legal practitioners, a legal academic, members of both chambers of Parliament (including minority parties) and persons nominated by the executive. The Commission is located in the judiciary and is responsible for the nomination, regulation and discipline of judges. The President, however, is responsible for the appointment of judges and only the National Assembly (the lower house of Parliament) may remove a

judge on a two-thirds majority if the Commission finds that a judge acted with gross incompetence, gross misconduct, or is physically incapable of performing judicial functions. The Kenyan Constitution adopts a very similar approach, with the constitutional establishment of a Judicial Service Commission. However, the process for the removal of judges is different: After investigation by the Commission, the President has to establish a tribunal whose membership is set in the Constitution. This Tribunal will issue a binding decision. The relevant judge may still appeal the decision to the Superior Courts (Section 168).

In contrast, section 124(2) of the Indian Constitution states that Supreme Court judges are appointed by the President in consultation with the Chief Justice. Furthermore, judges may only be removed by a two-thirds majority of each house of Parliament as well with the order of the President, and can only be removed on the grounds of a misdemeanor or incapacity (Section 124(4) of the Indian Constitution).

It may be worth noting that Egypt's judiciary under the 1971 Constitution was one of the most independent in the Arab World.⁶ Perhaps it is unsurprising that the provisions of the 2012 Constitution take the corresponding provisions of the 1971 Constitution as their starting point. The structure and scheme of Part III, Chapter 3 of the 2012 Constitution mirrors that of Chapter IV of the 1971 Constitution, although there are a few notable changes in the substance of the 2012 Constitution's provisions. To begin with, while both Constitutions state the principle of judicial independence, the 2012 Constitution provides that "[i]nterference in judicial affairs or in proceedings is a crime to which no statute of limitations may be applied" (Art. 168). This is an extremely strict provision, and although it would be preferable to see some indication of what kind of interference will constitute a crime (will investigations into the conduct of judges constitute a crime, for example?), the provision certainly sends a very clear message about the need to safeguard the integrity of the judicial process.

Article 169 of the 2012 Constitution provides that each judicial body will administer its own affairs, and that ordinary law will regulate this. As much was provided for in the 1971 Constitution, but Art. 169 goes on to provide that each judicial body will have an independent budget and must be consulted on draft laws purporting to govern its affairs. Financial independence is an important element of judicial independence, and involvement in statutory processes by which courts and judicial bodies are regulated will help to prevent the subjection of the judiciary to legislative fiat.

Article 170 would appear to reinforce the independence of the judiciary by stating that judges cannot be dismissed. Indeed, a number of constitutions around the world do the same (the French Constitution of October 4, 1958, for example, in Art. 64). The 1971 Constitution also prohibited the dismissal of judges. This is followed in Art. 170 by the rather cryptic provision that "when delegated, [judges'] delegation is absolute, to the destinations and in the positions defined by the law, all in a manner that preserves the independence of the judiciary and the accomplishment of its duties". An absolute prohibition on removing judges from office preserves the integrity of the judiciary only so long as judicial appointment procedures tend to ensure the appointment of independent and impartial judges who will serve with integrity, and only to the extent that processes for exposing and disciplining corruption in the judiciary are established. Art. 170 preserves the approach of the 1971 Constitution, however, in allowing the "conditions and procedures for [judges'] appointment and disciplinary actions against them" to be regulated by ordinary law. Even appointments to the Supreme Constitutional Court are to be determined by ordinary law, although the 2012 Constitution does require that whatever else the ordinary law says, the President will make appointments to the Supreme Constitutional Court "by decree" (Art. 176).

Constitutional measures that shield the judiciary from outside influence and protect judges from criticism and political censure are usually to be welcomed. But the combination of constitutional arrangements conferring a great deal of influence over judicial appointments to the executive and legislature, and provisions insulating the judiciary from scrutiny and protecting judges from disciplinary proceedings,

would seem to create opportunities for the “capture” of the judiciary by political forces.⁷ It may also prove relevant in this regard that the 2012 Constitution does not guarantee judges’ salaries.

The independence of the judiciary under the 1971 Constitution in the absence of any meaningful constitutional rules safeguarding judicial independence can be explained as a result of the choices of the political leadership.⁸ Courts can remain independent even in the absence of constitutional protections for judicial independence, in other words, if political forces choose to refrain from interfering in the judiciary. The successes of the old Egyptian judiciary should not stand as an argument in favor of constitutional silence on the organization of the judiciary. Instead of relying on a political choice to allow the judiciary to operate freely and independently, a constitution should guard against the possibility of a political choice to influence or corrupt the judiciary. In this light, it is encouraging that the 2012 Constitution provides for greater independence in the prosecuting authority than did the 1971 Constitution, expands the constitutional mandate of the State Council, and establishes an independent Administrative Prosecutor to initiate proceedings in the State Council. These additions are discussed in the sections below.

4. An independent prosecuting body

The mechanisms that bring criminal matters to the judiciary should be sufficiently protected from political influence. One way of accomplishing this is by entrenching a prosecutorial body in a constitution and providing for sufficient safeguards to ensure its independence. As with the judiciary, this would involve protecting the mechanisms for appointing and for removing prosecutors from political influence.

The 1971 Egyptian Constitution did not regulate prosecutors. Egyptian law under the 1971 Constitution stated that the prosecutorial body is an independent institution within the judiciary. However, in practice, the President appointed its members and the Minister of Justice was responsible for disciplinary action brought against prosecutors (Law 46/1972).⁹ Members of the prosecuting authority could not be removed from office (Art. 67 of Law No. 35/1984).

There is no problem, in principle, with locating prosecuting bodies under the authority of either the executive or the judiciary. However, there are drawbacks in both approaches. Placing the prosecuting authority under the government (through the ministry of justice) can discourage the prosecution of corrupt senior officials, and may even encourage the persecution of rival political groups. Conversely, placing the prosecution authority firmly within the judiciary is far from ideal, as the judicial branch will then have the function of both prosecuting and judging cases at the same time.

Comparative practice provides a number of examples of how prosecutors can be insulated from political pressure, even when they are placed under the executive’s authority. According to sections 157-158 of the Kenyan Constitution, prosecutors do not require the executive’s permission to launch investigations and prosecutions. Also, a prosecutor can only be removed from office on specific grounds and only after two bodies have investigated the matter. One of these bodies is an *ad hoc* tribunal whose membership is constitutionally predetermined to include judges.

The 2012 Constitution is a marked improvement over the 1971 Constitution in that it entrenches the prosecuting authority in the Constitution rather than leaving its organization and mandate entirely to ordinary law. The 2012 Constitution provides that “The public prosecution is an integral part of the judiciary”, thus rejecting the Kenyan Constitution’s approach in favor of the approach taken in, for example, France, where both judges and public prosecutors are supervised by the High Council of the Judiciary (French Constitution of October 4, 1958, Art. 65). Article 173 of the 2012 Constitution goes on to provide a detailed procedure for the appointment of the Prosecutor General from among the judges of

the Court of Cassation and the court of appeals, or from among existing assistant Prosecutors General. The President appoints as Prosecutor General a person nominated by the Supreme Judicial Council.

It is worth noting at this point that the 2012 Constitution refers to the “Supreme Judicial Council” in several places (Arts. 152, 173 and 209), but nowhere defines or establishes such an institution. There was similarly no provision under the 1971 Constitution, leaving the organization, mandate and functioning of the Supreme Judicial Council to be determined by law (see laws 43/1965, 82/1969, and 25/1984).

5. The State Council

The 2012 Constitution establishes the State Council as an independent judicial body with authority to adjudicate administrative disputes and disputes arising from disciplinary proceedings and appeals (Art. 174). The 1971 Constitution established a State Council in similar terms, but Art. 174 of the 2012 Constitution goes on to provide, in addition, that the State Council “undertakes disciplinary proceedings and appeals, adjudicates in legal issues to be determined by law, reviews and drafts bills and resolutions of legislative character referred to it and reviews contracts to which the state is a party.”

While the overall functions and competencies of the State Council remain to be determined by law, as under the 1971 Constitution, the inclusion in the Constitution itself of a handful of powers, especially the power to review contracts to which the state is party, may prove useful in the fight against corruption.

6. Administrative Prosecutor

Perhaps the State Council’s greatest value in the fight against corruption is the relationship the 2012 Constitution outlines between it and the Administrative Prosecutor (Art. 180). Also an independent judicial body, the Administrative Prosecutor “investigates financial and administrative irregularities, raises disciplinary proceedings before the courts of the State Council and follows up on them, and takes legal action to address deficiencies in public facilities.” Further, Art. 180 provides that the members of the Administrative Prosecutor shall “share immunities, securities, rights and duties assigned to other members of the judiciary”.

The Administrative Prosecutor, together with the State Council, has the capacity to contribute greatly to the fight against corruption in Egypt. It is mandated to investigate and prosecute financial irregularity within the administration, in a judicial tribunal specifically designed to adjudicate cases of an administrative nature. The Administrative Prosecutor performs functions similar to those of an auditor-general in a number of constitutions, and in this sense is in line with international trends. In Kenya and South Africa, the Auditor-General is required to audit and report on the accounts of a range of public institutions annually (section 188 of the South African Constitution; section 229 of the Kenyan Constitution), just as the Egyptian Central Auditing Organization is required to file a yearly report on the annual state budget (Art. 121, read with Art. 205). In South Africa and Kenya, the Auditor-General is empowered to audit and report on the accounts of any other institution that receives public funds. While the Central Auditing Organization does not play this investigatory role in Egypt, it is encouraging that the Administrative Prosecutor and the State Council are established to perform similar functions.

It is suggested that the Administrative Prosecutor and the State Council enjoy greater powers of investigation and prosecution than more traditional Attorneys General, as in South Africa and Kenya. The Administrative Prosecutor in fact bears a close resemblance to the now-defunct Directorate of Special Operations (DSO) in South Africa. That institution, established in terms of the National Prosecuting Authority Act 32 of 1998, was mandated and empowered to investigate and institute criminal proceedings

relating to fraud and corruption in national and provincial government, among other things. The DSO was very effective in identifying and prosecuting high-level corruption, but because the DSO was established in terms of ordinary law it was relatively easily disbanded by subsequent legislation in 2009.¹⁰ An institution intended to investigate and prosecute political corruption may easily raise the ire of those in power. Unless there are sufficient protections to ensure that such an institution cannot be neutralized by fundamental changes to its mandate, organization, powers, or even its existence, such an institution will not make a lasting contribution to anti-corruption efforts.

Part IV: Independent constitutional authorities

1. An independent anti-corruption ombudsman¹¹

An independent anti-corruption ombudsman, in its simplest form, is given a relatively high-degree of constitutional independence and mandated to investigate maladministration in the state. The inclusion of such an institution in a constitution is rare, probably owing to the fact that they do not fall within one of the traditional arms of government.

In Egypt, an Administrative Control Authority (ACA) was established by legislation in 1964 (Law 54/1964). The ACA serves as Egypt's most independent anti-corruption watchdog. The ACA is tasked with investigating public-fund crimes committed by public servants. Although it has features similar to an independent ombudsman, there are significant limits to its independence in practice:

- (i) The ACA has been suspended in the past (as was the case from 1980-82);
- (ii) The President's permission is required for the arrest of public officials;
- (iii) The ACA cannot investigate certain categories of state officials;
- (iv) The ACA's budget is determined annually by the state; and
- (v) The ACA's reports are not available to the public and are only submitted to the President, Prime Minister and the People's Assembly.

Comparative experience highlights the advantages of including an ombudsman in a constitution. Somewhat progressively, sections 182-183 of the South African Constitution establish an independent body (the "Public Protector") that is responsible for investigating, reporting and taking appropriate steps on improper state conduct, which includes corruption. The head of this independent body is appointed by the President for a non-renewable seven-year term. The lower house of the legislature, the National Assembly, recommends the candidate to the President on the basis of a resolution supported by 60 per cent of members of the Assembly. The appointee can only be removed on limited grounds with the support of two thirds of the Assembly (sections 193-194 of the South African Constitution). Section 79 of the Kenyan Constitution requires the creation of an independent ethics and anti-corruption commission responsible for ensuring compliance with the "Leadership and Integrity" chapter of the Constitution. Article 102 of the Iraqi Constitution also establishes an independent Commission on Public Integrity; the Constitution does not further elaborate on this commission, save for stating that the Council of Representatives will monitor the commission and that national legislation will regulate its functioning.

The most significant advantage in the establishment of an independent anti-corruption ombudsman is that it can ensure, in some circumstances, that substantive provisions and principles of the constitution are protected and enforced by ensuring that an adequate avenue of redress is available when traditional constitutional structures fail, or are unable to effectively deal with threats, due to political pressure. This is particularly the case in a new constitutional democracy that still needs to instill a culture of

accountability. Their investigate capacity can also assist other institutions responsible for fighting corruption.

Although these institutions, when properly implemented, provide an additional and effective mechanism to investigate corrupt practices, there are drawbacks to the constitutional establishment of an institution of this nature:

- (i) These institutions are not elected and their accountability is extremely limited. Even the judiciary, whose members are also not elected, has appeal and review procedures.
- (ii) The mandate of the ombudsman will almost certainly overlap with the functions and responsibilities of other branches of government, particularly the criminal investigation of corruption as well as parliamentary inquiries into the executive. This can very easily lead to overlapping jurisdictions, which can lead to inefficiency and wasted resources. The establishment of an ombudsman, in addition to the regular branches of government, could be interpreted as suggesting that traditional institutions such as the prosecuting authority are incapable of satisfying their responsibilities.
- (iii) Although these institutions compile reports that usually include recommendations, a lack of political will could result in the ombudsman's investigations being disregarded.
- (iv) Limited resources will always result in discretionary decisions on which matters to investigate, which can potentially lead to perceptions of bias which in turn will undermine the entire purpose of the ombudsman.

The 2012 Constitution provides for a National Anti-Corruption Commission in Art. 204. This presumably replaces the ACA, with a mandate to combat corruption, deal with conflicts of interest, promote and define the standards of integrity and transparency, develop the national strategy concerned with these matters and ensure the implementation of that strategy. The entrenchment of the Anti-Corruption Commission in the Constitution should ensure that it is not manipulated and undermined in the same way as the statute-based ACA. Article 200 deals in general with the "Independent Bodies and Regulatory Agencies" established by the 2012 Constitution, and provides that they "have legal personality, neutrality, and technical, administrative and financial autonomy". Article 202 provides further that the President will appoint the head of the Anti-Corruption Commission (and the other independent bodies) with the approval of the Shura Council, and that he or she cannot be dismissed from that position without the approval of the Shura Council. So far the Anti-Corruption Commission is similarly constituted to the South African Public Protector.

Important details about the Anti-Corruption Commission's specific powers and functions are, however, left to the determination of ordinary law (Art. 203). This differs from the approach taken in South Africa, but is not inconsistent with the approach in Kenya and Iraq, where the Constitution merely requires that legislation establish an anti-corruption ombudsman. It is suggested that the entrenchment in the 2012 Constitution of the appointment procedures for the head of the Anti-Corruption Commission and the provision that it will be financially autonomous are important elements in ensuring that this new anti-corruption institution is more effective than the previous one. At the same time, allowing the law to determine the competencies, powers and mandate of the Anti-Corruption Commission beyond those that are listed in the 2012 Constitution is an acceptable mechanism to ensure that the Commission does not overreach.

2. Human rights and corruption

The framework discussed in this chapter is centered on the procedural overview mechanisms that a constitution could employ to entrench an effective anti-corruption framework in a constitution. It should not be forgotten, however, that the general public can also monitor government efficiency. This includes holding the people's government accountable for mismanagement. The rights to freedom of expression, freedom of the press, and access to information are particularly important in this respect, but the 2012 Constitution's provisions on these rights raise significant cause for concern.

The right to freedom of thought and opinion is guaranteed, in absolute terms, in Art. 45. Every individual, the article states, "has the right to express an opinion and to disseminate it verbally, in writing or illustration, or by any other means of publication and expression." This expansive statement of the right is, however, subject to significant limitation in several other parts of the 2012 Constitution. Article 31, for example, prohibits "insulting or showing contempt towards any human being". While many constitutional frameworks around the world must balance the rights of expression with the rights of reputation and protections against defamation, it is conceivable that Art. 31 could be relied on by public officials to suppress accusations of corruption.¹² Similarly, "crimes that harm the armed forces", of which civilians can be accused and tried for in military courts (Art. 198), could be interpreted to include accusations of corruption. While Art. 198 does not necessarily impose a limitation on the right to free speech, it does expose civilians to severe criminal penalties if their exercise of the right to free speech constitutes "harm" to the armed forces.

The right of access to information is guaranteed in Art. 47 of the 2012 Constitution, subject to the condition that its exercise "does not violate the sanctity of private life or the rights of others, and that it does not conflict with national security". The details of exercising the right, further, are to be determined by law. It is not uncommon for constitutional democracies to allow the regulation of the right to access information by law. The South African Constitution, for example, stipulates that national legislation must give effect to the right (section 32). However, one feature of Art. 47 in the 2012 Constitution justifies concern. While section 32 of the South African Constitution extends the right to "any information held by the state" and does not impose any limitations to the right, Art. 47 contemplates that considerations of "the sanctity of private life", "the rights of others", and "national security" may limit the exercise of the right to obtain information. The first worry is that these limitations will allow public officials to ensure the secrecy of any financial activity in which they are involved, including corrupt activity, by relying on the "sanctity of private life" and rights to dignity as guaranteed by Art. 31. There is nothing in Art. 47 to suggest that public officials will not be able to rely on these "other rights" to conceal information of their own corruption. Secondly, there is no indication of what "national security" might be. Leaving the definition of this term to national legislation allows the political branches great freedom to reduce the scope of the right to access information to a degree where it is essentially meaningless.

The right to freedom of the press in Art. 48 is open to the same kind of manipulation through the explicit limitation of the right against vague considerations of "the sanctity of the private lives of citizens and the requirements of national security".

The 2012 Constitution does not establish a human rights framework that is likely to allow citizens and the press to have an effective voice in the investigation and exposure of corruption in government. The discretion the legislature has to define terms like "national security" with respect to the right of access to information, and the reliance that public officials are likely to be able to place on protections against insult and the invasion of private life, suggest that private attempts to bring corruption to light will be thwarted.

Part V: Conclusion

Egypt's 2012 Constitution is in many respects little more than a series of revisions to the 1971 Constitution. The basic structure of the document remains the same, with some sections reproduced verbatim. Some of these reproductions would seem to be a mistake if Egypt is to root out the corruption that plagued the country during Hosni Mubarak's regime. In other areas the parroting of the 1971 Constitution is less concerning: parts of the judiciary under the 1971 Constitution, for example, managed to resist capture by the political branches and retained a measure of independence throughout.

The 2012 Constitution leaves much of the detail of Egypt's anti-corruption framework to be determined by legislation. The choice as to what to include in a constitution and what to leave to the judgment of a legislature is never an easy one, and the 2012 Constitution has benefitted from emerging trends in international practice in this regard. How the framework performs in the coming years, will, we suggest, depend on a handful of factors. First, what laws will the legislature adopt? It may prove easy for the legislature to undermine the efficacy of the various elements of the anti-corruption framework with laws that restrict their scope, limit their powers, or allow political interests to influence their conduct. Second, will the courts be aggressive in scrutinizing this legislation against the principles of the 2012 Constitution? A legislature willing to conceal corruption by drafting poor anti-corruption legislation can be checked by a court willing to reject laws that do not uphold the principles and imperatives of the constitution. Third, the dedication of staff and personnel in various institutions with anti-corruption functions will affect how well those institutions perform in rooting out corruption. Finally, the extent to which the people themselves remain committed to the ideals that sparked the Arab Spring in the first place will bear on how much corruption public officials are allowed to get away with. It will, however, be difficult for citizens to hold public officials to account in the context of the limited rights to freedom of expression, media, and access to information conferred by the 2012 Constitution.

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Notes

¹ Constitution of the Arab Republic of Egypt, 2012, unofficial English translation prepared by International IDEA, available online at <http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf>.

² Zaid Al-Ali, “The new Egyptian Constitution: An initial assessment of its merits and flaws”, 26 December 2012, *Open Democracy*, available online at <http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws>.

³ See the *National Integrity System Study (Egypt 2009)*, Transparency International, available online at <http://archive.transparency.org/content/download/50747/812368>, at 36-37. In the preparation of this paper, the authors relied on some factual descriptions contained in the *National Integrity System Study*. Not every fact relied upon in the *Study* has been referenced.

⁴ *Ibid*, 106.

⁵ *Ibid*, 76-8.

⁶ See, for example, Tamir Moustafa, “Law versus the State: The Judicialization of Politics in Egypt” (2003) 28 *Law and Social Inquiry* 883; and Nathan Brown, “Arab Juridical Structures”, study presented to the UNDP Programme on Governance in the Arab Region, August 2001, available online at <http://web.dubaichamber.ae/LibPublic/Arab%20judicial%20structures.pdf>.

⁷ On this phenomenon more generally, see the contribution in this Working Paper Series of Tom Ginsburg, “The Tunisian Judicial Sector: Analysis and Recommendations”, in Zaid Al-Ali and Richard Stacey (eds) *Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia*, Working Paper Series presented by International IDEA and the Center for Constitutional Transitions at NYU Law, June 2013, available online at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

⁸ Moustafa, “Law versus the State” (n 6), 927.

⁹ *National Integrity System Study* (n 3), at 112.

¹⁰ See the South African Constitutional Court decision in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

¹¹ For a discussion on anti-corruption institutions in the context of Tunisia’s constitutional transition, see the contribution to this Working Paper Series by Juanita Olaya and Karen Hussmann, “Preventing and Combatting Corruption: Good Governance and Constitutional Law in Tunisia”, Zaid Al-Ali and Richard Stacey (eds) *Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia*, Working Paper Series presented by International IDEA and the Center for Constitutional Transitions at NYU Law, June 2013, available online at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

¹² Zaid Al-Ali, “The new Egyptian Constitution” (n 2).

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Series Co-Editors

Zaid Al-Ali is Senior Adviser on Constitution-Building in the Arab region at the International Institute for Democracy and Electoral Assistance (**International IDEA**), and is based in Cairo. He was previously a legal adviser to the United Nations Assistance Mission to Iraq and to the United Nations Development Programme (Iraq Office), where he advised on constitutional, parliamentary, and judicial reform. Mr. Al-Ali is a leading regional expert on constitutional reform in the Arab region, and has written extensively on constitutional reform in the Arab region, including on the Iraqi Constitution and the transition processes in Egypt, Libya, Syria and Tunisia. His publications include: *The Struggle for Iraq's Future: After the Occupation, Fighting for Iraqi Democracy* (Yale University Press, New Haven 2014, forthcoming); *The Iraqi Constitution: A Contextual Analysis* (Hart Publishing, Oxford 2014, forthcoming, with Jörg Fedtke); "Constitutional Drafting, National Uniqueness and Globalization", in Thomas Fleiner, Cheryl Saunders and Mark Tushnet (eds), *Handbook on Constitutional Law* (Routledge, London 2012, with Arun Thiruvengadam); "Constitutional Drafting and External Influence", in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing, Cheltenham 2011); and "Constitutional Legitimacy in Iraq: What role local context?", in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, Oxford 2011).

Richard Stacey is the Director of Research at the Center for Constitutional Transitions at NYU Law (**Constitutional Transitions**). His publications include "Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making Process" (2011) 9 *International Journal of Constitutional Law* 587, and "Independent or Dependent? Constitutional Courts in Divided Societies", in Colin Harvey and Alex Schwartz (eds), *Rights in Divided Societies* (Hart, Oxford and Portland 2012, with Sujit Choudhry). He serves as co-editor of the multi-author reference work *Constitutional Law of South Africa* 2 ed (Juta, Cape Town 2007-), to which he has contributed chapters on socio-economic rights and executive authority. Between 2005 and 2010 he acted as an advisor on administrative law to the South African Department of Justice, and has advised the South African Parliament on matters of legislative drafting. In 2009, he acted as a consultant to Kenya's Committee of Experts on Constitutional Review.

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