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Preventing and Combatting Corruption: Good Governance and Constitutional Law in Tunisia

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Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia

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"Preventing and Combatting Corruption: Good Governance and Constitutional Law in Tunisia"

Abstract

This paper approaches the pervasive problem of political corruption from the perspective of constitutional design, and considers how a constitution can set out principles, rights, institutions and mechanisms that contribute to the prevention and combatting of corruption. Indeed, corruption, massive looting of state resources by the highest authorities, and frustrations stemming from cronyism were important factors in the discontent that sparked the Arab Spring in Tunisia, and later Egypt and Libya. The success of the constitutional transition in Tunisia and throughout the region, then, depends in part on the extent to which the reconstituted democratic state can weed out corruption and prevent future corruption. Consolidating the Arab Spring demands that attention be paid to these questions during the process of constitutional reform itself. The paper takes into consideration the particularities of the Tunisian context and constitutional tradition and uses as the main reference for analysis and recommendations the April 2013 draft of the Tunisian Constitution, and makes recommendations on the basis of this text.

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Preventing and Combatting Corruption: Good Governance and Constitutional Law in Tunisia

Juanita Olaya & Karen Hussmann

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Introduction

Corruption and allegations of massive looting of state resources by the highest authorities of Middle Eastern regimes have played an important role in the Arab Spring spreading from Tunisia throughout the region. Frustration about cronyism and corruption has been one of the key grievances of Tunisians bringing down the former regime. While the former Tunisian President Zine el-Abidine Ben Ali and his family are charged with money laundering and drug trafficking, among other crimes, corruption is claimed to continue in various forms. Issues of particular concern are said to be poorly written laws, on-going immunity for influential officials, media restrictions, no right to access public information and weak institutions, among others.[1]

Against this background, the present paper is intended to contribute with ideas, expert opinions and specific recommendations to the constitution drafting process currently under way in the Constituent Assembly of Tunisia, with regard to preventing and combatting corruption. The paper takes into consideration the particularities of the Tunisian context and constitutional tradition and uses as the main reference for analysis and recommendations the April 2013 draft Constitution.[2] Two previous draft Constitutions were made public in August 2012 and December 2012 and have also been considered in this paper. The paper also takes into consideration the study by Faycal Ajina and Ahmed Ouerfelli, entitled "Anticorruption Provisions in the Forthcoming Constitution of Tunisia".[3]

The best constitution is the one that is implemented. Constitutional texts express aspirations of well-being for a nation and its people, and are the result of social and political bargaining processes that drive a nation towards such aspirations. In this sense, and for them to be implemented, constitutions are and have to be close to the social and political reality and aspirations of the people living under their stated values, principles and structures. Only constitutions that belong and connect to the people will serve as the ultimate source and guarantor of the will of the people. There is therefore no "ideal" constitution, and one that has worked elsewhere might not work successfully in Tunisia. This document acknowledges this reality and its recommendations need to be understood against this background.

Part I: Constitutional law and preventing and combatting corruption (a framework)

1. A good governance framework

Corruption is both a cause and consequence of weak governance. Therefore measures to counter it need to be both preventive (to address the conditions that make corruption possible) and punitive (to sanction corrupt practices) in nature. The most important international reference for this approach is the United Nations Convention against Corruption (UNCAC), to which Tunisia has been State Party since September 2008. On the punitive side, the UNCAC covers a wide array of corrupt practices (including national and international as well as public and private sector corruption) that need to be criminalized in all State Parties. On the other hand, corruption prevention measures contained in Chapter II of UNCAC reinforce the notion that addressing corruption is and should not be an end in itself, but is a crucial component to make the state administration more effective, efficient and transparent, to strengthen the rule of law, to improve the management of public affairs, to strengthen democracy through participation, etc. Acknowledging that preventing and combatting or sanctioning corruption are highly distinct activities, involving different logics and different institutions, this paper makes an effort to avoid the vague term "anti-corruption" and uses instead more precise terms such as "corruption prevention" and "combatting or controlling corruption", the latter referring to punitive activities.[4]

In the same line of argument suggested by Ajina and Ouerfelli, we suggest including and developing corruption prevention mechanisms and punitive measures in the constitution as part of the overall governance system, rather than in isolation from it. As constitutions set the basic rules of how such governance system works, the phenomenon of corruption can and needs to be dealt with in many parts of the constitution and not just in a few specific sections.

The definition of corruption is linked to a fundamental concept: the public interest. Corruption is the abuse of entrusted power for private gain;[5] that "entrusted power" can be individual or collective; and "private gain" may not only be to the benefit of individuals but also to the benefit of groups of people (kin, political party, criminal network, etc.). In the case of public officials, the power they are entrusted with is derived from the constitution by the people of the nation. Nations who consider a closer relation between religion and the state, also acknowledge the role of God as another source of such governing power, a feature framed under the religious traditions and religious texts independently of the constitution. Both sources of "power" are nevertheless compatible, in that they ensure there is a supreme authority above the individual who bears those powers: the people and God. The actions of public officials are therefore at the service to the public interest, the interest of the overall society (the nation) and not of just a few.

Given that the state and its structures are created to serve the public interest, the state has the following two fundamental roles: i) delivering public goods and services for all and accessible to all, and ii) protecting and promoting the fundamental rights of its citizens. Any good governance system must be oriented toward ensuring that the state fulfills these functions. Corruption directly impedes the fulfillment of these functions as it puts private interests before the public interest. For a governance system to be good – and among other things to prevent and control corruption – it requires that citizens are guaranteed a series of rights and are subject to certain duties. It is therefore not possible to examine the issue of corruption prevention and control in the constitutional text only from the perspective of institutional design, without looking also at the goals of the state (and particularly goods and service delivery) and the catalogue of fundamental rights guaranteed by the constitutional text.

In summary, mechanisms for preventing and combatting corruption are not different from the general elements of a good governance system. This is also the reason why in this document we will focus on suggestions and recommendations at the level of principles and values, and the state structure in general, and will examine to what extent specialized corruption prevention or control entities are necessary.

2. *Comparative constitutional law and the prevention and combatting of corruption*

To the extent that addressing corruption falls within the general mechanisms of good governance, constitutions that adhere to at least the following principles have in place a basic set of tools to prevent and address corruption:

a) Rule of law;

b) Clear separation of powers;

c) Accountability and transparency of the state;

d) Primacy of the public interest;

e) Mandate of the state originates in the people;

f) Basic individual and collective rights of equality, freedom of expression and association, access to information, participation;

g) Independent and accountable judiciary;

h) Control mechanisms of the different state branches.

It is therefore not necessary for constitutions to explicitly proscribe corruption or to establish safeguards against it. However, there are countries that are explicit about preventing or combatting corruption, in one way or another.[6] In the end it is a matter of each country's choice. There are different ways in which constitutions can address the topic of corruption:

a) Explicitly and directly: The Nigerian Constitution of 1999 provides in section 15(5) that "The state shall abolish all corrupt practices and abuse of power".[7]

b) Explicitly but indirectly: Bolivia includes a duty for all citizens to report acts of corruption to the authorities (Art. 108(8)).

c) Indirectly: Most often the case (or the default case), including references to integrity and the primacy of public interest as governing principles of the state (for example in Colombia, Argentina, Mexico).

There is no evidence to date that would allow us to conclude that one method is better than another. Of these approaches, explicit and direct constitutional provisions proscribing corruption are used less frequently than the other approaches.

Constitutions do have an important socio-political imprint, but despite the existence of best practices the constitutional experience is not readily transferable from one country to another. Also, certain aspects of constitutions can have an important impact on social and political dynamics (drivers of change), but it is hard to predict which aspects of a constitution will have this effect, and the effects of similar constitutional arrangements may differ from country to country. This "driving change effect" depends greatly on the people who will take on responsibilities in the institutions defined by the constitution, and on how constitutional mechanisms are used. There is, for example, the case of Costa Rica where the right to a good environment was interpreted by its Constitutional Court to entail a right to good governance and the absence of corruption. The court devised a remedy for violations of this right to good governance, awarding compensation to victims of corruption. In Germany, the inviolability of "human dignity" (*Menschenwürde)* has been the base for granting protection to all dimensions of human life. In Colombia, a special constitutional mechanism to protect basic rights (*Acción de Tutela*) fostered changes not only in the way people perceived the justice system, but spurred actual changes in health, education, labor, social security and other policies. There is no such thing as the perfect constitution, but it will be important to set out all mechanisms possible for there to be an option for the constitution to be used as an instrument of change.

3. Good governance and addressing corruption in the history of the Constitution of Tunisia

Tunisia has a long constitutional tradition that dates back to the Fundamental Pact of 1857 and the first Constitution of 1861. After independence from France in 1956, the Constitution of June 1, 1959, set out a presidential system and in 1974 a reform introduced by President Bourguiba instituted his "presidency for life". This Constitution was further amended in 1976, 1981, 1988, 1997, and in 2002. With the fall of President Ben Ali on January 14, 2011, the Interim President Fouad Mbezzaa announced the election of a Constituent Assembly, which took place in October 2011. The Constituent Assembly held its first session in November that same year, and has since then worked through six thematic committees to produce

three draft Constitutions, dated 14 August 2012, 14 December 2012, and 22 April 2013. The April 2013 draft Constitution builds on the earlier drafts, and, taking into account the range of alternative formulations proffered by the Committees and the Joint Commission for Coordination and Drafting, purports to resolve the uncertainties remaining in the previous drafts.

The Constitution of 1959 and its amendments contained many aspects necessary for good governance, including basic rights of expression and association. Many of these dispositions where however not fully implemented or interpreted, and were manipulated to sustain an authoritarian regime that ended up serving its own individual interest at the expense of the people of Tunisia.

The relevant question and the main challenge the Constituent Assembly faces, is therefore not only what to include, but how to conceive a constitution that will be applied and that will enable the people of Tunisia to shape and develop their institutions for the better. The law alone will hardly create any change, if it is not followed by actual practice.

Part II: Considerations for the future Constitution of Tunisia

In this section, we present suggestions for the Constituent Assembly of Tunisia to consider, with the objective of providing instruments and mechanisms to prevent and combat corruption. These suggestions aim in general at ensuring the separation of powers between the branches of government, enhancing the accountability of each and all of them, and ensuring transparency and openness in all state institutions. We first look at aspects relevant for the institutional design, the structure and organization of the state, and then at principles, values and rights which are the backbone of states and societies resilient to corruption and aspiring to good governance for all.

1. Structure and organization of the state

1.1 Cross-cutting issues

1.1.1 Separation of powers and accountability

Perhaps one of the most fundamental aspects of good governance and the prevention and combatting of corruption is the separation of powers among the different state branches and their accountability. This is a cross-cutting issue, as the definition of separate functions alone does not guarantee the separation of powers. The separation of powers is crucial irrespective of what the final regime choice is, whether presidential or parliamentary, and the suggestions here are valid irrespective of the relationship between religion and the state.

The separation of powers carries two important consequences, applicable to both parliamentary and presidential systems, relevant in preventing and combatting corruption:

a) On the one hand, it constitutes the first and most basic limitation of power to the organs of the state. Each of them finds their functions and authority restricted to their own purpose, and without the possibility of taking over each other's functions.

b) On the other hand, it is the expression of (horizontal) accountability, whereby the legislature oversees the work of executive while the judiciary protects the rights of the people and ensures both the executive and the legislature abide by the constitution and the law.

The separation of powers can be expressed in different ways. The suggestions, which we include here for consideration, are not mutually exclusive, and our recommendation would be to consider all of them in the constitution in full as they cover different aspects:

a) **As a principle governing the functioning of the state**: This can have two manifestations:

- The explicit mention of the principle of separation of powers as governing the state structure (internal accountability).
- In addition, some constitutions also grant the existence of dissent and opposition as a principle of the functioning of the state (external accountability).

The usefulness of including the separation of powers as an explicit principle is that it gives guidance in cases of doubt, serves as a reference for examinations of the constitutionality of measures developed thereafter, and can be of use in resolving eventual contradictions.

b) ***De facto* and explicitly, in defining the structure of the state**: This includes three different aspects:

- *The explicit definition of functions and responsibilities* of each branch of the state. This implies, among others, avoiding the assignment of judicial functions to the president, the prime minister or the legislature, and limiting the legislative (regulatory) powers of the executive.
- *The election, designation or nomination procedures* for the heads of the main state institutions (see further below for each branch of the state). This is relevant as the main line of accountability is to those who elect or designate. The "controlled" should not designate their "controllers". This will be particularly relevant for institutions like the Audit Court (see § 1.5 below).
- *Funding and financial management*. A dependency is created when the operating funds of an otherwise independent institution depend on the institution it is meant to control. This is particularly complicated in the case of the judiciary, but relevant also for the legislature. It is advisable to consider in the constitution rules for the budgetary processes and the budget management of each branch that provide for autonomy and voice for the independent institutions (veto or consultation rights for the budget of each institution, for example).

c) **As a guarantee by the inclusion of legitimate mechanisms for dissent and opposition**: This includes providing in the constitution for citizen participation beyond voting in the elections, and also for guarantees for different political parties and their legitimate right to exercise opposition to government.

The reason for this lies in constitutional experience. Constitutions can design mechanisms for the separation of powers but how these will function in practice depends on the people exercising the authority entrusted to them. There are cases of parliamentary systems that operated in practice as authoritarian presidential regimes;[8] as well as cases where presidential regimes were curtailed by a stronger legislature.[9] It is also not possible to predict whether the separation of powers will be fully implemented or abused at some point in time. There is no "ideal system" whose sustainability can be fully guaranteed. It is therefore advisable to ensure the existence of an "external" control exercised via participation mechanisms, multiple political parties and the legitimate exercise of opposition. These mechanisms can function to balance, from the outside, imbalances on the inside of the state. It is also a way to provide voice for the people, and therefore also a source of stability.

d) **By ensuring constitutional control**: It is the essence of a "rule of law" system of governance that all organs of the state should be subject to the constitution and the law, without exception. This can be made explicit as a principle in the constitution, and can be enforced by including a constitutionality control of all acts of all state branches.

e) **By considering legitimate mechanisms for constitutional reform**: Constitutional reform mechanisms are an important instrument to allow constitutions to develop and adapt to social change. However, they require special parliamentary majorities and higher hurdles for reform to ensure they are the expression of a significant majority and not just a few or the executive. Constitutional reform mechanisms should also provide for referendums or open participatory mechanisms to initiate and validate changes with the citizens.

f) **By avoiding contradictions**: Even well crafted constitutions, setting separate functions and clear nomination and appointment mechanisms for the heads of key state institutions, could be weakened in practice by contradictory mechanisms. This is why we suggest paying attention to all the above issues and their interplay. It is therefore advisable, particularly in the upcoming compilation and conciliation work of the Tunisian Constitution to examine the text as a whole and to ensure consistency throughout the text.

1.1.2 Concerning the exercise of public office and public officials

Principles and duties governing the exercise of public power (and therefore at the core of preventing and combatting corruption) are applicable to all branches of the state and therefore a cross-cutting issue. At the constitutional level, it is important to include principles and mechanisms that will ensure the rule of law, accountability and integrity and also that the duty of public sector officials is primarily with the public interest.

With this in mind, it is advisable to consider the following:

a) **Equal treatment**: Ensure that all integrity, transparency and accountability mechanisms and requirements are applicable to all public officials in all branches of the state including the president, the prime minister, parliamentarians and all court magistrates (this is also required by the UNCAC). In some countries the constitution foresees the existence of codes of conduct to which all public officials and parliamentarians will be subject (in Nigeria, for example). In others there are specific codes of conduct for high-level public authorities and parliamentarians (in Afghanistan, for example). It is not ideal, though, to set different standards for different public officials, as it complicates the application of the law and sends conflicting messages. In some countries the constitution envisions an independent agency in charge of promoting and enforcing compliance to the code or at least responsible for disciplinary behavior of civil servants. This function could potentially be assigned to the institution that would be responsible for corruption prevention (irrespective of whether it will be a specialized agency or not), the agency responsible for the civil service, a specialized public ethics body or the like. There is no evidence that designating this function to a specific body in the constitution has a positive impact on results. What is clear, though, is that exempting high-level officials from integrity requirements promotes misconduct and induces cynicism.

b) **Immunity**: Immunity is thought initially to protect public officials from the arbitrary use of the law by others to hinder or impede their functions, or to compromise their independence. This is the case for high-level officials in all branches of power. Unfortunately, this purpose has been undermined and immunities abused, as government officials conceal corrupt practices under a shroud of impunity. The conduct of former President Ben Ali and his government amply illustrates how immunity can

breed corruption. However, this does not mean that immunities should be abandoned, as they play an important function in protecting public officials' freedom of action. Rather, the system should strike a balance to avoid abuse. It is therefore advisable to:

- Restrict the duration of immunity, usually to the term in office, and forbid lifetime immunity. Tunisia's April 2013 draft Constitution confers judicial immunity on the President "throughout his presidential term", and provides that the President "shall not be held accountable for acts executed as part of the office" (Art. 75). This suggests that the President's immunity for action taken in the course of presidential duties during the term of office will extend beyond the term of office, and that immunity for other acts applies only for the duration of the term in office. In our view, this would pose a risk for abuse. There are other mechanisms of presidential immunity that maintain its protective function while finding a balance between criminal and civil liability for official conduct and blanket impunity for officials, such as:
    - Immunity during the time in office for all acts, executed as part of the office or otherwise, but not afterwards. This creates an incentive to behave well (fear of future sanction) while protecting officials during their time in-office from spurious accusations. This could entail a "buffer period" allowing immunity to extend for a limited period after the expiry of the presidential term, in order to prevent abuse by political contenders.
    - Immunity for an extended period of time after the expiry of the term of office but with the possibility of terminating immunity (by the legislature in the case of the president and the prime minister) under explicit circumstances.
- There should be exceptions to immunity (so it is not absolute), particularly in cases involving crimes against humanity. To the extent that corruption can cause substantial damage to the people, it should be considered as a ground for exception.
- Consider mechanisms to avoid abuse. For example, for high-level officials (president, prime minister, parliamentarians or magistrates) the recourse to lift immunity could be issued by another branch of the state.
- Mirroring immunity is the right of pardon. Any form of pardon must be transparent and granted for explicit reasons determined beforehand by the law. The 1959 Tunisian Constitution contemplated a presidential power to grant pardons (Art. 48). The April 2013 draft Constitution continues to empower the President to grant special pardons (Art. 76), and also suggests through the requirement in Art. 68, although weakly, that pardons are subject to the terms set by the law. Ideally, a constitution would demand criteria of transparency and accountability and be explicit that pardons must be granted subject to criteria set out in the law.

c) **Declarations of assets and interests**: The request for officials to present an asset and interest declaration when entering into office (and upon departure, change of role or on a yearly basis) is a common practice in many countries. It is aimed at preventing illicit enrichment as well as to detect potential conflicts of interest that need to be managed. It also facilitates prosecution in cases where fraud and corruption actually take place. Declarations of assets and interests need to consider the following aspects:

- Effectiveness: it is paramount that a state authority is tasked with the collection, monitoring and random control of the asset and interest declarations.
- Publicity: In some countries declarations of assets and interests are made public (in Norway for example) in others there is still the debate (like in the United States) and in others it is forbidden

(like in Colombia). As a general principle it is advisable that declarations of assets and interests are publicly accessible for them to fulfill their intended function.

- Equal treatment: In any case it is advisable that asset and interest declarations be mandatory for all high level and high-risk public officials (e.g. contracting or spending officials) without exception of hierarchy or area of work.

The concrete development of the system can be further regulated by the law. The details do not need to be included in the constitution, but the requirement that subsidiary legislation work out these details for high-level elected and appointed authorities,[10] leading civil servants, and those in vulnerable positions should be included in the constitution.

1.2 The executive

There is no clear evidence on whether corruption risks are higher or lower under parliamentary or presidential regimes.[11] We are also not aware of any evidence or discussion on different risks in the division of roles between the president, the prime minister and the cabinet of ministers.[12] We recognize that corruption is a phenomenon that does not have ideologies and can affect all political systems, institutions and organizations. When it comes to preventing and combatting corruption, in regard to the executive, the following issues can be considered with reference to the April 2013 draft Constitution and in addition to the cross-cutting issues described above.

1.2.1 The President:

a) **Accountability to the legislature**: It is considered good practice to provide the legislature with a strong control function over the executive. Under presidential systems, this translates into the obligation of the president and the ministers to attend to information requests by the legislature. In a parliamentary regime, the control function is embedded in the capacity of the legislature to designate the president or prime minister and to issue orders and instructions. In this case it is advisable for a constitutional regime to include, for example, guarantees for multiple political parties to operate, the legitimacy of opposition, and an effective freedom of expression and association safeguarding democratic contradiction inside the legislature itself. Such measures avoid a blurring of the distinction between the legislature and the executive.

b) **Accountability to the people**: Irrespective of the type of regime, the president should act with openness and transparency. This can entail the proactive provision of information about his/her activities and about the cabinet's activities (mirroring the right to access to information), and the inclusion of mandatory and public yearly reports to the legislature.

c) The **power of appointing officials** is crucial: The April 2013 draft Constitution provides that the President will directly appoint senior officials within the Presidency and its affiliated institutions, will consult the competent parliamentary committee in making appointments to senior military and security positions and institutions affiliated with the Ministry of Defense, and suggests that the Prime Minister and the President will act jointly in making other senior appointments (Art. 76). Article 88 of the April 2013 draft Constitution suggests, however, that only the Ministers of the Interior and Defense will be appointed jointly. In general, it is advisable that the Constitution be more explicit and consistent as to whom the President will appoint directly, rather than referring only to "senior civil positions". In addition, the President should not be empowered to act alone in appointing heads of institutions that exercise oversight over the President or the executive, such as the Audit Court (see §

1.5 below). A requirement that the President consult relevant parliamentary committees, as is required for appointments to military and national security positions, is a mechanism that could be used to minimize opportunities for executive "capture". While Art. 76 of the April 2013 Constitution requires that these positions be regulated by law, the Constitution would benefit from explicit requirements of openness, transparency and avoidance of conflicts of interest. These changes would help to prevent independent agencies from being captured by the institutions they are meant to oversee and hold to account.

d) **Presidential immunity:** The April 2013 draft Constitution contemplates unrestricted immunity for the President (Art. 75), in similar terms to the provisions of the 1959 Tunisian Constitution (see § 1.1.2 above). It is advisable that certain restrictions to such immunity be considered, for example:

- A restriction on the duration of immunity, usually to the term in office, and a prohibition on lifetime immunity.
- The possibility of lifting presidential immunity, upon a decision of the legislature supported by a high qualified majority.
- The lifting of presidential immunity in situations considered particularly harmful, such as where evidence exists of the President's participation in, for example, crimes against humanity, the use of torture, or cases of large-scale corruption and misuse of public funds for private benefit.

Limitations on the President's immunity and the circumstances under which presidential immunity can be lifted should be clearly stated in the Constitution. Specific legislative enactments should regulate procedural aspects.

1.2.2 The Prime Minister and the government:

a) **Accountability**: The April 2013 draft Constitution considers procedural options for the appointment of the Prime Minister and government (Art. 88). It is important that under any scheme, the Prime Minister and the government in general remain accountable to the legislature, as Art. 91 of the April 2013 draft Constitution mentions. To be effective, it is important that this also entails specific reporting obligations on the part of the government towards both the president and the legislature, and the possibility of parliamentary oversight and meaningful debate of government policies in the legislature.

The April 2013 draft Constitution provides only for the convening of legislative investigation committees (Art. 65). It is disappointing that the rights of the Chamber of Deputies to summon members of the government and to pose written and oral questions, as well as the provision for parliamentary sessions dedicated to discussion of the government's policy, have not been retained from earlier drafts in the April 2013 draft Constitution.

b) **Accountability to the people**: Irrespective of the type of regime, the prime minister should act with openness and transparency. This can entail the proactive provision of information about his/her activities and about the cabinet's activities (mirroring the right to access to information), and the inclusion of mandatory and public yearly reports to the legislature. Here also the need to act transparently and openly could be explicit.

c) **The power of appointing officials** is crucial: It is advisable that the Constitution be more explicit as to which officials and functionaries the Prime Minister will appoint directly (see for example Art. 88 of the April 2013 draft Constitution), and that it does not empower the Prime Minister to appoint

the heads of the institutions mandated to exercise control and oversight over the Prime Minister and the government (Audit Court, Anti-Corruption Agency, etc.).

d) **Conflicts of interest**: It is good that the April 2013 draft Constitution prohibits concurrent membership in the government and the Chamber of Deputies (Art. 92), as this helps for the separation of powers. It would also be advisable to establish incompatibilities with the exercise of public office in order to avoid conflicts of interest, while allowing activities that do not entail conflict (that can be regulated by the law for public servants in general).

e) It is positive that the April 2013 draft Constitution **does not consider immunity** for the Prime Minister or the members of government.

1.3 The legislature

1.3.1 Accountability to the nation

It is positive that the April 2013 draft Constitution requires members of the Chamber of Deputies to take an oath that explicitly expresses the primacy of the public interest. Members of the Chamber of Deputies, upon assuming office, must "solemnly swear" to "work diligently to serve the nation" (Art. 56). The oath thus emphasizes that members of the legislature remain accountable to the nation for the work they are appointed to do.

1.3.2 Financial independence

It is desirable to secure independence at the administrative and financial levels of the legislature as the April 2013 draft Constitution does (Art. 51). However, it would be advisable to ensure transparency and accountability in the legislature's own financial and administrative management. For this purpose, different (but not mutually exclusive) options can be considered:

a) Include an explicit reference to the responsibility that the legislature's own financial management will be exercised with transparency and accountability;

b) Add a mechanism to control such administrative and financial management (that could rest on the Audit Court, for example);

c) Require that the Chamber's budget (and its expenditure) be open and public. Further detail can be regulated by organic or statutory law;

d) Require that plenary and committee meetings are open to the public, except for sessions that touch upon national security issues.

1.3.3 Immunity

The April 2013 draft Constitution considers immunity for the members of the Chamber of Deputies in two different situations:

a) Unrestricted (specific) immunity for "opinions or proposals suggested or for the work performed thereby because of the performance of the parliamentary functions thereof" (Art. 58);

b) Limited (general) immunity for crimes and misdemeanors committed during the term of office, but not related to official functions. This immunity can be lifted in terms of Art. 59 of the April 2013 draft Constitution.

It is important that the grounds and procedures to lift immunity be clearly defined. While the constitution could set basic criteria deferring the detail to the law, the April 2013 draft Constitution does not offer much guidance in this regard. It is advisable that the Constitution, or at least a law required by the Constitution, set these circumstances out. Provisions in the Constitution or in a law could include for example, criteria to distinguish between the specific immunity for behavior related to their role as Deputies from the general immunity for other behavior during the term of office; and could describe cases when immunity can be lifted, such as when the integrity of the Deputy is questioned (founded allegations of corruption, fraud etc.), mismanagement or misuse of public funds, crimes against the public administration, and crimes against humanity or violations of human rights.

Similarly, the procedure for lifting immunity should be spelled out. Two alternatives could be considered:

a) That it be requested by prosecutors or investigating agencies and decided by the Constitutional Court or any of the High Courts. This option has the advantage of involving independent branches of state other than the legislature itself, thus reducing opportunities for the members of the legislature to act only to protect their own interests.

b) That it be requested and decided by a qualified majority of the Chamber of Deputies. A high majority would ensure that different political parties would have to agree which reduces the possibility of abuse.

1.3.4 Legislative openness

It is advisable to set standards of transparency and openness as a general principle of operation of the Chamber of Deputies. Compliance with these standards ensures accountability, and strengthens the credibility and legitimacy of the institution. Openness includes among other things:

a) Proactively providing timely, reliable and understandable information about its work (agenda, discussion and decisions).

b) Holding sessions in public, with few exceptions in which case the topics to be discussed will be made public.

c) Ensuring public participation. Participation enhances the credibility and legitimacy of institutions, and provides for political fairness and balance. Despite a declaration of popular sovereignty (Art. 3), the April 2013 draft Constitution does not contemplate the exercise of legislative initiative by the electorate. This is a change from Art. 55 of the December 2012 draft Constitution, which provided that qualified minorities of voters could submit draft laws for referendum or for consideration by the legislature. The excision of this provision, while we do not comment specifically, makes consideration of other forms of popular participation in the legislative process, like public and open hearings and expert opinions, necessary.

d) Publicity of acts and decisions of the Chamber of Deputies.

1.3.5 Public budget legislative process

In regard to the process for debating and approving the public budget, (Arts 60 to 62), it is important to balance independence, accountability and expertise. With this in mind we make the following suggestions:

a) Keep the requirement included in the April 2013 draft Constitution that the government is exclusively competent to present the budget law to the legislature (Art. 60). The provision in its current form prevents the President from introducing the budget law on his or her own.

b) Keep the prohibition on the introduction of member's bills that pose charges on the public income or expenditure (Art. 61).

c) Prescribe in the Constitution the establishment of a special Public Accounts Committee (similar to those existing in other African countries), specifically charged with following up on government's income, credit and expenditure.[13] Usually, membership of this Committee requires special public finance expertise. The work of the Audit Court can be linked to this committee by enabling it to request Audits and by asking the Court to report to this committee.

d) It is positive that Art. 62 of the April 2013 draft Constitution requires an organic law to determine the procedures governing the enactment of the public budget (Financial Act) and, as we understand it, consequently includes this under the list of Organic Laws (Art. 68). This provides for stability in the procedures and should deter frequent changes. More generally, it is also advisable to ensure that the wording of the list on Art. 68, coincides with references to organic laws indicated elsewhere in the text.

e) Ideally, the organic law could require the Financial Act and government expenditure to be made available and accessible to the public (access via internet, mass media, publications etc.). At the constitutional level, it will suffice to state that the principles of transparency and openness must govern the budgetary process.

1.4 Judiciary

A strong and effective judiciary can make a difference and prevent and reduce corruption. The independence and accountability of the judiciary are perhaps two of the key cornerstones for its effectiveness. It is therefore also crucial when considering the prevention and combatting of corruption. Implementing independence and accountability of the judiciary is complex, and this section includes some recommendations taking aspects that are included in the April 2013 draft Constitution and including others that are not.[14]

1.4.1 Accountability: Decisions in the name of the people (Art. 105)

It is a relevant consideration in whose name and on whose behalf judges issue and execute decisions, because this indicates to whom judges are accountable. In this sense, it is more consistent with independence that judges issue and execute decisions on behalf of the people, departing from the Constitution of 1959, which stated that judges would issue decisions in the name of the people but would execute them in the name of the President.

1.4.2 Appointment

One relevant criterion applicable to any appointment mechanism is the importance of preserving judicial independence. The greater the president's discretion in the nominations process, the greater the risks to judicial independence. Direct appointment of judges by a president creates risks of corruption in the form of cronyism, nepotism and conflicts of interest.

The April 2013 draft Constitution describes different appointment procedures for judges of the judiciary, administrative judiciary and financial judiciary on the one hand, and of the Constitutional Court on the other hand.

a) **Judges of the judiciary, administrative judiciary and financial judiciary** "shall be nominated by virtue of an order made by the President of the Republic based on a similar opinion of from the Supreme Judicial Council" (Art. 100). A number of suggestions can be made to improve this mechanism:

- The roles can be clarified. Article 100 of the April 2013 draft Constitution leaves unclear the extent of the President's discretion in nominating judges and the role of the Supreme Judicial Council: must the President nominate whomever the Supreme Judicial Council recommends, or is the Supreme Judicial Council's opinion merely advisory?
- A two-tiered approach, whereby judges of the higher-level courts are appointed through a different process than judges in the lower-ranking courts, could help to reduce corruption and risks of capture. For this purpose, a combination of merit and political appointment processes could be used for high level courts while lower level judges or regional courts can be appointed by merit by the Supreme Judicial Council. This would establish a form of "judicial career" similar to that of the civil service. Combined with the "recognition" model of appointment for higher-level courts, this creates a form of "hybrid" judiciary that is increasingly common in many civil law countries.[15]
- Other options to elect high-level court judges could be considered. One option is to involve the legislative branch, as with appointments to the Constitutional Court (see below). The Chamber of Deputies could be required to confirm the President's nominees for judicial posts, or vice versa.
- A second option for appointments to the higher-level courts is to maintain the position set out in Art. 100, but clearly state the extent of the President's discretion as it relates to the opinion of the Supreme Judicial Council. Within this option, different alternatives could be used with varying degrees of presidential discretion, while preserving the principle that the appointment is not the President's sole decision:
    - The Supreme Judicial Council nominates one candidate for each judicial vacancy, whom the President is obliged to appoint. This is a formal function, in which the President exercises no discretion;
    - The Supreme Judicial Council nominates one candidate for each judicial vacancy, whom the President has the discretion only to appoint or to refuse to appoint, giving reasons for his or her refusal to do so, making them public and returning the decision to the Council for reconsideration;
    - The Supreme Judicial Council nominates a selection of candidates for each judicial vacancy, from which the President must choose to appoint one judge.

In all cases the appointments should respond to merit and qualifications, and the appointments process should be public, open and transparent.

b) Appointments to the **Constitutional Court** are governed by a detailed process set out in Art. 112. The process involves the President, the Prime Minister, the Chamber of Deputies and the Supreme Judicial Council, and for this reason helps to ensure that the members of the Constitutional Court are not beholden to one site of political power. Article 112 provides further that the members of the Constitutional Court shall elect a president and a vice president from among their own number, while Art. 106 provides that the members of the Supreme Judicial Council shall elect the Head of the Council from among the member judges of the Council. These procedures strengthen the independence of these institutions, and should be retained.

1.4.3 Term

It is important that the term of the highest judges does not coincide with that of the President or the legislature. Ideally, the terms of judges of the higher-level courts, and the Constitutional Court in particular, will be staggered in groups. This means that not all members' terms would expire at the same time, and that for the first time, some Court members' terms will be longer than others. In this sense it is good that Art. 112 of the April 2013 draft Constitution foresees that one third of the Constitutional Court will be renewed every three years.

1.4.4 Constitutional review of legislation

Judicial review of legislation for its compatibility with the provisions of a constitution is another mechanism of accountability. The review of legislation for constitutionality ensures that the executive and the legislature abide by the constitution and the law.[16] The April 2013 draft Constitution contains procedures for constitutional review of legislation both before ratification by the President – "abstract review" (Art. 114(1)) – and after promulgation – "concrete review" (Art. 114(5)). Constitutionality review is thus a mechanism of ensuring that the laws in terms of which government officials operate are in line with the provisions of the Constitution. This helps to ensure accountability and adherence to the rule of law.

1.4.5 General comments

It is advisable to clarify which institution has jurisdiction over matters related to fraud and corruption in the administration. Normally it will be criminal courts. Many countries also create sanctions via civil and administrative law. At the constitutional level, only the different types of courts, their jurisdiction and competency need be stated. In some cases, constitutions mention that crimes against humanity and the misuse of public funds are not subject to a statute of limitations (the possibility of trial will not expire) – this is an advisable provision for Tunisia as well. Should there be a special institution in charge of investigating and/or prosecuting corruption, the jurisdiction between this body, the ordinary prosecuting authority, and the judiciary, should be clarified.

1.5 The Audit Court and other independent oversight and control entities at the national level

The April 2013 draft Constitution considers the Court of Audit (referred to internationally as a Supreme Audit Institution or SAI) as part of the "Financial Judiciary" (Art. 111), with the function of supervising the sound spending of public funds in accordance with the principles of Sharia, effectiveness and transparency, preventing errors in public fund management, assisting the legislature and executive powers in the passage and execution of financial laws, and preparing annual and special reports submitted to the President, Prime Minister and Chamber of Deputies. These reports must be made public.

The SAI is a key institution in any country with a relevant role in preventing and combatting corruption, particularly as it deals directly with the use of public funds. In the following discussion we present some considerations with reference to the model as it currently stands in the April 2013 draft Constitution and taking into account good practice from elsewhere.

1.5.1 Institutional arrangements

There are different institutional models for SAI's around the world, each with different advantages and disadvantages partly depending on the specific country context and also on the type of regime (parliamentary or presidential). In any case, the most important characteristic is its independence; the SAI should not belong to the executive or the legislature (and could be placed outside the judiciary, almost as a different – fourth – power of the state) and should be a separate independent body.

In the German model, for example, the Audit Court (*Bundesrechnungshof*) is set up independently outside the three branches of the state. As such, it has no adjudicative power but its reports and recommendations are mandatory for the government and the legislature to act upon. In France, the Court of Accounts is also set up independently, but it belongs to the judiciary and has quasi-judicial powers, with its own prosecutors who are civil servants. The French model requires instituting a complete investigative and decision-making infrastructure but it has enforcement authority, while the German SAI works more closely with the other state institutions, is less complicated in its structure, and derives its power from the requirement that the government and legislature follow its conclusions. In the Commonwealth model (followed in many countries in Africa), the SAI is appointed by and responds to the legislature, focusing more on financial auditing and less on compliance with the law. Auditors are not considered civil servants.[17] In looking at the proposals contained in Art. 111 of the April 2013 draft Constitution, the model proposed looks closer to the French model. This has the advantage of clarity, in assigning judicial functions only within the judiciary; and the advantage of effectiveness, in ensuring sufficient powers to adjudicate. The disadvantages of this model are, first, that as the proposed Audit Court is institutionally within the judiciary, it is not independent enough to scrutinize the management of the funds of the judicial branch; and second, that building the structure of the institution can be cumbersome and risks inefficiency.

1.5.2 Key elements of the audit institution

No matter what model for an Audit Court is finally chosen in Tunisia, the following are in our view key points to consider under any of them:

a) **Independence**: This entails different aspects:

- *Autonomy*: the Audit Court requires its own recognition as a legal entity even if it is considered to have judicial powers. The April 2013 draft Constitution provides legal-entity status only to the Judicial Council. It would strengthen the Audit Court to have this status as well.
- *The capacity to determine its own activities*: this is an important – and perhaps defining – source of independence (i.e., it can decide on particular topics, themes or institutions to control within its mandate).
- *Appointment process, status and tenure*: To ensure independence, it is better if the three branches of power participate in the nomination and appointment process of the head of the Audit Court (or the Board members should the SAI be headed by a committee); its appointment could be left, for example, to the Judicial Council upon nominations by the President and the Chamber of Deputies. The tenure must be fixed and made to be different from the legislative and executive election cycles. The tenure can only be interrupted by the decision of the Constitutional Court or the Chamber of Deputies by a qualified majority. Ideally, the status of the Head of the Audit Court would be similar to that of ministers or High Court judges.

b) **Clarity of mandate**: It is not clear what type of audit or oversight functions the Court of Audit will perform. The effects of the Audit Court's findings also need to be clear and set out in advance, in order to give the institution strength and power. Article 111 of the April 2013 draft Constitution is not clear on whether the Audit Court will issue semi-judicial decisions on its own, or if it will issue reports with mandatory (administrative) impact. The Constitution should define this and the above points and leave the law to determine the internal organization and procedures.

c) **The advisory role**: The SAI often acts in an advisory capacity to the legislature and the executive. This is more common in the German model than in the French one. It is easier to implement if the institution does not exercise judicial powers, as the advice will not be taken as pre-judgment, is not confused with self-enforcing recommendations and leaves options open to governmental discretion. The scope of the advisory role the SAI plays depends on the preferred nature of the organization. It entails a preventive role that is also relevant and enables the institution to engage constructively with other entities.

d) There are different alternatives with regard to the **reports the Audit Court provides to the legislature and the executive** and these need to be made explicit:

- The Audit Court should have authority to review and control all entities that manage public funds (the executive, the president's office, the legislature, the judiciary and publicly owned companies). This should be irrespective of the final regime choice.
- The Audit Court can communicate with the legislature and the executive through its ordinary reports, which can be of different types:
    - An annual general report which is made public (along the lines already mentioned in Art. 111 of the April 2013 draft Constitution). The requirement that these reports be made public should be emphasized.
    - Individual reports addressed to each audited institution. These reports are directed to the management of the institution and should be made public together with the management's response.
- In addition, the Audit Court can be requested by the legislature or the executive to produce special audit reports. It is advisable also that the Audit Court can produce special reports outside the ordinary controls upon its own decision.

1.5.3 Regional and local government control

The control scheme at the national level needs to be replicated at the regional and local level, with equivalent control agencies. Depending on how decentralization will be organized, there are different models for instituting control agencies at the sub-national level. In some cases there are separate entities at the sub-national level whose heads are appointed by the sub-national executive and/or councils. No matter which model will be chosen, it is advisable that sub-national supreme audit institutions are organically linked with and report to the national level entity, so that there is coordination and quality control.

1.5.4 Accountability

One difficult issue with independent control institutions is the question of who controls the controller. First of all, the appointment of their officials needs to be done transparently and with extra scrutiny to select people based on merit. Second, the budgets and operations of SAIs need to be transparent, and SAIs should be held publicly to account for their results and use of resources, just as any other public institution. Third, their accounts need to be reviewed by an external auditor, which could be either a private external auditor or an auditor engaged by the Judicial Council.

Finally, other control agencies could be envisioned to oversee and control civil service functions, strengthen their capacity and ensure the compliance of all public officials with the code of conduct.

1.6 Decentralization: local and regional entities[18]

There is no clear evidence as to whether decentralized systems pose greater or lesser corruption risks. What is clear is that they are prone to different corruption risks. The importance of decentralization is more related to efficiency, service delivery and development, often underscoring that more empowered and responsible regions are able to promote growth, equality and quality of life, while the national government serves a coordinating and assurance function.[19] How decentralization is implemented (its governance arrangements and in particular the devolution process and the time allowed for this) affects the actual outcomes. Here we include a few considerations in regard to regional and local authorities:

a) Ensure autonomy goes hand-in-hand with responsibility and capacity. The main aspect of the relationship between the central and the local governments turns on how public funds are mobilized, allocated and spent. All of these processes are prone to corruption and unfortunately there is considerable evidence that decentralization "decentralizes" corruption, in particular if the process does not take into account the required time to build local institutional capacities and systems. While this should not divert attention from decentralization, an effort needs to be made in the design of ground rules. These ground rules can be generally set by the constitution as principles and goals leaving the further development of them to the organic statutes; among those rules, one can consider the following:

   - Ensuring that local governments' budgets include a mix of local and national incomes, as provided for in Art. 127 of the April 2013 draft Constitution. Some constitutions establish criteria to allocate national funds among local and regional divisions, for example proportional to the number of inhabitants, the quality of life conditions and each region's own contribution to the nation's finances.

- Local government debt can only be admitted within the limits of the national budget, or under certain procedures that enable for economic authorities for some control.
- Regional and local governments are responsible for the well being of their people and should ensure that basic needs be satisfied and public goods and services provided.
- There should be mechanisms to ensure coordination between the local and the national level.
- Local governments should be encouraged to coordinate among themselves, particularly for the design and delivery of infrastructure projects.

b) Ensure openness, transparency, participation and accountability of local governments to their people.

c) Consider establishing jurisdiction for the Supreme Audit Institution at the local and regional level, which can also be exercised in a decentralized way.

d) Envision in the Constitution a transitional regime while the decentralization law is put in place, enabling local governments to start preparing for more responsibilities.

1.7 Electoral institutions, political parties and campaign finance

Election processes that are effective, transparent, free from fraud and perceived as legitimate contribute to good governance. Encouraging and allowing dissenting opinions from outside the government helps in this respect too. Civil society in general as well as political opposition should be free to express dissenting opinions. It is therefore important to establish institutional mechanisms at the constitutional level for these purposes. Such mechanisms include citizens' rights of freedom of expression and political opinion, and government's duty to recognize political dissent. Further, the rules and procedures of the electoral system itself must seek to minimize corruption within the electoral and political party system as such. The following recommendations are made in light of what is currently included in the April 2013 draft Constitution:

a) The independence of the Electoral Authority is crucial. Articles 119 and 120 of the April 2013 draft Constitution establish good mechanisms to safeguard this (appointment, tenure and replacement). It is advisable to request that the Authority will behave openly and transparently and that its reports will be publicly available.

b) Political party institutionalization. The April 2013 draft Constitution includes the right to political association and to establish and join political parties, syndicates and associations (Arts. 30 and 33) but does not conceive mechanisms to implement the right or a structure within which the right can be enjoyed. The Election Authority could exercise functions of registering parties as well.

c) Political party finance is a source of corruption and influence but also a necessary mechanism to ensure that political parties can exist. The Constitution can leave the law to regulate the matter but could require minimum standards, such as the need for contributions to be known publicly.

d) Some countries include guarantees for political opposition (like appointment of representatives of the opposition in certain positions, including oversight institutions, parliamentary committees etc.).

1.8 Specialized institutions to prevent and combat corruption

Contrary to the widespread common belief that specialized anti-corruption bodies are effective in combatting corruption and that they are mandatory under UNCAC, there are arguments both for and

against having specialized anti-corruption agencies and UNCAC wisely leaves member states' options open. Instead of requiring specific institutional arrangements, UNCAC contains the obligation for state parties to ensure that certain key functions for the prevention and combatting of corruption are provided for: Art. 6 mandates state parties to have "a body or bodies" to implement, oversee and coordinate anti-corruption policies and to disseminate knowledge about corruption, while Art. 36 mandates states to ensure "the existence of a body, bodies or persons specialized in combatting corruption through law enforcement".[20] It is important to note that these functions fall into very different institutional mandates and logics: on the one hand, functions related to policies and coordination thereof which can often be best performed by an organ close to the executive; and on the other hand, functions related to straightforward law enforcement which need to be performed by independent institutions and the judiciary.

Reviews of existing anti-corruption agencies show that: i) there are different ways of organizing a country's institutional arrangements to prevent and combat corruption; and that ii) specialized enforcement-oriented and multi-purpose anti-corruption agencies in most cases do not live up to their promises.[21] The different institutional arrangements for anti-corruption roles can be largely grouped into four categories:

a) **Multi-purpose specialized anti-corruption agencies**: This model is used in Hong Kong (see the Independent Commission Against Corruption), and has been followed by many countries in Africa and by some in Asia. Transplants of this model have often failed to acknowledge important differences in context. In most countries these agencies have not generated expected results, have often been politicized, or used merely to soothe public opinion.[22]

b) **Specialized bodies or units within existing law enforcement institutions with a primary mandate of investigating and sanctioning corruption**: These show mixed results. In some cases they have brought about results and remained strong, while in others too successful performance has led to side-lining or abolishing the bodies.

c) **Specialized bodies with prevention mandates**: A number of these institutions have emerged in Eastern Europe and Latin America, depending on the executive and focusing on promoting transparency and integrity policies, inter-institutional coordination and monitoring. These are integrated into the administrative structures of the executive branch; some of them within existing entities, others have been created separately without constituting independent agencies. For these agencies to be effective they seem to need the full support and direct backing of the president.

d) **An array of institutions with partial mandates to prevent and combat corruption as part of their overall institutional mission**: In Chile, for example, the range of institutions is coordinated through a special mechanism to ensure overall coherence.

Specialized multi-purpose anti-corruption agencies are those most studied. Evidence suggests that most of their difficulties are associated with a lack of high-level political will to make them work; unclear mandates; limited resources and capacity; lack of coordination with other state entities and control agencies; limited reach at the decentralized level; and, at times their abuse for political purposes, like pursuing political opponents only.[23] Often, they face conflicting jurisdictions overlapping with those of prosecutors and criminal judges. On the more positive side, they may contribute to promoting awareness and knowledge, may serve to receive and channel citizen complaints and reports of corruption, and in some cases identify instances of corruption. Overall, these agencies are faced with high expectations but have a rather disappointing impact. Ironically, they sometimes occupy the public agenda on corruption, leaving other institutions off the hook in terms of generating tangible results for the people.

The April 2013 draft Constitution does not establish a specialized anti-corruption unit, although the December 2012 draft provided for the establishment of an "Authority for Good Governance and Anti-Corruption". The role described for this institution was to contribute to the policies of good governance and anti-corruption, and to promote the principles of transparency, integrity and accountability. It is unclear whether such an institution will be revisited in subsequent drafts of the Constitution. In any case it is nevertheless desirable that the April 2013 draft Constitution mentions explicitly the specific need for the government to address corruption. In terms of Art. 19, the government is required to "develop the mechanisms necessary" to fight corruption. This function can occur within the existing structure along the lines described above, and is required by the UNCAC Convention anyway. The following are a few suggestions in considering different options:

a) **Define the mandate clearly and explicitly**: An anti-corruption institution can be directed either towards prevention or investigation and prosecution of corruption. Our suggestion is clearly to separate the two functions institutionally. There are different options to organize the institutional arrangements for such a division of functions:

- *Without creating a new institution*: Anchor in the Constitution the need for the state to have the two functions of preventing and combatting corruption including a reference to the separation of these functions and the need for both to be exercised through an institutional design regulated by law, their main characteristics, as well as the main principles that institutions to be created by normal law should contain. In this option there is no need to create any institution to prevent or combat corruption in the Constitution. In South Africa, for example, there is no separate independent agency, but a team of specialized prosecutors and investigators working in a coordinated way with other state agencies. Or in Chile, there is also no specialized corruption-prevention body, but a coordinating mechanism has been established to harmonize and coordinate actions of a variety of institutions with a mandate to prevent corruption. It is worth noting that even in the absence of such mandate under the Constitution it is possible (if not mandatory) for the government to assign the function and give it enough powers, in light of the commitments assumed by Tunisia under UNCAC.

- *Create an institution for the prevention of corruption in the Constitution only*: This institution should have a clearly defined mandate to assume responsibility for issues that are crucial for the prevention of corruption and that do not have an institutional home yet, e.g. reception, monitoring and control of declarations or assets, income and interests, guidance and oversight on conflict-of-interest management, promotion of public ethics, and the coordination and monitoring of policies and programs to address corruption (both preventive and punitive). If this institution was created by the Constitution, constitutional provisions should specify how the head will be selected, by whom and for how long. The issue of independence needs to be pondered as there are advantages of having a corruption prevention organ close to the executive with direct backing of the President in order to give the institution political clout and access to other powerful public institutions.

- *Create an independent institution with the explicit mandate to investigate and prosecute corruption allegations only*: Such a body would need to have a very clear mandate that does not overlap or clash with other law enforcement institutions, and its head or collegial directorship would need to be selected with the involvement of all state branches and civil society, with utmost transparency and with a fixed term tenure in office that does not coincide with the political cycle of the government.

b) The **function of guaranteeing transparency** is highly relevant and promising and should be combined with a general principle in the Constitution to guarantee access to information as a citizen right and mandating state institutions to act with transparency, openness and accountability as a public duty. In some countries, there are specialized institutions with the mandate (separate from anti-corruption agencies) to guarantee access to information for citizens, such as is the case in Mexico and Chile. Such institutions do not necessarily need to be anchored in the constitution. However, in the current Tunisian context, it may make sense to consider creating this institution at the constitutional level as it "institutionalizes" an additional channel of communication between the citizens and the state. The head of such an institution and its staff should have fixed tenure in office, should be selected through a mechanism that allows for participation of societal actors (e.g. candidates nominated by different groups) and appointment rules should ensure that both the President and the legislature have a say.

Although all the options are equally valid, we caution against overloading the Constitution with the creation of institutions, and suggest a focus on ensuring that the objectives of preventing and combatting corruption are addressed. The institutions that in our view are most likely to achieve these objectives, and which should therefore be strongly considered for inclusion in the constitutional architecture of Tunisia, are those intended to guarantee that the right of access to information is meaningfully enjoyed, and those established to police the separation of powers between the branches of government.

2. Constitutional principles and social values

The principles, values and fundamental rights included in a constitution determine much of the character of the nation. They determine how a constitution is implemented and interpreted. They also serve as fundamental vehicles to identify and implement mechanisms for preventing and controlling corruption. In fact, all mechanisms for the prevention and control of corruption are based on these general principles and fundamental rights. Here, we describe them in two categories: 1) General principles and values and 2) Fundamental rights and duties.

2.1 General principles and values

The general principles and values set the ground for what the "code of conduct of public officials" should be. They would be included in the sections regarding the organization of the state or also within the first Chapter of the Constitution of Tunisia, containing general provisions. In regard to corruption prevention and control, these include three main guiding principles:

a) **The primacy of public interest**: The public interest has priority over the private interest. This can be explicitly expressed this way. In addition, it is also captured when explicitly said that the main accountability of all public officials is towards the people of Tunisia.

b) **Principles governing the public administration**: These should indicate/describe how the public administration works. Usually they refer to issues such as effectiveness, efficiency, transparency, service delivery, accountability and integrity. This can also include necessary attitudes like honesty, impartiality and openness.

c) **Principles and values for all citizens**: Participation, integrity and transparency are also relevant in the conduct of ordinary citizens and businesses. Government corruption can involve private enterprises and private citizens, and integrity in the private sphere may help to reduce corruption in the public sphere. A public demand for accountability from the public authorities, expressed through

participation in public and political life, contributes to a culture of transparency, openness and integrity within government.

2.2 Fundamental rights and duties

There are also fundamental rights to be included in the constitution that are basic for the development and implementation of a system to prevent and control corruption. Some of these rights are already included, in various forms, in the April 2013 draft Constitution.

a) The right to access information (Art. 34), and the corresponding duty of public authorities to proactively provide such information (openness), to respond to information requests and to act as guarantor of this right, are crucial in efforts to expose corruption. There can be limits set to access to information, but they should be clearly set in the law and only for the purpose of protecting the public interest (in some cases of national security or when a publication would produce damage – like in cases of witness protection mechanisms).

b) The freedom of association and the freedom of expression (Arts. 30 and 40) are also important to exposing corruption. Careful consideration needs to be given as to how the law can regulate these issues, and what limitations can be imposed. For this reason, it would be convenient to include explicit criteria in the Constitution as a basis for determining acceptable limitations and requiring that such limitations be consistent with other human rights.[24] These rights were included in the previous Constitution of the Republic of Tunisia, and reports indicate they were not respected.[25] Care needs to be taken to include them in ways that make a difference, among them:

- Clarity on criteria under which the law can determine possible limitations;
- The need to be transparent, clear and open when limitations are enforced;
- The opportunity to challenge restrictions on these rights.

c) The right of participation for all citizens of Tunisia entails that the involvement of citizens in the decisions of the state is not limited to electing officials (Arts. 3 and 47),[26] but it includes also the right to set priorities, consult, give opinions, group in political parties (Art. 30) and demand accountability from public officials. The right to participate runs in parallel to the right of association and assembly and freedom of expression (Arts. 30, 31 and 40); and the rights of equality including gender equality and political participation complement each other (Arts 6 and 11). The April 2013 draft Constitution is not explicit, however, in establishing a right to political participation or describing the contours of such a right. The constitutional entrenchment of a right to political participation gives a legal guarantee to the citizens for the use of non-violent means of expression, and ensures the existence of channels for involvement that can be used in different ways to prevent corruption and facilitate good governance.

d) The freedom of the press, and all necessary mechanisms to guarantee it, creates another mechanism to expose, and thus discourage, state corruption (Arts. 36 and 40).

e) Equality and non-discrimination in all of its forms, including gender equality (Arts 6, 11 and 42), commit the state to treat all people fairly and equally, limiting opportunities for bias and other forms of political favor.

f) The inclusion of socio-economic rights is another expression of the public interest (Arts 32, 37, 38, 39, 41, 44, 45 and 46). These rights refer to various and minimum aspects of collective life that should be provided and guaranteed by the state. They are relevant for corruption-prevention systems as they

concretize also the public interest and provide a concrete measure of the goals to which the nation should aspire in a state without corruption.

g) The duty to report acts of corruption is already mandatory for Tunisian officials under the current criminal law statutes. Ajina and Ouerfelli suggest this duty could be extended to ensure that reporting corruption does not conflict with obligations of professional confidentiality borne by lawyers, accountants and other professionals.[27]

The April 2013 draft Constitution provides that laws relating to, among other things, "Freedoms and human rights" and the "Organization and funding of parties, associations, organizations and professional bodies" shall be deemed to be "organic laws" requiring different procedures than "normal" laws (Art. 68). Specifically, while normal laws can be approved by the Chamber of Deputies with a majority of "attending members", organic laws must be approved by "an absolute majority of the members" of the Chamber of Deputies (Art. 69). While any organic laws pertaining to rights and freedoms must therefore pass more stringent legislative procedures, it is not advisable to leave too much to the law, as this subjects the definition of rights to change. The advantage of defining basic rights in the Constitution is that it sets a more stable framework, especially in light of the fact that constitutional amendment procedures are themselves very strict (Arts. 135-137).

Part III: Concluding remarks

Including corruption prevention and enforcement mechanisms in a constitution is intimately linked with a good governance system governed by the rule of law. It does not necessarily require the creation of different or specialized entities to prevent or fight corruption, or the articulation of new rights or values. However, in our opinion the most important aspects to be considered in the constitution-drafting process, in order to reduce opportunities for corruption and increase the control of corruption, are:

1. Providing for an effective separation of powers, where the balance among the branches of government aims at securing that the state as a whole fulfills its responsibilities to the people of Tunisia. Irrespective of the final regime choice, this should take into consideration:
    - Nomination and appointment processes of high-level officials that secure independence.
    - Avoiding unrestricted immunities.
2. Providing for a strong, independent and accountable judicial system.
3. Providing for a few strong, independent and accountable control and oversight institutions: supreme audit institution, electoral commission, and an institution to guarantee the right of access to information.
4. Developing a political and governance system based on transparency and openness of all its state branches as well as participation for citizens and organized civil society, where access to information is a guaranteed right and the norm in practice.
5. Protecting and promoting basic rights of association, expression, participation and equality.
6. Considering what institutional arrangements would best fit for preventing corruption and punishing corruption, and separating these functions clearly.

The Tunisian Constitution alone will not engender change, but with a well thought out institutional design that fits the Tunisian context, provides tools, mechanisms and a legal basis for action, Tunisia's new constitutional order stands a good chance of promoting social and political transformation.

* * *

Notes

[1] See in this regard comments by Ricardo Fabiani, North Africa analyst at political risk consultancy Eurasia Group, and Nicola Ehlermann-Cache, senior policy analyst at the Organisation for Economic Cooperation and Development (OECD), quoted in Luke Balleny, "Could corruption be worse in Tunisia, Egypt, after Arab Spring?" *Reuters,* 20 March 2012, available online at http://blogs.reuters.com/the-human-impact/2012/03/20/could-corruption-be-worse-in-tunisia-egypt-after-arab-spring/.

[2] Draft Constitution of the Republic of Tunisia, 22 April 2013, unofficial English translation prepared by International IDEA, available online at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Tunisia-third-draft-Constitution-22-April-2013.pdf.

[3] Faycal Ajina and Ahmed Ouerfelli, "Anticorruption Provisions in the Forthcoming Constitution of Tunisia", (International IDEA, 2012), available online in the original Arabic from the International IDEA website, at www.IDEA.int (forthcoming 2013).

[4] Around the world there has been an increasing tendency to use the term "anti-corruption" indiscriminately. For example, projects to strengthen the Auditor General's or Ombudsman Offices may refer to them as "anti-corruption" institutions, and initiatives to strengthen a country's procurement system or guarantee access to information may be labeled as "anti-corruption" projects. While there is no doubt that these measures will help reduce opportunities for corruption and increase the probability of detecting corrupt practices, it is important not to lose sight of their broader institutional mandates and good governance related goals.

[5] See definitions by Transparency International (www.transparency.org), Daniel Kaufmann and Pedro C Vicente, "Legal Corruption" Second Draft (World Bank, October 2005, available online from the SSRN, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829844); J Olaya, "Good Governance and International Investment Law: The Challenges of Lack of Transparency, Corruption and Legal Stability with Particular Reference to Colombia", Ph.D Dissertation, Bonn University, 2009. See also J Olaya, "Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption", paper presented at the Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, 8-10 July 2010, available online from the SSRN, at http://ssrn.com/abstract=1635437.

[6] After the ratification of the UNCAC, it is reported that some countries may have introduced explicit references to corruption. See for example E Gorbak, "The effects of Anti-Corruption and Good Governance Rules in Latin American Countries after their Constitutional Reforms: Analysis of the Current Situation", paper presented at the VII World Congress of the International Association for Constitutional Law, Athens, 11-15 June 2007, available online at http://www.enelsyn.gr/papers/w16/Paper%20by%20Prof%20Erica%20E.%20Gorbak.pdf.

[7] See also Oyelowo Oyewo. "Constitutions, Good Governance and Corruption: Challenges and Prospects for Nigeria", paper presented at the VII World Congress of the International Association for Constitutional Law, Athens 11-15 June 2007, available online at http://www.enelsyn.gr/papers/w16/Paper%20by%20Prof%20Oyelowo%20Oyewo.pdf.

[8] This is the case, for example, with the independence constitutions in East Africa drafted in the 1960s, many of which had to be reformed again in the 1990s. Hatchard *et al* claim that one weakness they had, despite declaring openly the separation of powers, was that they did not secure political party activity, opposition, or multi-partisan systems. Authoritarianism flourished under single-party schemes where

there was no longer a difference between the state and the party, and the separation of powers was forgotten (J Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, Cambridge 2004).

[9] This is the case in the USA, for example, where mid-term elections have returned a legislative majority from a party opposing the President, or where the "filibuster" has defeated legislative efforts. Although neither divided government nor filibustering have threatened the democratic system, they have induced less healthy political practices.

[10] See Ajina and Ouerfelli (n 3).

[11] See for example theoretical and empirical work by Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions: What do the data say?* (MIT Press, Cambridge MA 2005); J Kunicová and S Rose-Ackerman, "Electoral Rules and Constitutional Structures as Constraints on Corruption" (2005) 35 *British Journal of Political Science* 573.

[12] Persson and Tabellini, *The Economic Effects of Constitutions* (ibid), and Kunicová and Rose-Ackerman, "Electoral Rules and Constitutional Structures" (ibid). These studies emphasize the role of opposition, dissent and election rules (direct, indirect, etc.) within the executive as determinative of levels of corruption, rather than the division of executive roles itself.

[13] Depending on the roles assigned to this Committee, it could be simply created by organic law regulating the Chamber of Deputies. Including it in the Constitution explicitly may make sense should the Audit Court be responsive explicitly to this Committee, or should the regime choice be parliamentary.

[14] On the judiciary more generally, see Tom Ginsburg's paper in this Working Paper Series: "The Tunisian Judicial System: 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/.

[15] Ginsburg, "The Tunisian Judicial System" (ibid).

[16] In Nigeria for example, the Court interpreted the Constitution and the Anti-Corruption Act so as to change the view that the Constitution's anti-corruption provisions were not actionable. In light of the Court's interpretation, citizens can approach the courts to determine whether government's conduct and the legislature's enactments are in compliance with the Constitution's anti-corruption provisions. See Oyewo (n 7).

[17] For a broad description of SAIs, see for example R Stapenhurst and J Titsworth, "Parliament and Supreme Audit Institutions" in R Stapenhurst, N Johnston and R Pelizzo (eds), *The Role of Parliaments in Curbing Corruption* (World Bank, Washington DC 2006).

[18] On decentralization more generally, see Jörg Fedtke's contribution in this Working Paper Series: "Tunisian Constitutional Reform and Decentralization: Reactions to the Draft Constitution of the Republic of Tunisia", 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/.

[19] The literature on this point is diverse and abundant. See for example a list of resources under http://www.transparency.org.uk/corruption/resources/corruption-resources-decentralisation-of-governance.

[20] See H Hechler and M Peñailillo, "Institutional arrangements for corruption prevention – Considerations for the implementation of the United Nations Convention against Corruption Article 6", U4 Anti-Corruption Resource Centre Issue Paper (2009), available online at http://www.u4.no/publications/institutional-arrangements-for-corruption-prevention-considerations-for-the-implementation-of-the-united-nations-convention-against-corruption-article-6/.

[21] See for example A Doig, R Williams and A Sakr Ashour, "Anti-Corruption Agencies: Reflections on International Standards and Experiences and Considerations for Arab Countries" (2012, A El Seblani (ed)), UNDP, available online at http://www.pogar.org/publications/ac/2012/Studies/Final%202.pdf; OECD, "Specialized anti-corruption institutions – a review of models", (2008), available online at http://www.oecd.org/corruption/acn/39971975.pdf (there is a more recent 2013 edition of this OECD review available online at http://www.oecd.org/corruption/acn/specialisedanti-corruptioninstitutions-reviewofmodels.htm); and J Heilbrunn, "Anti-corruption agencies: panacea or real medicine to fight corruption?" (World Bank Institute, Washington DC 2004).

[22] A Doig *et al,* "Measuring 'success' in five African Anti-Corruption Agencies", U4 Anti-Corruption Resource Centre Issue Paper (2005), available online at http://www.u4.no/recommended-reading/measuring-success-in-5-african-anti-corruption-commissions/; E Bolongaita, "An exception to the rule? Why Indonesia's anti-corruption commission succeeds where others don't", U4 Anti-Corruption Resource Centre Issue Paper (2010), available online at http://www.u4.no/publications/an-exception-to-the-rule-why-indonesia-s-anti-corruption-commission-succeeds-where-others-don-t-a-comparison-with-the-philippines-ombudsman/.

[23] See literature mentioned above.

[24] In this regard see the contribution of Jörg Fedtke in this Working Paper Series: "Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia", 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/.

[25] Amnesty International, *Tunisia: Submission for Consideration by the National Constituent Assembly on the Guarantee of Political, Civil, Economic, Social and Cultural Rights in the New Constitution* (Amnesty International Publications, London 2012, available online at http://www.amnesty.ca/sites/default/files/2012-04-12mde300042012entunisiaca.pdf), 12-13.

[26] This issue is emphasized by Ajina and Ouerfelli (n 3).

[27] Ibid.

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