

ANTI-CORRUPTION PROVISIONS IN THE AFGHAN CONSTITUTION?

Andras Sajo

Professor of Law Central European University, Budapest

Corruption as a constitutional problem?

Few constitutions are directly concerned with corruption, and even less use the word corruption. Many constitutions are silent on the issue because of the way the role of the constitution is understood. Traditionally constitutions were intended to set a framework for the state that limits Tirana by separation of powers and the protection of fundamental (human) rights. This understanding of the constitution leaves the solution of specific social problems to the ordinary legislative process. However, the traditional constitutional arrangements may become obstacles to anti-corruption activities. If this is the case a constitutional consideration of corruption is reasonable. Further, constitutions which were enacted in the past two decades in developing countries have provisions which are closely related to the problem. Corruption is mentioned generally if corruption as such is a principal political concern in creating or amending the constitution (see e.g. Ecuador).

Is it *corruption* the constitutional problem?

What is the concern that animates anti-corruption measures? All public officials (both those elected to political positions and the civil servants) should serve the public interest. Any impermissible remuneration or advantage that may influence these officials in their public duties has the potential to cause them to betray the public interest in favor of some private self-interest. Therefore corruption has to be understood in the broadest sense. It goes beyond bribery, and it includes situations where improper private influence may be exercised upon the officials. It includes trading in influence, favoring family and kin, giving and receiving gifts, and situations that have the potential of improper influence. Corruption is to be prevented. Such primarily preventive measures include conflict of interests rules and other rules of incompatibility.

Although such matters may seem too much of a detail, there is sufficient reason to incorporate a general prohibition of situations of conflict of interest and self-dealing. Once it is left to politicians and affected civil servants to define the matter in ordinary legislation and codes of ethics their private interests might result in improper legislation. Constitutions increasingly require that members of parliament and civil servants declare their assets and liabilities, and refrain from private activities. Lack of declaration, false declarations and maintaining impermissible positions should be sanctioned by loss of the position. There can be a prohibition on participation in matters where the person has personal interest. (Such rules often exist in parliamentary by-laws or Standing Orders.) A very radical solution is that a decision taken by officials in a conflict of interest situation shall be void if the person within the prohibited position had a decisive contribution. Some constitutions prohibit public office holders to have any other occupation outside the public office, except teaching and other creative non-decision-making activities.

Language: "Elected public officials, office-holders named in the Constitution and civil servants shall have no other employment relation or business partnership, except in education and religious activities; they shall not enter in business relations with entities that deal with the state and shall disclose all their assets, liabilities and income from time to time and how they acquired or incurred them, as the case may be. Violation of these rules shall result in discharge as determined by the constitution and the law. Details and exceptions for local and regional elected officials are determined by law."

Sajo anti-corruption

Alternatively there can be a whole chapter on integrity as is the case e.g. in Uganda (see Appendix)

A well developed separation of powers (checks and balances) system takes care of most of the corruption-prevention that can be done at the level of the constitution

A proper separation of powers provides considerable constitutional protection against corruption. In addition contemporary constitutions define and provide for independent agencies that are serving purposes of accountability of the various branches of power. This applies to such institutions too that are elected/appointed by one or another branch and serve the supervision of the branches and the public administration. Special procedures of impeachment may apply in case of crimes and other constitutional violations committed by chief elected officers (including the President, highest judicial authorities and perhaps some of the independent public bodies, including the special anti-corruption unit if the decision is to have one). In some countries special tribunals are elected to deal with such matters and this is probably one of the roles of the Council of Constitutional Law in the emerging Afghan draft. The constitution shall state the crimes for which impeachment like procedure might be used. Bribery and abuse of power for personal benefit should be on the list.

Among the general purpose supervisory bodies parliamentary investigative committees and various accounting (audit, comptroller) bodies are of particular importance. The constitutional provisions on these institutions should take into consideration the conditions of their successful anti-corruption activities. The relevant measures do serve, however, other purposes and are not primarily corruption oriented.

Parliamentary investigative (inquiry) committees shall be established upon the request of the parliamentary minority, with a chairperson coming from the minority and (preferably) with equal powers in the committee for opposition and government parties. The committees should have access to all public and private information and should have subpoena powers.

The public audit body shall be independent and responsive. In some constitutions the public audit operates as a body of the Parliament but its independence is always guaranteed, even if some partisanship in the appointment is inevitable. To increase independence the traditional techniques of agency independence might apply. These include:

- the requirement of professional expertise
- the prohibition of giving directions (for the exception see below)
- appointment by supermajority, or by several branches jointly, perhaps upon proposal coming from professional non-governmental bodies; powers of nomination-appointment shared among the branches
- no dismissal by the appointing body or by political bodies; dismissal by the body itself; dismissal upon court findings only (for a caveat, see below)
- financial independence of the institution (last year's base, inflation indexed as a minimum)
- financial independence of the chief officer (e.g. remuneration linked to remuneration of parliamentarians)
- internal procedures determined by the body (constitutional language: "autonomous and independent")
- search powers shall equal that of the public prosecution (questionable)

Caveat: Increased independence and autonomy reduces the accountability and responsiveness of the public audit. In order to avoid complicity of the audit office with certain improper or corrupt practices the legislative branch might retain the power of the initiative of

Sajo anti-corruption

dismissal, with qualified majority. Parliamentary majorities minorities and the head of the executive branch should have the right to ask for priority review in case of suspected corruption.

Many constitutions leave it to Parliament or the executive to draw conclusions from the findings of the audit body. In the French model audit is done by special courts. If the audit body has the powers of a court it might impose certain sanctions on improperly acting public bodies.

Transparency of public spending is a crucial modern requirement of checks and balances. It has major advantages for anti-corruption and these features require constitutional guarantees. The use of public monies should be made accessible within the general freedom of information, including the use of public money by private entities. A rule in this regard makes party finances partly transparent.

The problem of special immunities

In order to grant the necessary level of independence for the various branches of power special immunities and privileges are granted to the officials who take the decisions. These measures limit accountability. Further, laws, and exceptionally constitutions grant special legal protection to civil servants and limit state responsibility. Finally, in the name of protecting the efficient functioning of the state access to public information is restricted, or constitutionally not guaranteed. These are considerable obstacles to learning about corruption and taking action against it. The obstacles might be hard to overcome even for police and prosecution. In particular the legislative body will not waive the immunity of the member who is charged with crime, and the same happens with judges whose immunity may depend on a special judicial panel.

Experience indicates that allegations of corruption are used by those in power to destroy their political opponents. On the other hand, charges of corruption, the production of corruption scandals are used by those who would like to bring down the government and this might destabilize and delegitimize democracy. If the immunities and privileges of elected representatives of the people or other public authorities (including judges) are easily subjected to legal (criminal) procedures in the name of fighting corruption that might undermine any democratically elected body and constitutional institution.

The Ecuador Constitution does allow for the recall of elected public officials (although only one attempt can be made upon the initiative of 30 per cent of a constituency). Recall of representatives goes against a fundamental doctrine of representative government that is based on the assumption that elected representatives and officials are only politically accountable, that is they will be sanctioned at the next election by the electorate.

If corruption (and certain other criminal activities) are a major danger to society than the constitution may provide for mandatory loss of political rights if one is found guilty.

The Constitution as an expression of agreement regarding fundamental values. Is the integrity of public institutions a constitutional social value?

Classic constitutions are short with as little declaratory part as possible. Declarations undermine the legal nature of the constitution, and result in uncertainty, as it is never known which of these declaratory statements will be used and for what purposes. Under special circumstances the Constitution may serve as a tool of public education. In this case certain fundamental values that are to be accepted in the society. In principle, in an Islamic Republic there is no special need to refer to the impropriety of corruption given that engaging in bribery is a sin (2:188 and 8:27). Corruption as a social problem per se does not necessitate a value statement in this regard. An otherwise inevitable reference to the rule of law ("The Islamic Republic of Afghanistan is a state under the rule of law") implies the impermissibility of

Sajo anti-corruption

corruption. This might be tied to the provision that describes that all powers emanate from the people and all power and public offices shall be held in trust for the people. [The last part of the sentences comes from Uganda's Constitution: XXVI. (i).] Constitutions often mention that the government shall be efficient, transparent and accountable. In principle these references are sufficient to address the problem at a general level.

If however, the concern of the constitution-drafters is that the problem is fundamental, or that an anti-corruption position would greatly strengthen the public credibility of the constitution, or that the public is completely unaware of the impropriety of self-dealings in public affairs than specific reference can be made to corruption, with clear statement that acting for one's family and kin is also incompatible with public trust. A general non-discrimination rule contains an express prohibition on "favoring one on grounds of kinship". This takes care of the special concern.

Language: "Public officials accepting bribes, or acting in their self interest or in the interest of their family and kin are in breach of public trust".

Once again, under ordinary circumstances this matter is not for the constitution.

Writing anti-corruption policies into the Constitution?

Constitutions are not intended to embody special policies. Constitutions are intended to be lasting frameworks, while policies change and might become counterproductive on the long run by committing resources where these resources cannot be efficiently utilized. References to policies occur mostly where the policy is intended to undo past unjust policies that were the result (at least partly) to legislative or normative measures (for example the undoing of the caste system in India, or apartheid in South-Africa). Corruption in its nature is not related to past legal injustice or impropriety. A provision that would require the legislation or the government (executive) to develop efficient measures to fight corruption does not provide any additional guarantee for efficient anti-corrupt practices and policies. If the Constitution states the duty of the state to observe public trust under the rule of law, additional exhortation is unnecessary.

Special anti-corruption agency

Some experts claim that special central anti-corruption units are very efficient tools to fight corruption. Such units operate among others in Singapore and Hong Kong. The evidence regarding the performance of such special units is debated. It is also argued that, at least in some instances, the central anti-corruption unit becomes a political tool in the hands of the government, or against the government. Such institutions are generally created by ordinary legislation, or even by executive order. Nepal provides for a constitutionally mandated body. The Nepal Commission for the Investigation of Abuse of Authority deals with all abuses including corruption but the constitution itself provides that certain public officials and the Army come under different supervision. The Constitution of Ecuador has written provisions regarding a special anti-corruption agency that is composed of members of non-governmental organizations as determined by law. It is not the Commission that is in the center of anti-corruption measures: the Ecuador Constitution rules that the State Prosecution (Ministerio Publico) shall head and co-ordinate the anti-corruption activities.

The disadvantage of a special agency is that it will compete with other bodies for resources. Serious problems of co-ordination might emerge. (The competing agencies don't share their information). The advantage of a special agency is that corruption related investigation will be a priority. If the prosecution and police cannot be trusted with effective anti-corruption activities, the special agency might be a solution. This does not require per se that the

Sajo anti-corruption

institution be mentioned in the constitution, except perhaps if otherwise it would not have full investigative and prosecutorial powers.

Language: “An independent Public Accountability Committee, established by law, with the powers of public prosecutor shall protect the integrity of public life.”

Some constitutions (Fiji) concentrate all public interest and human rights protection in a single Ombudsman-like office. Uganda is currently considering a similar arrangement. Merging these functions is a consideration in view of the affordability for the country of the cost of running the above bodies. However, because anti-corruption or certain matters of human rights are politically sensitive, the involvement of the Ombudsman in politically sensitive actions might jeopardize his credibility and success (both in the eyes of the citizenry and of government). The Ombudsman may need powers for anti-corruption investigation that do not fit into human rights protection activities. In ethnically divided societies too much dependence on one public rights protector might be counterproductive. A less ambitious solution is provided in the South African Constitution. Here an independent Public Protector is entitled to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. His powers and specific obligations are determined by law. Such limited power is easier combined with the role of a human rights protector.

Integrity and transparency of political life

To the extent corruption in election and of political parties undermines democracy there might be need for special constitutional measures in this regard. Such constitutional rules are necessary, if ordinary legislation would incapacitate the fight against corruption in political life because such measures would violate the constitutional protection granted to political rights.

Corruption related restrictions of political rights might apply to parties and election results. The constitution may make it mandatory that election results that are the result of corrupt practices (in violation of rules of funding be voided and that people involved in election related corrupt practices and other improprieties should not be eligible for a period of time. (French statutes contain similar rules.)

Bans on parties involved in corruption are an extremely harsh measure. Writing such rules into the constitution is appropriate only where the danger of such practices is clear and present. If, however, the constitution opts for public funding of parties, denial of funding as determined by law is advisable. (Of course, there is no compelling reason for constitutionally mandating public funding for parties and elections).

Language (in case the constitution has provisions on public funding of election campaign and parties): “Parties in violation of the rules on party financing and individuals and parties in violation electoral financing shall be denied future public funding as determined by law.”

Integrity of the civil service

There shall be certain provisions on the civil service, including a mechanism to prevent and investigate abuse of power and other improprieties.

Pardons and amnesties

Amnesty and pardon are generally mentioned in the constitution, as they represent departure from the principle of equal justice. Pardons and amnesties are often abused by those who can grant them. This phenomenon fits into the broader problem of self-pardoning. If a total ban on pardoning corruption related crimes is not practicable than at least sequestration and loss of political rights shall not be affected, in order to avoid the corrupters return to politics.

Sajo anti-corruption

Language [to be added where pardon and amnesty is discussed: “Pardons [amnesties] shall not affect the restrictions on political rights imposed for a crime against the integrity of public life.”

Such wording gives indication that there shall be a special chapter in the criminal code dealing with crimes against the integrity of public life.

Citizen’s fundamental rights

A number of rights that are to be protected anyway are important for effective anti-corruption measures and should be worded in a way that guarantees the specific anti-corruption needs. The specific rights are

Freedom of information, including the use of public money (see above)

A general protection and effective protection granted to all those who make use of their constitutional rights and carry out their constitutional obligations

Language (at the end of the rights and duties section) “ The state shall take effective measures to enable citizens to use their constitutional rights and carry out their constitutional duties.”