

Summary of Papers on Anti-Corruption Measures in the Constitution of Afghanistan

Center on International Cooperation, New York University

Traditionally constitutions have left measures against official corruption to legislation. Recently, however, a growing international consensus has come to view the corruption of government officials as a serious obstacle to the rule of law, democracy, and equitable development. Since those officials who may benefit from corruption are those who would be responsible to legislate against it, drafters increasingly include measures against corruption in constitutions to place them beyond the reach of politicians in power. Constitutions now often enshrine principles of accountability, transparency, and service to the public; prohibit forms of corruption and prescribe fuller legislation; and establish independent tribunals and other institutions to prevent and punish official corruption.

Afghanistan has particular reasons to guard against corruption. It will depend for many years on international assistance to rebuild itself after decades of conflict. Such aid will not be forthcoming if donors fear it will be lost to corruption, nor will Afghanistan benefit from the aid as it should if it is wasted in this manner. Afghanistan will soon introduce political parties and partisan electoral campaigns for the first time. The need to finance such campaigns is a major source of corruption in many countries. In addition, the widespread Afghan norm of sharing the power and benefits of public office with one's own qawm and of deciding public matters on the basis of wasita and rawabit has undermined public faith in legitimate government and promoted violent conflict.

Specific Measures against Corruption

Some constitutional measures to control corruption of high officials include:

- Explicit inclusion of at least certain types of corruption as grounds for impeachment of the heads of state and government (if distinct), supreme court justices, and perhaps other high officials.
- Requiring declarations of assets by officials and their immediate or extended family members before taking up positions, at regular intervals while in office, and upon leaving office.
- Establishing full transparency of public spending and revenue by requiring publication of all government accounts by an independent auditor and requiring free access to public records with limited exceptions established by law.
- Provision for recusal in the event of a conflict of interest.
- Regulation and monitoring of the funding of political parties and campaigns, possibly including public funding of campaigns.

- Appropriate protection for public officials and private citizens who expose or denounce corruption.





Measures against corruption should also include balances against their abuse:


- The special immunities often enjoyed by members of parliament and other officials may serve important goals (discouraging intimidation of opponents), though they can also constitute an obstacle to fighting corruption
- Special anti-corruption agencies risk becoming political tools, as they arguably have in Hong Kong, Pakistan, and Singapore. Hence there are good reasons to establish some checks over their actions.

Institutions

Previous constitutions of Afghanistan provided for special institutions for official misconduct, though the historical record does not indicate they were widely used. The constitutions of 1923 and 1931 provided for a high court (diwan-i 'ali), which sat temporarily as an ad hoc body to "try Ministers of the State" (Cons. 1923: 33-34, 56-57; Cons. 1931: 79-82, 95-96). The Constitution of 1931 required that investigations into the conduct of ministers and government servants be carried out by an investigative team formed by the national assembly, with the consent of the King.

Special requirements must be set for the staffing and operation of independent investigative bodies to assure their competence, independence, and transparency. The major advantage of a special agency is that corruption-related investigations are its main or sole priority. Such agencies have to compete for their survival and funding, however, with other government bodies.

Independent agencies for accountability can include: a statutory auditor-general, parliamentary committees, special tribunals, or a constitutional or high court empowered to try high officials. The French model provides that an investigative or audit body report to the executive or national assembly to draw conclusions from and act on the findings. The constitutionally mandated body of  deals with several types of abuses, including corruption, but the constitution  places civilian and military officials under different jurisdictions . In Ecuador the anti-corruption body draws its members from NGOs, independent from  government.

Such an independent body may have a broader mandate: in Fiji an Ombudsman office includes both public interest and human rights monitoring functions. The political sensitivity of human rights and anti-corruption issues, however, might jeopardize the credibility of the Ombudsman's office and distract it from the more mundane complaints that constitute its usual duties. A more practical choice might be the South African model of a public protector. The public protector is an official entitled to investigate any questionable conduct in the state or public administration. His limited powers and specific obligations are determined by and can easily be merged with the role of a human rights protector. This model may very well fit into the Afghan  text.

Annex: Sample texts

The following sample texts could be used for drafting clauses on the integrity of public offices. These texts could form the basis for later, more elaborated laws.

Text 1: Office-holders named in the Constitution, and civil servants shall have no other employment relation or business partnership, except in education and religious activities. These public servants, as well as elected public officials, shall not enter into business relationship 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. Violations of these rules shall result in discharge as determined by the constitution and the law. [See also the Ugandan Constitution for a model].

Text 2: Whereas corruption and other forms of malfeasance undermine democratic functioning, public officials, both elected and appointed, have an obligation to maintain high standards of public integrity. As a consequence, they shall refrain from accepting or soliciting bribes, shall not engage in practices that enrich themselves at the expense of the state and its citizens, and shall not favor family members or personal associates in hiring, contracting, or making policy. Private citizens and business organizations have an obligation to deal fairly with the state, and, therefore, they shall refrain from paying bribes or pursuing any other means, including use of personal or family contacts, illicitly to influence public decisions.