

Corruption

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Corruption of politicians and public officials, including the police and the military, can undermine efforts to establish democracy. Thus, it is appropriate to consider including clauses in the Afghan Constitution to highlight and respond to this problem. However, a detailed anti-corruption policy cannot realistically be included in a constitution.

Nevertheless, if corruption is the result of dysfunctional general policies and institutions, those designing the basic constitutional structure of the state need to consider the incentives for corruption created by alternative political, bureaucratic and judicial structures. In addition to these fundamental issues of state organization, the constitution could include clauses that commit the state explicitly to controlling corruption.

The term “corruption” includes a range of ways in which public officials can misuse their offices for private gain or can illegally benefit their political allies. Efforts to control corruption need to include not only political and bureaucratic officials inside government but also those in the private sector who pay bribes and seek illicit favors. Thus, corruption includes both the payment and the receipt of bribes, whether or not the services provided are themselves illegal. It also includes actions by officials that do not involve bribery such as fraud and the misuse of public funds, facilities, and goods and services for private benefit. Conflict-of-interest is a separate, related problem that needs to be defined and limited. Political party financing and the financing of political campaign are an important, contested area where laws need to be clear about where the line is drawn between legal and illegal contributions. In the interest of brevity, I will not deal further with either conflicts of interest or political financing, but they are issues that the drafting committee may want to consider as well.

In the section of the constitution that outlines the rights and duties of citizens and state officials a clause could be included saying: “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 and shall not engage in practices that enrich themselves at the expense of the state and its citizens. Private citizens and business organizations have an obligation to deal fairly with the state, and, therefore, they shall refrain from paying bribes or using any other means illicitly to influence public decisions.” This clause or something like it would express an aspiration of the framers but would, of course, need to be made concrete with the passage of an organic statute.

The details of an overall anti-corruption policy would be included in statutes passed after the Constitution has been approved. However, corruption of high level officials could be included in the Constitution because these officials would have little reason to pass strong laws during the implementation phase. The problem of corruption could be subsumed under a general section in the Constitution concerning public integrity. This would include efforts to limit the payment and the receipt of bribes; self-dealing and fraud by state officials, both elected and appointed; and conflicts of interests where officials have private interests that conflict with their state duties. The Constitution could create an office to monitor government integrity, including procurement, financial audits, the integrity of elections as well as corruption. This office would need to be independent of the day-to-day operation of government, but the appointment of its leaders would need to reflect the political factions in the state. The office could levy fines and impose disciplinary sanctions, and it could be required to refer criminal cases to those who prosecute other crimes. Below I present one such model derived from the new Thai Constitution.

In writing this part of the constitution, the drafting group must consider how it fits together with other parts of the document. Of particular importance are the sections on the criminal law and the protections afforded those accused of crimes. In a country

without such protections, allegations of corruption can easily be used to destroy political opponents, whether or not the allegations are true. Thus, strong anti-corruption provisions need to be coupled with presumptions of innocence in the criminal law and procedural protections for the accused. Furthermore, anti-corruption provisions that depend on the imposition of criminal sanctions require reasonably competent and honest prosecutors and judges, conditions that are probably lacking in Afghanistan at present.

In addition, given the limitations of criminal law enforcement, I would urge that some concern be given to the structural aspects of the constitution that can limit or enhance corrupt incentives. These would be sections of the constitution dealing with the civil service, with transparency and public accountability (for example, independent auditing, freedom of information provisions, required publication of laws and decrees, creation of an Ombudsman, judicial independence, procurement standards). Institutions for transparency and accountability need to be designed to serve two purposes. First, Afghanistan is likely to be very dependent on foreign financial assistance for many years. Thus, the government must establish systems that make it easy for outsiders to know how their money has been spent. Second, if democracy is going to mean anything to ordinary people, there must be methods of accountability that permit individuals to complain without fear of reprisals. This means that both complaint mechanisms and locally based consultation processes must be constructed that are not completely controlled by local leaders.

Even the most fundamental structures of government can encourage or discourage corruption. In a recent paper, I have shown that a system that combines a strong president with a legislature elected by proportional representation is particularly conducive to corruption. I argue that this is so because, first, the elected representatives are dependent on party leaders and are poorly controlled by the voters and, second, that party leaders and the president can too easily collude to share the gains of office. These results suggest the value of an electoral system that produces representatives with accountability to local constituencies and some incentive to take positions at odd with their parties. Those

drafting that part of the constitution need to consider the opportunities for corruption built into the structure of government.

Focusing just on the detection and punishment of corrupt high officials, one model is provided by the Thai Constitution of 1997 although it includes too many details that ought to be left to subsequent implementing statutes. The relevant sections dealing with corruption are Chapter X (sections 291-311) and section 331 (specifying the contents of the organic law required to implement Chapter X). The Chapter has four parts dealing with: declaration of accounts by those holding political positions, the National Counter Corruption Commission, procedures for removal of high officials from office, and criminal proceedings against persons holding political positions. In the following paragraphs I present a proposed set of constitutional articles derived from the Thai constitution. Drafters should also consult the original document and those involved in drafting it. I have shortened the text by omitting many details that seem more appropriate for the implementing statutes, not the constitutional text, and I have modified the substance in ways that are explained in brackets. The Thai constitution is at <http://www.krisdika.go.th/law/image/lawpub/e11102540>.

Part 1: Declaration of Accounts Showing Particulars of Assets and Liabilities (from section 291-296).

“On taking office, all those elected to public office or appointed to high political office, along with their spouses and children, shall submit accounts of their assets and liabilities to the National Counter Corruption Commission (NCCC). An equivalent report is required every two years and upon leaving office. These reports shall be made public by publication in the Government Gazette.”

[The Thai constitution requires that the reports of the Prime Minister and Ministers be disclosed on taking office, but not those of other officials. It requires that the NCCC publicly report on the change in assets for all those leaving office. It has no provision for interim reports.]

Part 2: The National Counter Corruption Commission (sections 297-302)

“The NCCC consists of a President and four members, all of obvious integrity, appointed by the President of the State with the consent of a two-thirds [or three-fifths] majority of Meshrano Jirga [or the Wulussi Jirga]. They shall serve for staggered terms of five years with one possible reappointment and will remain in office until a successor is appointed. The NCCC shall have an independent secretariat and budgetary autonomy.”

[The Thai Constitution has an NCC with eight members plus the President of the NCCC. This seems too large for efficient decision-making. The members serve for one nine-year term. Whatever the details, the idea is to have an appointments process that encourages both political balance and the appointment of non-partisan people of known integrity. In the Afghan case one house should confirm the appointments. The super majority requirement is an attempt to assure the broad acceptability of candidates, but, of course, it could be used to prevent any appointments. The terms should be staggered and not coincide with the terms of the President or the legislature. Thus five years is just an initial guess.

I understand that the initial proposals suggest the creation of a “high office of constitutional law” to perform multiple oversight roles dealing with constitutional violations. If corruption by high officials is included in the constitution, this body could prosecute such cases. As I understand it, the body would have 11 members, a rather large number. If this body is established, obviously, an important issue is whether to give it jurisdiction over corruption cases. I am rather doubtful that it would have enough independence to do so, but I also understand that Afghanistan does not have enough qualified people to create a large number of oversight institutions.]

“The NCCC shall have the following powers and duties:

- (1) to inquire into facts, summarize the case, and prepare an opinion to be submitted to the Shura under part 3 below [or maybe just to the Meshrano Jirga];
- (2) to inquire into facts, summarize the case, and prepare opinions to be submitted to the criminal court under part 4;

- (3) to inquire whether a State official has become unusually wealthy or has committed an offense of corruption or malfeasance and to take further action under the organic law on counter corruption;
- (4) to inspect the reports on assets and liabilities and their change submitted under part 1;
- (5) to submit an annual report of its activities to the President and the Shura;
- (6) to carry out other acts provided by law.” [the focus in the Thai Constitution is on high officials, especially elected officials. Although (6) is open-ended, the Afghan drafters might consider adding a section on bureaucratic corruption and state reform.]

Parts 3 and 4: Removal from Office and Criminal Proceedings (sections 303-307)

[This section sets up a way for the Thai Senate to remove high level national politicians and other top officials, such as judges, from office for various types of malfeasance not limited to corruption. The Senators must request an investigation by the NCCC if at least one-quarter of the Senate or the House of Representatives or at least 50,000 voters lodge a complaint. After an investigation, the NCCC decides whether to proceed. A decision not to proceed is final, but the text does not include a decision rule for the NCCC. At the same time as the NCCC reports back to the Senate it also refers the case to the Prosecutor who decide whether or not to prosecute. If he decides not to prosecute, a working committee is set up to try to resolve the dispute. This all seems to too complex. Furthermore, Thailand has a separate Criminal Division for Persons Holding Political Positions, a luxury that Afghanistan can probably not afford. Thus my recommended articles are quite different from the Thai text although they preserve their purpose]

Part 3: “Offenses by elected officials and by other high officials. Corrupt offenses include ‘unusual wealthiness indicative of the commission of corruption, malfeasance in office ...or the intentional exercise of power contrary to the provisions of the Constitution or law.’ [The meaning of these terms would have to be defined by the organic statute, but they surely include accepting bribes and enrichment at public expense.] The Meshrano Jirga shall request an investigation by the NCCC if it receives a request from at least one-fourth of the members of the Wulussi Jirga or the Meshrano

Jirga or from at least 50,000 citizens of voting age. The NCCC shall investigate such requests and can decide to drop cases where it determines that the evidence is insufficient. The NCCC shall proceed with an investigation if at least four out of five of its members agree to move forward. After the investigation, the NCCC shall submit a report to the Meshrano Jirga and to the Prosecutor. The Meshrano Jirga then votes on a motion seeking to remove that person from office. To succeed, the motion must be supported by at least three-fifths of the members of the Meshrano Jirga. The person is then prevented from serving in government service for five years.”

Part 4: “At the same time as its report is submitted to the Meshrano Jirga, the NCCC submits a report to the Prosecutor [or maybe to the “high office of constitutional law”]. The Prosecutor has discretion to decide whether to proceed with a criminal prosecution within the framework of the Afghan criminal law defining corrupt offenses. Any immunity given to high officials shall not apply to corruption allegations.” [It seems to me that unexplained wealth should not lead to criminal liability although it could be a reason for further investigation by the prosecutor. There is also the important issue of whether these cases should be handled by the ordinary criminal courts by a special body such as the “high office of constitutional law.” Not being sure how this high office would operate or whether it would be impartial enough to handle such cases, I do not have a view of this issue.]

The basic outlines of a constitutional approach to corruption could have three parts: (1) a general clause stating the problems with both political and bureaucratic corruption for democracy and defining the class of offenses in broad terms, (2) clauses dealing with transparency and accountability including provisions for auditing and information provision and for public participation and oversight, and (3) a chapter similar to chapter X of the Thai Constitution that specifically deals with corruption of high officials.