

Libya Constitution-Building Manual¹

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¹ This English version of the ‘Libya Constitution Building Manual’ is not final and is published and circulated merely for the benefit of those individuals who are interested or who are involved in the Libyan process and who do not read Arabic. The only official and final version of this Manual was published in Arabic and is available for free download here: <http://goo.gl/mzndJ5>. The official Arabic version departs from the English version in a number of respects.

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Preface

Libya is a unique country in a unique situation. Although its post-revolutionary phase poses a number of challenges, Libya continues to benefit from a vibrant civil society and from the opportunities created by the fact that its revolution swept away the previous political order. Also, despite the regression that was imposed by its former regime, Libya has the benefit of being able to draw from a number of traditions, including its own 1951 Constitution.

This Constitution Building Manual was developed specifically with that context in mind. It consists of five chapters, covering traditional areas of importance (including the separation of powers, fundamental rights, and decentralization) as well as some areas that are specifically relevant to Libya (including natural resources and corruption). The Manual does not proceed along classical lines; it focuses mainly on those areas that have been identified as being particularly relevant to Libya. For example, the Manual's section on fundamental rights does not discuss each of the political, economic or social rights that are typically included in constitutions (as it is assumed that the Libya constitutional drafters and jurists will certainly give due attention to all such rights in the new constitution). Instead, the Manual focuses on the principal methods that are used by modern constitutions to protect the application of rights in practice.

The Manual draws on comparative experience from the Arab region (in particular, the new constitutions that have been developed in Egypt, Tunisia, Morocco and Jordan since 2011), Europe, Latin America, North America, Africa and Asia. As always, this Manual respects IDEA's commitment to independent, objective, informed and non-prescriptive analysis. None of this Manual's sections are designed to achieve any objective other than to assist the constitutional drafters and all other interested parties in their efforts to establish a democracy in the region.

International IDEA is proud to publish this Manual as part of a series of documents that have been prepared on constitution building for Libya. We are confident that the Manual will contribute to a better understanding of relevant comparative practice on key constitutional issues, and that it will inform the continued debate on constitutional reform in Libya and beyond.

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Part 1: Fundamental Rights

1. Introduction

All modern constitutions, including past Libyan and Arab constitutions, contain lists of provisions that purport to protect political, economic and social rights. Some constitutional systems have been very successful in protecting fundamental rights and in improving standards of living. Others have been far less successful. Although the differences between successful constitutional systems and those that are less successful can relate to complex political, economic and social factors, the manner in which constitutional frameworks are drafted can have an important impact as well. There are however two important differences in the way in which constitutions can protect fundamental rights.

Firstly, some constitutions include many more rights than others:

- Almost all constitutions formally protect the freedoms of speech, assembly and association (usually referred to as ‘first generation’ rights);
- Many but not all constitutions also grant rights to citizens on important socio-economic issues, including the right to free education, to health care, to employment and to social security (‘second generation’ rights);
- Other constitutions also provide for other rights such as the right to a clean environment and community rights (‘third generation’ rights).

Several studies and examples already exist setting out the different types of rights that could be set out in a constitution, and so Part 1 will not elaborate further on that issue. Instead, Part 1 will focus on *enforcement mechanisms*, which are designed to ensure that rights do not remain theoretical, as has been the case for so long in the Arab region, including in Libya. This is a particularly challenging issue, particularly in post-totalitarian societies. A successful enforcement mechanism will depend on a number of factors, including an effective judicial system, parliament and government. In particular, government and parliament should be respectful of whatever rights are included in the constitution, and the courts should act to ensure that the government and parliament do not overstep their authority by unnecessarily or unjustifiably restricting rights (see Part 2).

A successful constitutional framework will also measure the strength of those institutions against the relevant country’s constitutional traditions (weighing its successes and failures) and decide whether additional provisions and mechanisms may be necessary to protect fundamental rights. These can include mechanisms such as including limitations clauses in the constitutions or providing significant detail in the constitution itself on how specific rights should be exercised in practice and what the limitations to those rights should be.

(a) General provisions

Fundamental rights provisions often raise general questions pertaining to:

- their status within the general constitutional framework of a nation;
- their application;
- their interpretation;
- and/or their limitation.

While many constitutions leave these questions more or less unanswered (see, for example, the French Constitution of 1958), and thus leave it to the judiciary to develop solutions on a case-by-case basis, other texts (such as the German Basic Law of 1949, the South African Constitution of 1996, or—to a *much* lesser extent—the Iraqi Constitution of 2005) contain important operational provisions which address these issues openly (albeit in varying degrees of detail). Systems with a mixed track record of human rights protection in general, or with limited practical experience in the adjudication of human rights disputes by the courts, may find much value in the implementation of some general rules in this area.

(b) Ensuring that fundamental rights are binding on the State (Supremacy Clauses)

Many constitutions contain provisions clearly stating that fundamental rights bind the exercise of power by public authorities. All branches of government (legislative, executive and judicial) on all levels of the state (national, regional and municipal), as well as any other organs of state (such as the various commissions established by the DC), should be included within the ambit of fundamental rights protection. The following examples from Germany, South Africa, Namibia and Iraq reflect this notion:

German Basic Law (1949), Article 1(3)

The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Constitution of South Africa (1996), Section 8(1)

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

Constitution of Namibia (1990), Article 5

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Constitution of Iraq (2005), Article 2

(1) Islam is the official religion of the State and is a foundation source of legislation.

- A. *No law may be enacted that contradicts the established provisions of Islam.*
- B. *No law may be enacted that contradicts the principles of democracy.*
- C. *No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.*

Article 13

- (1) *This Constitution is the preeminent and supreme law in Iraq and shall be binding on all parts of Iraq without exception.*
- (2) *No law that contradicts this Constitution may be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.*

Note that the German, South African and Namibian provisions bind all three branches of government; the Iraqi text, on the other hand, binds the legislature with respect to, inter alia, fundamental rights—articles 2(1)(C) and 13(2)—while the executive and judicial branches are not specifically mentioned.

2. Limitations Clauses

Most societies limit fundamental rights in some form; every piece of legislation that regulates human activity carries with it at least the potential for the limitation of some right. For example:

- Freedom of expression is limited by the prohibition against defamation. In other words, one cannot use freedom of expression to ruin the reputation of another, or to call for immediate violence against a specific individual or groups of individuals.
- Freedom of movement is limited by traffic rules, by rules relating to detention and imprisonment, and finally by immigration rules. In other words, freedom of movement is routinely limited to make public transport more efficient, to protect law and order through the detention of criminals, and for economic reasons including the desire to protect local labour markets by preventing large-scale immigration.

In the past, many constitutions recognized this problem by specifically requiring parliament to determine how each right would be limited. For example:

1951 Constitution of Libya, Article 25

The right of peaceful meetings is guaranteed within the limits of law.

1971 Constitution of Egypt, Article 47

Freedom of opinion is guaranteed. Every individual has the right to express his opinion and to disseminate it verbally or in writing or by photography or by other means within the limits of the law.

Although the drafter's intention here is obvious, in practice, these constitutional provisions do not grant or protect a right. They merely announce that the right exists, and that it subject to restriction, without providing any indication as to how far that restriction can extend. In practice, as is well known, although all Arab constitutions provided for the existence of specific rights, hundreds if not thousands of laws were passed that so restricted those rights that they rendered the rights themselves completely meaningless. For example, in Egypt under the 1971 Constitution, a law was passed that prohibited any public discussion of the president's health on public security groups. Rules were passed that prohibited any public criticism of the police, of the army, or of the courts. It became almost impossible to criticize the state, which meant that freedom of expression was essentially non-existent, despite article 47's very broad and generous wording.

Today, this type of provision is commonly referred to as a ‘clawback clause’ because it appears to announce a fundamental right held by the people but then states that the government can take that freedom back from the people through legislation. Clawback clauses are highly problematic and undermine any protections of rights given by the constitution because they allow for legislation to take away all meaning from fundamental rights. In the absence of a strong judiciary (which is mostly absent in the Arab region), a government that seeks to completely limit fundamental rights faces almost no obstacles when the right is only protected by a provision like this one.

Many countries in the world have been struggling with these each issues for more than half a century, and have together developed a number of solutions, some more effective than others. These countries (including Canada, Germany, South Africa, Kenya and many others) have been learning from each other’s experience to strengthen their own national experience. Most recently, Tunisia builds on that comparative experience by incorporating some innovative provisions in its new constitution. The two main approaches that exist today to limit the state’s ability to arbitrarily and unfairly curb fundamental rights include:

- specific limitation clauses; and
- general limitation clauses.

A specific limitation clause is a clause connected to a specific right, which explains the purposes or means by which that right may be limited. A general limitation clause is one set of instructions given for how all rights in a constitution, or a particular section of a constitution, may be limited. These clauses each have their benefits and drawbacks, and their impact depends very much on how they are written. Libya must seriously consider including a limitation clause of its own in its new national constitution if it wishes to increase the chances of building a state in which fundamental rights are respected by the state and not be routinely violated as they were in the past.

(a) Specific Limitation Clauses

Specific limitation clauses are clauses that are contained in the same provision as a particular freedom and explain how that freedom may be restricted. Specific limitation clauses vary significantly, but all are aimed at preventing arbitrary restrictions of rights. Specific limitations can take the form of a single phrase within an article.

Constitution of Chile, Article 19

This Constitution assures to all persons:

(6) Freedom of conscience, manifestation of all creeds and the free exercise of all cults which are not opposed to morals, good customs or public order

The words ‘which are not opposed to morals, good customs or public order’ are limitations. These words mean that that right to free exercise of all cults may only be limited if the exercise interferes with one of these three enumerated values. The particular phrasing that is adopted by article 19 of the Chilean Constitution is problematic, because it invites the government, parliament and courts to limit freedom of conscience based on three highly subjective values that are not defined anywhere in the constitution. Provisions such as article 19 have been used in many parts of the world to selectively

restrict rights based on particular officials' interests, even if they are in conflict with large segments of the population.

Specific limitations clauses can also be far more detailed than the previous example.

South Africa Constitution, Article 16

- (1) *Everyone has the right to freedom of expression, which includes—*
- (a) *freedom of the press and other media;*
 - (b) *freedom to receive or impart information or ideas;*
 - (c) *freedom of artistic creativity; and*
 - (d) *academic freedom and freedom of scientific research.*
- (2) *The right in subsection (1) does not extend to—*
- (a) *propaganda for war;*
 - (b) *incitement of imminent violence; or*
 - (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

This model is significantly clearer because it extensively discusses the contents of the right, and then separately discusses potential limitations in detail. Because this formulation clearly expresses that the freedom may be limited, it must also be carefully crafted to not allow for total restriction of the right. This provision does this by making the categories of allowable limitations very narrow. The South African Constitution, as discussed below, has disposed of vague and subjective phrases such as public welfare, order and morals, in exchange for more precise text like that seen here.

(b) General Limitation Clauses²

General limitation clauses set out the means and purpose necessary for the limitation of all rights in the constitution. These clauses are included to ensure that the constitution is uniformly supreme to legislative attempts to restrict rights. These clauses can ensure that no constitutional right can be completely limited. The language must be broad, because these clauses apply to all rights, and drafters must avoid vague or ambiguous language that will allow for arbitrary limitations. Different wordings of general limitation clauses ensure the protection of rights to a different degree.

German Basic Law (1949), Article 19(1)(2)—Restriction of Basic Rights

- (1) *Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.*
- (2) *In no case may the essence of a basic right be affected.*

² This section draws significantly from a paper entitled 'Tunisian Constitutional Reform and Fundamental Rights: Reactions to the Draft Constitution of the Republic of Tunisia', Jörg Fedtke, Working Paper No. 4, Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia, Al-Ali and Stacey (eds.) (June 2013), published by the Center for Constitutional Transitions at NYU and International IDEA, available at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

Canadian Charter of Rights and Freedoms (1982), Section 1

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society.

Constitution of South Africa, Article 36

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Constitution of Iraq (2005), Article 46

Restricting or limiting the practice of any of the rights or liberties stipulated in this Constitution is prohibited, except by a law or on the basis of a law, and insofar as that limitation or restriction does not violate the essence of the right or freedom.

Constitution of Indonesia, Article 28J(2)

In exercising his/her rights, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

Constitution of Tunisia (2014), Article 49

The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.

Judicial authorities ensure that rights and freedoms are protected from all violations.

There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.

The content of these clauses will be discussed at length below, but the differences and similarities in phrasing are significant, and are worth summarizing here:

- Canada's general limitation clause is short and its meaning has been largely developed by the Constitutional Court.

- Iraq's provision is also short and vague and therefore depends on the courts to give the provision meaning; this has turned out to be a major mistake given the weakness of Iraq's court system and its lack of independence.
- South Africa's is more extensive and this formulation puts in writing concepts very similar to the concepts developed by the Canadian judiciary.
- Tunisia's limitation clause includes references to many of the same elements as South Africa's constitution, but also specifically indicates that it is the responsibility of the courts to protect rights and freedoms from all violations. The clear implication here is that the courts must protect rights and freedoms from violations *by the government and the parliament*.
- Indonesia uses similar language as the others but places the burden on individuals to accept restrictions rather than placing the burden on those limiting the rights to demonstrate the limitations' appropriateness.

Commonly, constitutions with general limitation clauses also have some rights that have specific limitation clauses. For example, South Africa's article 25 announces the freedom from arbitrary deprivation of private property, but then explains the purposes for which private property may be taken by the state. Some commentators have expressed concern that having two layers of limitation clauses will make rights appear eminently limitable. In other jurisdictions, the existence of specific limitations clauses may have made the general limitation clauses less relevant.

However, the two layers can work positively together. The general limitation clause can serve as protection for all rights, without the need for additional protections. At the same time, different rights have different characteristics and may have different importance. Specific limitation clauses can allow limitations to be tailored to the characteristics of a particular right. Article 25 of the South African Constitution is a good example of this. Property rights have a unique character and physical property can be taken in ways that other intangible rights cannot. The drafters reasonably sought to apply a special set of limitation restrictions to them. General limitation clauses can also lead to increased uniformity in analysis by the courts, while including specific limitations clauses can create a hierarchy of rights that instructs the court how to respond when two fundamental rights conflict.

(c) Content of Limitation Clauses

Limitation clauses have had varying effectiveness in protecting fundamental rights and their content is significant to their effectiveness. The content of these clauses can be broken down into a small number of categories.

(i) Legality

One of the goals of limitation clauses is to ensure that restrictions are not arbitrary. To achieve this goal, many limitation clauses require that any restriction on rights is made by law rather than an individual action. Laws, particularly those passed by the legislature, are believed to require increased consideration compared to an executive action, and provide citizens a clear body to hold politically accountable for the restriction. However, simply requiring that restrictions be made by law may provide little protection as executive actions can also have the status of a law.

Partly in order to resolve this problem, some constitutional provisions require that a law meet a certain standard before it can be allowed to restrict rights. For example, the first part of South Africa's article 36 says: 'The rights in the Bill of Rights may be limited only in terms of law of general application'. 'General application' means that any law limiting rights must apply to all individuals and not only one particular case. This is a response to concern that laws could be passed or government actions taken that are arbitrarily directed at particular groups or individuals. Kenya has an even more robust legality requirement.

Constitution of Kenya, Article 24(2)

...a provision in legislation limiting a right or fundamental freedom—

(a)...is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation;

Kenya's requirement reinforces both of the ideals of consideration and accountability. The provision requires that legislators consider the impact the legislation will have on rights and then specifically indicate in the law itself what the expected impact of the legislation will be in practice. Requiring legislators to acknowledge the rights infringement will also make it easier for citizens to hold these officials accountable.

(ii) Purpose

Limitation clauses are distinct from clawback clauses because limitation clauses place limits on the government's ability to restrict rights. Often they do this by stating that parliaments and governments may only restrict rights to achieve certain purposes, such as national security, public order, and others.

Constitution of the Republic of Korea, Article 37(2)

The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Constitution of Indonesia, Article 28J(2)

In exercising his/her rights, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

Constitution of Tunisia (2014), Article 49

Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.

The Korean Constitution allows for restrictions based on national security, order and public welfare, while the Indonesian Constitution also includes morality and religious values. Terms such as public

order, welfare, and morals are highly subjective and have no settled legal definitions. International attempts to define these terms still leave limitations essentially unrestrained. This makes the terms vulnerable to the will of a country's leaders and therefore these terms fail to provide sufficient protection to fundamental rights.

Although article 49 of Tunisia's constitution also states that a limitation of rights can be made for the purpose of 'public order, national defense, public health or public morals', it also imposes as a condition that any restriction must be 'necessary to a civil and democratic state'. Although this provision has yet to be applied by the Tunisian courts, they will be required to define what can be qualified as being 'necessary' and what a 'democratic state' consists of.

South Africa's article 36 does not include any of these terms because many of these same terms had been used to excessively limit rights in their country's past. Instead of focusing on the suitable reasons for limitations, South Africa strengthened the requirement that any restriction be proportional to the goals it seeks to achieve.

(iii) Proportionality

Proportionality is, by international standards, arguably the single most important factor when it comes to the limitation of fundamental rights. German courts have been at the forefront in developing the idea of proportionate state action despite the fact that the German Basic Law, itself, contains no direct reference to the concept. When deciding cases, German courts now routinely check to ensure that acts of public authorities (whether legislative, executive, or judicial) are:

- pursuing a legitimate aim/interest;
- suitable to achieve this aim (*geeignet*);
- deploying the mildest possible means (*erforderlich*); and
- proportionate in relation to the extent of the limitation and the importance of the affected fundamental right (*verhältnismäßig im engeren Sinne*).

Kenya's new Constitution builds on this tradition and incorporates many of these elements into its limitation clause.

Constitution of Kenya, Article 24

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

...

Provisions like this guide entities seeking to restrict rights as well as courts determining the constitutionality of restrictions. The inquiry into whether there are less restrictive means available to the state to achieve a specific objective is particularly effective in requiring courts, legislatures and executives to consider whether the restriction is necessary. South Korea's general limitation clause, seen above, actually requires that restrictions be necessary for them to be constitutional.

(iv) Exceptions

All forms of detailed limitations clauses enforce the concept of constitutional supremacy. These clauses create requirements that legislators or executives must satisfy in order to legally restrict a right. Some jurisdictions have made an effort to balance constitutional and legislative supremacy and give some power back to the legislature.

Canadian Charter of Rights and Freedoms, Section 33

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.

...

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

This provision allows the legislature to expressly override the limitation clause and pass legislation even when it restricts a constitutional right. The legislature is, however, required to acknowledge that it is restricting a particular right, and the restriction expires after five years. This type of override provision may only be appropriate in jurisdictions with an established and trusted legislature, and with an independent judiciary. It may be more appropriate to require a government to consider whether a situation warrants a state of emergency, for which there are very limited reasons, before it is allowed to override the constitution.

Some exceptions also prevent restrictions that would otherwise satisfy the requirements of the limitation clauses. One type of exception is protection of the 'essence' of rights from being encroached upon. For example, South Korea's article 37 states that even when limitations are placed on rights, 'no essential aspect of the freedom or right shall be violated.' While some jurisdictions use this language to protect the essence of rights, this is another subjective concept which will depend on the will of the court for its meaning. Almost all of the examples of general limitation clauses also require that limitations are compatible with an open and democratic society. In jurisdictions with more succinct limitation clauses, this language functions as an interpretive tool that guides courts in their analysis.

3. States of Emergency

Another common rationale for restricting freedoms has been states of emergency. Constitutions often grant governments the authority to declare states of emergency during times of great danger so that they can take actions that would otherwise be unconstitutional. What circumstances are sufficient, and what procedures necessary to declare a state of emergency are important issues for legislative-executive relations. Two important aspects of states of emergency implicate fundamental rights. The

issues are 1) which fundamental rights may be derogated during a state of emergency and 2) how long can those derogations last.

(a) Non-derogability

There is significant debate about whether listing the rights that are non-derogable provides better protection to fundamental rights than leaving the matter unaddressed. Listing rights as non-derogable, even in instances of states of emergency, can ultimately protect those rights from any infringement. South Africa's State of Emergency provision, article 37, contains a clear table of non-derogable rights, which refers back to earlier sections of the Bill of Rights and makes whole or parts of provisions non-derogable during states of emergency:

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: <ul style="list-style-type: none"> – subsection (1)(d) and (e); – the rights in subparagraphs (i) and (ii) of subsection (1)(g); and – subsection 1(i) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: <ul style="list-style-type: none"> – subsections (1)(a), (b) and (c) and (2)(d); – the rights in paragraphs (a) to (a) of subsection (3), excluding paragraph (d) – subsection (4); and – subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

Other constitutions address non-derogability more generally:

Constitution of Kenya, Article 25

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- (b) freedom from slavery or servitude;*
- (c) the right to a fair trial; and*
- (d) the right to an order of habeas corpus.*

Listing some rights as non-derogable may, however, make other fundamental rights appear more limitable and make them more vulnerable to complete derogation during times of emergency. Therefore inclusion of a list of non-derogable rights may lead to increased restrictions on fundamental rights. Kenya's Constitution responds to this problem by placing additional limitations on emergency derogation. Article 58 requires that any derogations be necessary and consistent with international law.

Article 58

- (6) Any legislation enacted in consequence of a declaration of a state of emergency—*
 - (a) may limit a right or fundamental freedom in the Bill of Rights only to the extent that—*
 - (i) the limitation is strictly required by the emergency; and*
 - (ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency [...]*

The manner in which constitutions are structured may also guide courts during times of emergency. Many constitutions include the right to call a state of emergency in the section relating to the powers of the executive. Others, including South Africa, include their state of emergency provisions (and lists of non-derogable rights) within the Bill of Rights. By tying non-derogability to states of emergency, a constitution may better protect those rights than a constitution that leaves open the possibility that the restrictions on non-derogability were not to be applied during times of exception.

(b) Time Limits

It is also uncertain how effective constitutional time limits are for ensuring that states of emergency only last as long as is necessary. In jurisdictions where short time limits exist and states of emergency were renewed repeatedly until they lasted for years, the executive could either re-enact the state of emergency unilaterally or with the approval of another sympathetic branch of government. Egypt's 2012 Constitution provided a novel approach to restricting states of emergency.

Constitution of the Arab Republic of Egypt (2012), Article 148

...The declaration shall be for a specified period not exceeding six months, which can only be extended by another similar period upon the people's approval in a public referendum.

This provision puts the power to extend a state of emergency in the hands of the public through a referendum. This prevents an executive and legislature of the same party from continuing a state of emergency indefinitely. Other jurisdictions have attempted to remedy this problem while still keeping the power to re-enact states of emergency with the government.

Constitution of Kenya, Article 58

- (1) A state of emergency may be declared only under Article 132 (4) (d) and only when—*
 - (a) the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and*
 - (b) the declaration is necessary to meet the circumstances for which the emergency is declared.*

- (2) *A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of the declaration, shall be effective only—*
- (a) *prospectively; and*
 - (b) *for not longer than fourteen days from the date of the declaration, unless the National Assembly resolves to extend the declaration.*
- (3) *The National Assembly may extend a declaration of a state of emergency—*
- (a) *by resolution adopted—*
 - (i) *following a public debate in the National Assembly; and*
 - (ii) *by the majorities specified in clause (4); and*
 - (b) *for not longer than two months at a time.*
- (4) *The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.*
- (5) *The Supreme Court may decide on the validity of—*
- (a) *a declaration of a state of emergency;*
 - (b) *any extension of a declaration of a state of emergency; and*
 - (c) *any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.*

Kenya's provision keeps the extension of states of emergency in the hands of the legislature, but places restraints on the reasons for the state of emergency and involves the court in the decision-making process. It should be noted however that Kenya's approach can only be successful if the court system is truly independent from the other two branches of government.

4. Enforcement of Rights

To protect fundamental rights, a constitution must provide for the enforcement of its fundamental rights provisions. Traditionally, the judiciary is the principle mechanism through which fundamental rights can be protected. Constitutions can grant courts the authority to hear claims that rights have been violated as well as to strike down laws that violate these rights. Constitutions can also allow for enforcement of rights by allowing any individual or group to bring claims of rights violations and by creating independent enforcement bodies, such as national human rights institutions. Enforcement of social and economic rights can be more complex than traditional first-generation rights and constitutions have employed various methods to protect these rights.

The inclusion of second-generation, or socioeconomic, rights in constitutions is increasingly common. These rights include the right to health care, the right to a fair wage, the right to education, and many others. These rights have been enforced to varying degrees across jurisdictions because of the way they are provided for in constitutions. The phrasing of the rights and their place within the constitution are both important. India placed these rights in a chapter of the Constitution titled 'Directive Principles of State Policy' and expressly made these rights non-enforceable.

Constitution of India, Article 37

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

South Africa did not distinguish between these rights and other fundamental rights; both are contained in the Constitution's 'Bill of Rights' and are covered by that chapter's justiciability guidelines.

Constitution of South Africa, Article 8

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.

South Africa's Constitution does, however, recognize that these rights might pose challenges that first-generation rights do not pose. For example:

Constitution of South Africa, Article 26

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

This provision recognizes that some socioeconomic rights may implicate state budgets in ways that some first-generation rights do not. For this reason, article 26 only requires the state to act *within available resources*. This provision also recognizes that it may take time to build institutions to administer these rights, and so article 26 allows for the *progressive realization* of them. The enforceability of these provisions is not questioned in South Africa, but each case does raise complex questions regarding how these rights should be enforced, and when it would be reasonable for a court to force the government to ensure protection of a particular right. The Constitution provides courts with the necessary flexibility to enforce these rights.

Constitution of South Africa, Article 172

(1) When deciding a constitutional matter within its power, a court—

(b) may make any order that is just and equitable

Article 172(1)(b) allows the court the flexibility to strictly enforce second-generation rights while still respecting resource and time limitations.

Third-generation rights, a category that includes environmental and collective community rights, also raise questions of enforcement because they often contain broad language and have an aspirational tone. Chile's Constitution seeks to address this issue by containing specific language ensuring that these rights are enforceable.

Constitution of Chile, Article 20

He who by cause of arbitrary or illegal acts or omissions suffers privation, disturbance or threat in the legitimate exercise of the rights and guarantees [...] concerning the freedom to work and to the right of freedom of choice and freedom to contract [...] can on his own, or anyone on his behalf, resort to the respective Court of Appeals, which will immediately adopt the measures that it judges necessary to reestablish the rule of law and assure due protection to the affected person, without prejudice to the other rights which he might assert before the authority or the corresponding tribunals.

The recourse of protection in the case of Numeral 8 of Article 19, when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or a specific person, can also proceed.

The first paragraph of Chile's article 20 ensures that rights ranging from equal protection, to the right to life, to freedom of contract, which may appear to be broad unenforceable principles, are justiciable. The second paragraph expressly considers the third-generation right to an uncontaminated environment and states that it is also justiciable. This provision also encourages enforcement by granting courts flexibility to 'adopt the measures that it judges necessary' and contains a broad standing provision that allows anyone to bring a claim on behalf of a person whose rights have been infringed or threatened.

The Constitution of Columbia goes one step further by creating a special mechanism to ensure that individuals always have a course of action, particularly in situations when the courts are unable to satisfy their function:

Constitution of Columbia, Article 86

Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority. The protection will consist of all orders issued by a judge enjoining others to act or refrain from acting. The order, which must be complied with immediately, may be challenged before a superior court judge, and in any case the latter may send it to the Constitutional Court for possible revision.

This action will be available only when the affected party does not dispose of another means of judicial defense, except when it is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between filing the writ of protection and its resolution.

Article 86 recognizes that the ordinary judicial process is in some cases insufficient or unsatisfactory for many individuals. It therefore states that where an individual does not have access to a judicial remedy, he may appeal before a court at any time and in any form; in practice this right has allowed for Columbians who do not have access to legal representation to make their submissions to the Columbian courts in the form of short letters, and sometimes even in the form of oral messages. Article 86 also provides that courts must respond to the request in less than 10 days. This mechanism, referred to in Columbia as a 'tutela', is today studied around the world for its innovative approach to the enforcement of first- and second-generation rights.

(a) Standing

For effective protection of fundamental rights, allegations of rights violations must be able to be brought to a court. Many constitutions provide that individuals whose rights have been violated may bring a claim before a court to seek redress. However, most ordinary citizens whose rights have been violated do not have the time, financial resources or legal expertise to bring successful claims against the state. Comparative studies show that where a constitution provides that only harmed individuals can bring claims, the protection of fundamental rights is weakened. One solution that some constitutions have adopted to this problem is to allow for greater access to the courts by third parties.

Constitution of South Africa, Article 38

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;*
- (b) anyone acting on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interest of its members.*

This article grants broad access to the court and enables parties with more resources to bring claims on behalf of individuals who may not have the resources to or may not be aware of their rights.

(b) Human Rights Institutions

Many constitutions today create national human rights institutions (NHRI) that are tasked with protecting and enforcing fundamental rights. The strength of these bodies depends on their constitutional grant of power and their independence. The two most common forms of these institutions are Human Rights Commissions and Ombudsmen. The amount of success has varied significantly from country to country and there is some consensus on what circumstances need to exist in order for these bodies to be successful.

The United Nations Office of the High Commissioner for Human Rights lists six factors that are critical to the success of a NHRI:

- independence
- defined jurisdiction
- adequate powers
- accessibility
- cooperation
- operational efficiency
- accountability

Some of these and other important factors, such as the character of the leader of the NHRI and receptive government and public, are difficult to codify in a constitution. Independence, for example, is an outcome of many factors including separation from the political branches as well as competent leadership and a supportive political environment. The South African Constitution attempts to ensure the independence of its NHRI as well as other government oversight bodies.

Constitution of South Africa, Article 181

...(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions...

Poland has a particularly strong constitutional provision that provides citizens broad access to assistance from their NHRI, the Commissioner for Citizens' Rights, protects the independence of the Commissioner, and gives the Commissioner the ability to directly petition the Constitutional Tribunal.

Constitution of Poland, Article 208

- 1. The Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.*
- 2. The scope and mode of work of the Commissioner for Citizens' Rights shall be specified by statute.*

Article 209

- 1. The Commissioner for Citizens' Rights shall be appointed by the Sejm, with the consent of the Senate, for a period of 5 years.*
- 2. The Commissioner for Citizens' Rights shall not hold any other post, except for a professorship in an institute of higher education, nor perform any other professional activities.*
- 3. The Commissioner for Citizens' Rights shall not belong to a political party, a trade union or perform other public activities incompatible with the dignity of his office.*

Article 210

The Commissioner for Citizens' Rights shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm in accordance with principles specified by statute.

Article 211

The Commissioner for Citizens' Rights shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Sejm. The Commissioner for Citizens' Rights shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The Marshal of the Sejm shall be notified forthwith of any such detention and may order an immediate release of the person detained.

Article 212

The Commissioner for Citizens' Rights shall annually inform the Sejm and the Senate about his activities and report on the degree of respect accorded to the freedoms and rights of persons and citizens.

Article 80

In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority.

In addition to these articles, article 191 grants the commissioner the power to directly petition the Constitutional Tribunal to determine whether a statute conforms to the constitution or international treaties. While the Polish constitution's provisions account for important attributes of its NHRI, the powers provided to it are vague. Other jurisdictions, such as Ghana, provide their commissioner with extremely detailed duties and powers in the constitution.

The United Nations Human Rights Commission has also adopted the Paris Principles, which provide a detailed framework for the creation of an effective NHRI. Adherence to these principles, however, cannot guarantee an effective NHRI. Some NHRI exceed these principles and exist in a supportive political environment, yet have proven ineffective. NHRI are not ultimate guarantors of fundamental rights, but if they are supported by strong constitutional provisions and a supportive public and cooperative government they may be a useful tool.

5. International Law

International law can play an important role in the protection of fundamental rights. When rights of individuals are protected by international documents, it can remove these rights, which may be controversial, from the contentious domestic political discussions. Rights based in international law may also be supported by jurisprudence which can be used to apply the right. However, decisions regarding international law will not be made by domestic actors, and the public may therefore think international law is illegitimate. Another problem is that incorporation of international law into domestic legal structures can be complex and confusing. The constitution must provide clearly for how international law should be dealt with, otherwise citizens again could view the use of international law as illegitimate. Various methods of incorporating international law have been employed with varying levels of clarity.

Constitution of Kenya, Article 2(5)

The general rules of international law shall form part of the law of Kenya.

Fourth Draft Constitution of the Tunisian Republic, Article 19

The international agreements approved and ratified by the Chamber of Deputies shall be superior to laws and inferior to the Constitution.

Spanish Constitution, Section 10(2)

Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.

Constitution of South Africa, Article 39

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) must consider international law; and*
- (c) may consider foreign law.*

These provisions present methods of both direct and indirect incorporation of international law. In Kenya and Tunisia, international law becomes part of domestic law. However, provisions like Kenya's may create confusion because they do not explain what will happen when domestic law conflicts with international law. The Tunisian provision is clearer, though international law may still be seen as illegitimate by the people when it nullifies a law passed by Tunisian legislators. The provisions of the Spanish and South African constitutions illustrate indirect incorporation of international law. These provisions direct courts to use international law in their decision-making process. This approach results in increased legitimacy and sovereign supremacy but it also may result in increased ambiguity in the law and increased discretion for courts.

6. Case Study: The Freedom from Torture

The majority of constitutions contain complete prohibitions on torture. However, even strongly worded anti-torture provisions have not eradicated torture in many jurisdictions. Torture provisions demonstrate the need for additional considerations, beyond simple prohibitions, when attempting to protect a fundamental right in the constitution. Torture takes place because 1) there are incentives to engage in torture; 2) punishment for officers who torture is unlikely and 3) officers have the opportunity to torture. To eradicate torture, constitutional provisions must eliminate the incentives and opportunities to torture and increase the disincentives.

(a) Eliminating Incentives to Torture

There are several incentives to torture that must be confronted. In jurisdictions that allow for convictions based solely on confessions, there is an incentive to extract a confession from detained persons. This is particularly true in systems that reward police based on the number of convictions they achieve. Countries in which torture is common often rely more on confessions than on evidence-based proceedings. Even in jurisdictions that do not allow convictions based on confessions, there are incentives to use torture to extract evidence of a crime, or to intimidate individuals or communities. Several jurisdictions have attempted to eliminate these incentives in their constitutions.

Constitution of Iraq, Article 37(1)(C)

All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.

Constitution of the Republic of Korea, Article 12(7)

In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

Both of these provisions prohibit confessions from being relied on if they were obtained via torture, which is broadly defined. South Korea's provision goes further by prohibiting confessions from serving as the sole evidence against a defendant, regardless of how the confession is obtained. This protects individuals in instances where it will be difficult to prove that torture occurred. Neither of these provisions, however, excludes evidence other than a confession from being obtained via torture. This is an unfortunate omission because it still allows for the use of evidence obtained through the torture of persons surrounding the defendant.

It is also worth noting that in Iraq's case, article 37(1)(C) has been very ineffective in preventing confessions that were extracted through torture from being used in court. This should serve as an important indication that merely stating that torture should not take place, or that confessions obtained through torture should not be relied upon, does not serve as a guarantee that these things will not happen. Additional mechanisms must be established to seek to redress these issues.

(b) Increasing Disincentives to Torture

It is also essential to increase the disincentives to torture. The primary disincentive is punishment. In many jurisdictions, constitutions fail to ensure that torturers are punished. In order to dissuade torture, jurisdictions must both increase the likelihood that torture will be discovered, and increase the likelihood that it will be punished once it is discovered.

The right to prompt legal counsel is common in constitutions, and while this right is essential, it is not sufficient to ensure that torture will be uncovered. There are several less common constitutional rights that will increase the likelihood that torture will be uncovered.

Constitution of Peru, Article 2(24)(h)

No one shall be a victim of moral, psychological, or physical violence, nor be subjected to torture or inhuman or humiliating treatment. Any individual may immediately request a medical examination for the injured person or someone who is unable to appeal to the authorities by himself. Statements obtained by means of violence are null and void. Whoever employs such violence shall be held liable.

Constitution of South Africa, Article 35(2)

Everyone who is detained, including every sentenced prisoner, has the right—
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
(f) to communicate with, and be visited by, that person's—
(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counselor; and
(iv) chosen medical practitioner

Constitution of the Republic of Korea, Article 29(1)

In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by law. In this case, the public official concerned shall not be immune from liabilities.

The South Africa and Peru provisions ensure that detainees have access to medical examinations as well as other persons who will be able to see if mistreatment is taking place. Other individuals can even be expressly given the right to request the medical treatment on the detainee's behalf, as seen in Peru's Constitution. South Korea's Constitution removes immunity from officers in cases of torture and provides detainees the promise of compensation, which provides an additional reason to report instances of torture.

Detainees must also be aware of these rights if they are going to have an impact. South Africa's Constitution contains several provisions that announce the rights of detained and arrested persons that also require that the person be 'informed of this right promptly'.

Constitution of South Africa, Article 35(2)

Everyone who is detained, including every sentenced prisoner, has the right—

...(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly

Rights are significantly more vulnerable when citizens are unaware of them. This requirement to inform persons of their rights should be attached to all rights granted to detained and arrested persons.

There are also a number of provisions that can be used to increase the likelihood that torture will be punished when it is discovered. As a foundation, torture must be given a broad definition so that all inhumane treatment of detainees is subject to the protections surrounding torture. For example, the Peru, Korea, and Iraq provisions mentioned above include psychological as well as physical torture. To increase the likelihood of punishment, victims of torture should be also protected from retaliation as they are by domestic law in some jurisdictions. Constitutions must also respond to the potential for corruption in the police force and the judiciary. Several have done this by establishing an independent body responsible for investigating police abuse.

Constitution of Ghana, Article 218

The functions of the Commission shall be defined and prescribed by Act of Parliament and shall include the duty

(a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;

(b) to investigate complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services...

Constitution of South Africa, Article 206(6)

On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

Ghana's Constitution grants the Human Rights Commission explicit authority to investigate complaints against the police, and other jurisdictions have granted this same authority through domestic legislation. Mauritius grants this authority and allows for its Human Rights Commission to manage the internal disciplinary proceedings of the police. South Africa enshrined in its constitution an independent police complaints body. These oversight roles have proven effective, but there must be a cooperative relationship between the police and these oversight bodies.

(c) Eliminating Opportunities to Torture

Constitutions must decrease the ability of police, military and security officials to engage in torture. Individuals are most vulnerable to torture during pre-trial detention periods. During this time interrogations may be unmonitored and take place without a detainee knowing the crime for which he was arrested. Constitutional provisions should be aimed at minimizing this time period and increasing monitoring of it. South Africa requires that individuals be brought before a court within 48 hours, and Peru only allows for 24 hours. The family of the detainee should also be notified of the detention without delay, as is required by the Korean Constitution.

Finally, governments have circumvented strong torture protections by declaring states of emergency. As discussed above, state of emergency provisions can have a significant impact on fundamental rights such as torture. To protect against this, the freedom from torture must be non-derogable, even during states of emergency.

Part 2: Separation of Powers

1. Introduction

(a) Systems of government

Today's democracies fall into three general systems of government: presidential, parliamentary, and mixed. While systems within these categories share some general traits, there is wide variation within these categories with respect to how power is distributed. This chapter utilizes these categories to demonstrate how constitutions generally structure government. However, two parliamentary systems may vary widely in terms of the power of the executive relative to the power of the legislature or judiciary. The same is true of presidential and mixed systems, with the variation being perhaps most apparent in mixed systems.

Presidential systems: In presidential systems, the president exercises executive power through a cabinet, which serves at the president's pleasure. Generally, the president does not serve at the pleasure of the legislature, but rather serves a fixed term established by the constitution. Therefore, he or she is directly accountable to the electorate.

Presidential systems are frequently associated with strong executive power relative to the power of the other branches. This partially results from the fact that executive power is consolidated in a single office, which is not accountable to any other entity during its term (except through extraordinary measures such as impeachment and, increasingly, popular recall procedures). Moreover, the executive exercises full control over the cabinet, which is similarly unaccountable to the other branches. Generally, he or she may appoint or remove cabinet members at will (although the legislature may exercise some control over appointment, as discussed below). Many Latin American constitutions have established presidential systems in which the president is recognized as the most powerful figure in the state.

Constitution drafters might be motivated to create presidential systems because they are believed to engender stability. The president serves a fixed term; thus, unlike a parliamentary system, the executive may carry out a longer-term policy agenda without the fear of being removed by the legislature. Moreover, party politics may not influence an executive in a presidential system as strongly as an executive in a parliamentary system because a presidential system does not require the confidence of majority of the legislature to keep the executive in power. However, presidential systems are prone to several major criticisms including that they increase the risk of sliding back into authoritarian rule (see below).

Parliamentary systems: In a parliamentary system, the legislature selects a prime minister, who then selects a cabinet that comprises the government. The prime minister and the government carry out the executive functions of the state. One of the most distinctive aspects of the parliamentary system is that the prime minister and the government serve at the pleasure of the legislature. In other words, some mechanism exists by which the legislature holds the executive accountable by exercising the power to remove the executive, often through a vote of no confidence. While parliamentary systems often have presidents or monarchs who serve as the head of state (with the prime minister serving as head of government), that position is often ceremonial.

Unlike presidential systems, parliamentary systems are noted for allowing flexibility in the political process. Since the executive does not serve a fixed term and may be voted out of office if it loses the confidence of the legislature, changing political preferences may be reflected in the composition of the government. This may be especially important in countries with fractured societies and a multitude of political parties. The executive is compelled to comply with the political preferences of the majority of the legislature; otherwise, it faces not only a challenge in promoting its policy agenda, but also a threat to its survival.

Parliamentary systems have the potential to create instability. Precisely because governments can turnover in quick succession, there exists the risk that coherent, long-term policies are not advanced. This risk might be especially acute in countries in which political party discipline is low and party allegiances shift easily. On the other hand, if political party discipline is high, the legislature may not serve as an effective oversight body over the executive. In other words, the party or parties controlling the majority in the legislature may be unwilling to criticize the government's policies. Similarly, the government may be unwilling to introduce novel policies due to the fear of losing the legislature's confidence.

Semi-presidential systems: In addition to presidential and parliamentary systems of government, many countries, especially in recent times, have opted for mixed systems of government. Semi-presidential systems may be characterized as those in which a president and a prime minister share executive power. The president is directly elected, while the legislature and the president generally share control over the selection of the prime minister.

Like in a presidential system, generally, the president is not directly accountable to the legislature. Furthermore, like in a parliamentary system, the prime minister and government are directly accountable to the legislature. In some semi-presidential systems, often labeled president-parliamentary, the prime minister and the government are also accountable to the president, such as in Niger. Those in which the prime minister and government are accountable only to the legislature are labeled premier-presidential. Specific mechanisms of government accountability are elaborated upon in the below discussion.

The aim of semi-presidential systems is to combine the purported stability of presidential systems with the purported flexibility of parliamentary systems. Constitution builders are motivated to adopt semi-presidential systems with the hope of encouraging inclusiveness and limiting the extent to which one entity may consolidate power. Perhaps the most well-known example of a semi-presidential system is the French Fifth Republic of 1958. Several emerging democracies, particularly Francophone countries, have followed the French example by experimenting with different forms of semi-presidentialism, experiencing varying degrees of success in terms of democratic survival.

The strongest criticisms of semi-presidential systems focus on the potential for intra-executive conflict. Struggles over which entity controls the policy agenda, which entity has authority over the military, and which entity has authority over the bureaucracy may undermine the goals of cooperation and inclusiveness. Such struggles may be especially acute when the president and the prime minister are from different political parties, a phenomenon known as co-habitation. During a period of co-habitation, the potential for deadlock may be high because the president and the prime minister are unable to achieve agreement on important policy issues. Furthermore, the potential for deadlock may be higher when the president and prime minister are from different parties and the prime minister does not control a majority in the legislature—a phenomenon known as divided minority government. Both co-

habitation and divided minority governments seem more likely to occur in highly divided societies that implement electoral systems characterized by proportional representation.

Semi-presidential systems in which deadlock is a real possibility raise similar concerns as presidential systems. If the president and prime minister are in conflict and a common policy is not developed, popular discontent and/or military intervention become regime-threatening possibilities, particularly in fragile democracies just emerging from authoritarian rule. Another concern is that the president will consolidate power in the face of obstacles to his or her policy preferences. President–parliamentary systems might be particularly prone to presidential consolidation of power due to the power of the president to dismiss the prime minister.

(b) Guarding against autocracy³

This is particularly relevant in the Arab region, where the separation of powers has traditionally been tilted heavily in favour of the executive, which abused its power for non-democratic purposes over a period of decades. The prevalence of presidential dictatorships in the Arab region before 2011 can be attributed to the combination of three failures:

- The absence of constitutional limits on the president’s powers;
- A legislature that is both institutionally weak and, as a result of the poor representation of minority and opposition parties, unable to offer any real political opposition to the president or mobilize the legislature to act as a check against the president; and
- A single-party state in which important and influential positions in the government, administration and bureaucracy are filled from the ranks of a single party that is loyal to the president.

These failures were the result of both the constitutional rules under which Arab countries operated and the political consequences of those rules. Constitutional rules allowed the emergence of a strong president and a dominant party, which in turn facilitated the suppression of political opposition and the disintegration of the party system and meaningful political competition. Indeed, the rules were in many cases deliberately instituted in order to reflect and maintain the political reality, and did little more than institutionalize the prevailing political conditions. These constitutional failures, in turn, yield a number of principles according to which the constitutional design of new political systems can be organized:

- **Semi-presidentialism as a potential solution to autocracy:** The need to guard against a return to presidential autocracy is a driving imperative of the constitutional transitions in the MENA region, and new constitutions in the MENA region should be designed with this imperative in mind.

One apparent solution to this problem is to adopt a purely parliamentary system, in which the head of state or president is not directly elected, has no popular mandate, and has very limited and largely ceremonial powers. Yet Iraq’s experience shows that eliminating the office of the

³ This section draws significantly from the report entitled ‘Semi-Presidentialism as Power Sharing: Constitutional reform after the Arab Spring’, Sujit Choudhry and Richard Stacey, published by the Center for Constitutional Transitions at NYU Law and International IDEA (April 2014), available at www.constitutionaltransitions.org and www.idea.int.

president does not by itself eliminate the problem of wide executive power. Although Iraq's 2005 Constitution establishes a purely parliamentary system in which parliament can withdraw confidence from government relatively easily, the prime minister has nevertheless managed to accumulate significant power, recreating the fear that the state could be captured by a small number of individuals.

A semi-presidential form of government is often presented as a solution to this problem. It is promising because it establishes a dual executive, in which neither the president nor the prime minister holds all the executive power. However, the experience of presidential autocracy in the semi-presidential systems of pre-Arab Spring Egypt and Tunisia demonstrate that the system itself is insufficient to prevent presidential autocracy. Rather, specific elements of this system must be designed in order to increase the likelihood that the principle of limited presidential power is upheld.

- **Legislative oversight of the executive:** The legislature must be empowered not only to investigate and call into question the conduct of the executive, but to act against the executive if it finds the latter's conduct unacceptable. In this regard, a semi-presidential constitution must authorize the legislature to act against a president who overreaches, either by removing the president from office directly or by impeaching the president and beginning trial-like proceedings through which his or her conduct can be scrutinized.
- **Power sharing:** Sharing executive power among the political parties, interests and groups that fill the public space in the postauthoritarian setting reduces the opportunities for centralizing executive power. The need to ensure that a diversity of political views and groups is represented within the executive branch is a response to the experiences of single-party dominance and the consequences of the one-party state. Executive power sharing is a method of reducing the risk that a single party will capture the institutions of state.
- **Executive leadership:** If the concern is that governments that rely on the support of a fragmented parliament will be unstable, then retaining a president as an independent executive authority who holds an electoral mandate separate from the legislature ensures that some executive authority can still be exercised in the event of parliamentary chaos. Even if the legislature cannot agree on a government, the president will be able to provide executive leadership. If a government is formed but cannot develop a coherent policy programme because it must accommodate numerous ideologically divergent voices in the legislature, the president's independent electoral mandate will allow effective and legitimate leadership.

If Libya decides to establish a president who is directly elected, then two elements must be addressed. First, the president must hold sufficient power to be able to assume a leadership role when the vagaries of parliamentary politics render the legislature or the prime minister's government ineffective. This power, however, has to be balanced against competing principles of limited presidential power and power sharing—especially if the legislature is dominated by a political party loyal to the president, as in President Mohamed Morsi's post-Arab Spring Egypt. The president's role as executive leader, therefore, has to be carefully outlined and his or her powers carefully set out in the constitution in order to ensure appropriate presidential leadership without the risk of presidential autocracy. Second, the president must be seen as a symbol of the nation, for example by speaking for the nation on the international stage and recognizing and receiving foreign dignitaries. The president will not easily rise above politics and

represent the nation as a whole if he or she is embroiled in party political squabbles and sullied by the horse-trading and pork-barreling that occurs on the floor of the legislature. This imperative must also be reflected in the constitutional rules that establish the president's role and powers.

It is worth noting from the outset that none of the principles set out above provide an absolute guarantee against the possibility that the state might be captured by undemocratic forces. A number of other measures will need to be taken to prevent such a thing from recurring, including the establishment of an electoral system that will increase the likelihood that power will be diffused. For example, if a semi-presidential system of government were adopted, government will be most effective when the president and the prime minister come from different parties. Indeed, the experiences of other semi-presidential countries suggest that where the president and the prime minister represent the same party and are supported by a legislative majority, the president is able to exert a great deal of power over national politics, effectively relegating the prime minister to a politically inferior position and reducing the semi-presidential system to a presidential one. Yet during periods of 'cohabitation', in which the prime minister and the president represent different parties and the president's party is not represented in government, the balance of power tends to shift to the prime minister. This may facilitate power sharing between different political parties.

2. The Executive

(a) Presidential term limits

As discussed above, procedures for the selection and removal of the executive vary across systems of government. In presidential systems and mixed systems with a president, the president is directly elected by the electorate. In some systems, there is an intermediate representative body, such as the electoral college in the United States, which selects the president according to the votes of the electorate. However, the notion of a popularly elected president with the mandate of the people holds true even in these systems. The president serves a fixed term and may not be removed by the legislature, save for impeachment, until the end of his or her term through an election.

One of the most important instruments constitution drafters utilize to prevent reverting back to authoritarian rule in presidential or mixed systems is a term limit on the president's office. While the majority of presidential constitutions allow for at least two presidential terms, some constitutions, such as Turkey's, allows only one term.

Constitution of Turkey (1982), Article 101

The President of the Republic cannot be elected for a second time.

Term limits may be absolute in the sense that an individual may only serve a set number of terms as president during his or her lifetime.

Constitution of Tunisia (2014), Article 75

The office of presidency cannot be occupied by the same person for more than two full terms, whether consecutive or separate. In the case of resignation, the term counts as a full term. [...]

However, some countries only set limits on the number of consecutive terms an individual may serve as president. For example, Panama requires a gap of two terms before a president may again run for office.

Constitution of Panama (1972), Article 178

The citizen who has been elected President or Vice-President of the Republic may not be elected for the same office in the two Presidential terms immediately following.

Because term limits play an important role in limiting the power of the executive and preventing a return to authoritarian rule, presidents with authoritarian ambitions often attempt to amend constitutional provisions that set term limits. To address this issue, some countries have established constitutional provisions forbidding amendment of term limit provisions.

Constitution of Tunisia (2014), Article 75

[...] The constitution may not be amended to increase the number or the length of presidential terms.

Constitution of Honduras (1982), Article 374

*The foregoing article, this article, the Articles of the Constitution relating to the form of government, national territory, **the presidential term**, the prohibition from re-election to the presidency of the republic, the citizen who has served as president under any title, and to persons who may not be president of the republic for the subsequent period may not be amended.*

South Korea has taken another approach by allowing the amendment of term limit provisions, but prohibiting them from taking effect until a new president is elected.

Constitution of South Korea (1948), Article 128(2)

Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the re-election of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

(b) Selection of the prime minister

As discussed in the preceding section, executive power rests fully with the prime minister in a parliamentary system and partially in a mixed system. Generally, the preference of the majority of the legislature dictates who is selected to be prime minister, even if the formal appointment is not in the hands of the legislature. For example, the Japanese Constitution requires the head of state to appoint the legislature's choice for prime minister. In Greece, on the other hand, the president must nominate a prime minister from the party that won the most seats in the legislative election.

Selection of the prime minister varies greatly in mixed systems. Many systems align closely with the parliamentary model in that the legislature primarily controls the selection of the prime minister, often through investiture.

Constitution of Romania (1991), Article 103(2)

Within 10 days of his/her appointment, the candidate for the office of Prime Minister will ask for a vote of confidence from Parliament for his/her program and the list of ministers.

In the French model of semi-presidentialism, the president selects the prime minister without the input of the legislature.

Constitution of France (1958), Article 8

The President of the Republic shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.

Other models fall somewhere in between the two examples above. For example:

Constitution of Portugal (1976), Article 187(1)

The President of the Republic shall appoint the Prime Minister after consulting the parties with seats in Assembly of the Republic and in the light of the electoral results.

Constitution of Egypt (2012), Article 139

The President of the Republic nominates the Prime Minister, who is assigned by the President the task of forming a government and presenting its programme to the Council of Representatives within 30 days. If the government is not granted confidence, the President appoints another prime minister from the party that holds a plurality of seats in the Council of Representatives. If the second nominee does not obtain confidence within a similar period, the Council of Representatives appoints a Prime Minister who is assigned by the President the task of forming a government, provided said government obtains parliamentary confidence within a similar period. Otherwise, the President of the Republic dissolves the Council of Representatives and calls for the elections of a new Council of Representatives within 60 days from the date the dissolution is announced. In all cases, the sum of the periods set forth in this Article should not exceed 90 days.

Constitution of Egypt (2014), Article 146

The President of the Republic assigns a Prime Minister to form the government and present his program to the House of Representatives. If his government does not obtain the confidence of the majority of the members of the House of Representatives within 30 days, the President appoints a Prime Minister based on the nomination of the party or the coalition that holds a plurality of seats in the House of Representatives. If his government fails to win the confidence of the majority of the members of the House of Representatives within 30 days, the House is deemed dissolved, and the President of the Republic calls for the elections of a new House of Representatives within 60 days from the date the dissolution is announced. In all cases, the sum of the periods set forth in this Article shall not exceed 60 days.

The question of who selects the prime minister may seem less important when considering that the legislature in parliamentary and mixed systems generally has the power to vote no confidence and remove the government. However, requiring legislative input prior to appointment allows the negotiation to occur before a government is in place, which arguably institutionalizes the bargain between the legislature and executive and improves efficient governance.

(c) Cabinet formation

Presidential systems usually provide ultimate discretion to the president in selecting cabinet members, although some systems require legislative confirmation of executive nominations. While the legislature

may have influence over who is selected to serve in the cabinet, it generally does not have the power to remove cabinet members, save for gross violations. The president retains total control over his or her cabinet. This means that executive power is centralized within the office of the president, and the cabinet members serve as instruments of the president's executive power.

Constitution of Chile (1980), Article 32(7)

The special attributions of the President of the Republic [are]: ... 7) To appoint and remove at his will the Ministers of State, undersecretaries, intendants and governors...

In a few presidential systems, the legislature does have direct influence over the terms of the cabinet members. For example, in Colombia, the legislature may censure cabinet members and compel their removal through an absolute majority vote in both chambers of the legislature (article 135[9]). This provision allows the legislature to exercise greater influence over the policy-making process within the executive. It forces the president to consider the policy-preferences of the legislature when designing and implementing policy through the cabinet. It also introduces the potential for the instability that is a concern in parliamentary systems; however, because of the high bar for approval in both chambers, it is fairly difficult to achieve. This type of design is relatively rare in presidential systems.

In parliamentary systems, the prime minister, to varying degrees, holds the power to select his or her cabinet, which will comprise the government. Some constitutions require the legislature to approve the selection of the cabinet.

Constitution of Mongolia (1992), Article 27(6)

The State Great Hural and its standing committee meetings shall have a quorum in the presence of its majority members and decisions shall be made by simple majority vote. A vote shall be held for appointment of Prime and Cabinet Minister or other issues not provided by a law.

(d) Withdrawal of confidence from the government

Even if the legislature does not play a role in cabinet selection, the power to vote no confidence in the government implicitly establishes accountability of the government to the legislature. Generally, the legislature possesses the power to vote no confidence in the government as a whole, but in order for this power to have any impact, the threshold for withdrawing confidence cannot be too high as to be almost impossible. For example:

Constitution of Egypt (1971), Article 127

The People's Assembly shall determine the responsibility of the Prime Minister, on a proposal by one-tenth of its members. Such a decision shall be taken by the majority of the members of the Assembly. It may not be taken except after an interpellation addressed to the Government, and after at least three days from the date of its presentation. In the event that such responsibility is determined, the Assembly shall submit a report to the President of the Republic including the elements of the interpellation, the conclusions reached on the matter and the considerations on which they are based. The President of the Republic may accept the resignation of the Government or return the report to the Assembly within ten days. Should the Assembly approve it once again by a majority of two-thirds of its members, the President of the Republic shall accept the resignation of the Government. Should the proposal on the responsibility of the Prime

Minister be rejected, the members requesting the withdrawal of confidence may not put forward another request during the same session.

The procedure under Egypt's 1971 Constitution was so onerous that the parliament could essentially only withdraw confidence from the government with the president's consent, rendering the entire process meaningless. Based on that experience, Egypt's new Constitution lowers the threshold significantly:

Constitution of Egypt (2014), Article 131

The House of Representatives may decide to withdraw its confidence from the Prime Minister, a deputy of the Prime Minister, ministers, or their deputies. A motion of no confidence may be submitted only after an interpellation, upon proposal by at least one-tenth of the members of the House of Representatives. The House issues its decision after debating the interpellation. A withdrawal of confidence requires a majority of members.

Some constitutions allow the legislature to vote no confidence in individual ministers. Not only does article 131 reduce the threshold to a mere majority of its members (from two thirds under the 1971 Constitution) but it also allows for the parliament to withdraw confidence from individual ministers. The power to remove individual ministers encourages individual ministerial accountability to the preferences of the majority of the legislature. Moreover, because a vote of no confidence in an individual minister would only require a single minister to be replaced rather than the entire government, it could encourage a higher number of no-confidence votes by the legislature. Systems in which the entire government is held accountable are thought to encourage more cohesive governments, while systems in which individual ministers are held accountable are believed to promote greater individual deference amongst ministers to the preferences of the legislative majority.

Government removal is a controversial and much debated issue for mixed systems. In president-parliamentary systems, the president or the legislature may remove the government, while in premier-presidential systems that power resides solely with the legislature. In Sri Lanka, the president may dismiss individual ministers at his or her total discretion (article 47), whereas in Niger, the president may only dismiss individual ministers upon the advice of the prime minister (article 56). Even in some premier-presidential countries, such as France, the president may dismiss individual ministers upon the advice of the prime minister (article 8). In Lithuania, the president may dismiss the prime minister with the consent of the legislature (article 84[5]). Arguably, president-parliamentary systems suffer a greater risk of deadlock. Because the president has the power to remove the government, he or she has no incentive to negotiate in its selection. It is generally believed that premier-presidential systems better incentivize negotiation between the executive and legislature.

(e) Impeachment of the president

Impeachment is another constitutional method of removing the executive. In most circumstances, it is considered a more extreme method of removal, appropriate in extraordinary circumstances. Constitutions often authorize impeachment for criminal wrongdoing on the part of the executive, depending on the severity of the crime. The specificity of the impeachment provision is an important consideration for constitution drafters. Vague provisions that may be openly interpreted and may capture otherwise innocuous conduct present opportunities for politics to motivate impeachment rather than actual misconduct. For example:

Constitution of Tunisia (2014), Article 88

The Assembly of the Representatives of the People may, through the initiative of a majority of its members, present a motion to bring to an end the President of the Republic's term for a grave violation of the Constitution.

Constitution of Egypt (2014), Article 159

A charge of violating the provisions of the Constitution, high treason or any other felony against the President of the Republic is to be based on a motion signed by at least a majority of the members of the House of Representatives.

These two formulations differ significantly. Article 159 of the Egyptian Constitution refers to specific crimes, including all felonies, as being sufficient to impeach the president. In Tunisia meanwhile, a mere felony is insufficient; the president needs to have committed a 'grave' violation of the constitution. This creates a distinction between those violations that are grave and those that are not, with no clarity whatsoever on where the difference lies.

Although constitutions vary with respect to who may initiate impeachment proceedings, the power rests often with the legislature. The judiciary also frequently plays a role in conducting the investigation or ruling on the appropriateness of impeachment. In both Tunisia and Egypt, senior judges are required to play a role, although the new Egyptian Constitution requires for a special court to be formed:

Constitution of Tunisia (2014), Article 88

Such a motion must be approved by two-thirds of the members. In such an event, the matter is referred to the Constitutional Court for a decision by a majority of two-thirds of its members. In the event of condemnation, the Constitutional Court orders removal of the President of the Republic from office, without excluding eventual criminal prosecution when necessary. Where the President has been removed from office under these circumstances, he/she is not entitled to run in any subsequent elections.

Constitution of Egypt (2014), Article 159

The President of the Republic is tried before a special court headed by the president of the Supreme Judicial Council, and with the membership of the most senior deputy of the president of the Supreme Constitutional Court, the most senior deputy of the president of the State Council, and the two most senior presidents of the Court of Appeals; the prosecution to be carried out before such court by the Prosecutor General. If an impediment exists for any of the foregoing individuals, they are replaced by order of seniority. The court verdicts are irrevocable and not subject to challenge.

(f) Dissolution of parliament

The converse of the legislature's power to remove the executive is the executive's power to dissolve the legislature. Several constitutions allow the executive to dissolve the legislature upon a vote of no confidence in the government or the failure of the legislature to vote confidence in a government after an election.

Constitution of Moldova (1994), Article 85

- 1) *In the event of the impossibility to form the Government or of blocking up the procedure of adopting the laws within 3 months, the President of the Republic of Moldova, following the consultations of the parliamentary fractions, may dissolve the Parliament.*
- 2) *The Parliament may be dissolved, if it has not passed the vote of confidence for setting up of the new Government within the term of 45 days from the first presidential request and only after the decline of at least two requests of investiture.*

Croatia has a similar provision by which dissolution is triggered by the failure of the legislature to pass a budget. The rationale behind these provisions is to overcome deadlock within the legislature and to ensure the efficient functioning of the government.

Usually, the constitution establishes some restrictions on the executive's ability to dissolve the legislature. For example, a number of constitutions limit the timing of dissolution or the number of times it may be used during a given term.

Constitution of Moldova (1994), Article 85

- 3) *The Parliament may be dissolved only once in the course of a year.*
- 4) *The Parliament may not be dissolved either within the last 6 months of the President of the Republic of Moldova's term of office or during the state of emergency, martial law or war, except for the case provided for by Article 78 paragraph (5).*

While dissolution of the legislature may assist in overcoming deadlock by forcing new elections, these restrictions help to ensure the executive does not abuse the instrument of dissolution. Namibia has implemented an interesting mechanism by which dissolution of the legislature by the president triggers new presidential elections (article 29[1][b]). Therefore, implicit in the president's decision to dissolve the legislature is a belief that he or she carries the mandate of the people and can win a new election.

(g) Citizens' recall⁴

Next to institutional control within or between the different branches of government, the citizens' right to remove the chief executive before the end of his/her term is another way to check executive power. In general, there are two different types of recall at national level, mixed recall and full recall. The latter means that both the initiative and the final decision rest exclusively with the citizenry. With regard to the executive, this type of recall is less common and only applicable in some Latin American countries (e.g. Ecuador). Mixed recall is the process in which the citizenry is involved only in one of the steps, either initiating it or deciding it in a referendum. Whereas in some countries the citizens' involvement is part of a suspension procedure as a result of presidential wrongdoing (as in Romania), in most cases citizens become part of a purely political debate, in which they have to approve the recall of the president (as in Austria and Iceland).

Citizens' recall has to balance principles of participation and effective governance and the need to harmonize recall procedures with effective institutions of representative democracy. On the one hand, frequent recall votes may undermine the idea of a representative democracy and may hamper the executive in implementing its mid- and long-term political agendas. On the other hand, making the

⁴ This section draws significantly from 'A practical guide to constitution building: The design of the executive branch', Markus Böckenförde, published by International IDEA (2011), and available at www.idea.int.

process overly cumbersome in order to avoid excessive use may limit its original intent to allow citizens to hold their representatives directly accountable.

(h) Substantive powers of the executive

Two of the most significant substantive powers are the executive's lawmaking powers and its emergency powers. Many constitutions offer the executive significant lawmaking powers, meaning the power to legislate by decree (as opposed to the executive's power to issue regulatory orders).

Executive decree-making capabilities can be a significant source of power. A constitution may provide the executive decree power for certain substantive policy areas. One rationale behind allowing the executive to legislate by decree in certain policy areas is functionalist. In states in which the policy-making expertise of the legislature is limited, allowing the executive to legislate by decree on particular issues may be more efficient and effective. It avoids the compromises that must occur due to political battles within the legislature, which often dilute ambitious policymaking. Moreover, it allows the legislators to focus their attention on issues that may be more politically salient to their constituencies. However, it is important to remember that providing for presidential decree authority risks the over-consolidation of power in the executive. It may also hamper the development of policy-making expertise in the legislature and allow individual legislators to avoid tough political decisions.

One way to mitigate the risk of executive consolidation of power through decree-making authority is to allow the legislature to delegate legislative authority by majority and for temporary periods of time. This compels the legislature to identify—by majority—instances in which the need for legislation exists but it is unable to legislate effectively. However, it still allows the legislature to constrain the legislative authority of the executive by only providing for the authority for a specific amount of time and, often, only on particular issues.

One example of constrained decree-making power is found in the Brazilian Constitution. Although article 62 allows the president to legislate by decree during emergency periods, the structure of constitutional constraints is instructive for drafters even outside of emergency periods. The president is prohibited from decreeing on issues such as political rights, electoral law, criminal law, and the budget. A decree is valid law for thirty days, after which the legislature may adopt it by a simple majority, amend it, or allow it to lapse. The president may renew decrees that have lapsed an indefinite number of times. Brazilian presidents have utilized this decree authority extensively, and the legislature has often allowed them to renew decrees for several months or even years. While article 62 may be viewed as an invitation for presidential consolidation of power, the legislature maintains some control through the amendment procedure. Moreover, the amendment procedure allows legislators to focus their efforts on pieces of legislation that are especially important to their constituencies while also providing them the opportunity to weigh in on policy areas in which the president exercises decree authority.

The risk of the executive's consolidation of power also factors into deciding how to design the mechanism by which emergencies are declared. Some constitutions describe specifically the circumstances under which an emergency may be declared, such as during an invasion or natural disaster.

Constitution of Kenya (2010), Article 58

1) A state of emergency may be declared only under Article 132(4)(d) and only when—

- a. *the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and*
- b. *the declaration is necessary to meet the circumstances for which the emergency is declared.*

Creating a detailed constitutional provision about when emergencies may be declared has both advantages and disadvantages. In one sense, the constraint prevents whichever actor has the power to declare emergencies from abusing the power by declaring unnecessary emergencies. However, it also limits flexibility and makes it more difficult for the state to address serious issues that may have been unforeseen at the time of drafting the constitution.

An equally important aspect of emergency declaration is who has the power to declare an emergency. Constitution drafters must balance the imperative of addressing emergency situations swiftly with the risk of over-consolidation of power in one branch. Therefore, in structuring the declaration power, drafters must also consider whether or not another actor must approve the emergency declaration, and if so, who that other actor should be. Emergency situations often call for immediate measures to be taken. Clear constitutional provisions that establish who has the declaration power are therefore essential. However, it is also important that the actor that has the declaration power does not abuse it. Therefore, establishing checks on the actor who has the declaration power is also useful.

Different constitutions around the world have structured emergency declaration powers in a variety of ways. In Peru, the emergency declaration powers are dispersed within the executive so that the president may declare an emergency, but it must be approved by the cabinet (article 125). Checks may also be established in other branches. The Mongolian Constitution vests complete power to declare an emergency in the legislature (article 22). The constitution may require that the legislature approve the emergency declaration before it takes effect, as in Ethiopia (article 77). This ensures that the executive does not unilaterally consolidate power, but it may also prevent immediate remedy of the emergency, especially when the legislature is sharply divided between several parties or when it cannot mobilize quickly for some other reason. One way to balance the imperatives of swift action and checks on power is to require retroactive legislative approval within a specified time period. For example, in Malawi, the executive's emergency powers go into effect upon declaration of the emergency by the executive. However, if the legislature does not approve of the declaration within twenty-one days, then the executive's emergency powers expire (article 45). Other mechanisms to constrain executive consolidation of power during an emergency include limitations on the executive's power to dissolve the legislature or to amend the constitution during an emergency.

Finally, and perhaps most importantly for the Arab region, many modern constitutions impose limits on how long a state of emergency may last. Egypt's 1971 Constitution set out almost no detail on how long states of emergency could last, which had the effect of allowing for the emergency to last for decades:

Constitution of Egypt (1971), Article 148

The President of the Republic shall proclaim a state of emergency in the manner prescribed by law. The proclamation must be submitted within the following fifteen days to the People's Assembly for a decision. In case the People's Assembly is dissolved, the matter shall be submitted to the new Assembly at its first meeting. In all cases, the proclamation of the state of emergency shall be issued for a limited period which may only be extended with the approval of the Assembly.

In effect, the only real condition that article 148 imposed in order to renew a state of emergency was that the parliament had to approve, but even that had no impact given that the parliament was dominated by the president's own political party. That negative experience inspired a number of important changes in 2012:

Constitution of Egypt (2012), Article 148

The President of the Republic declares, after consultation with the government, a state of emergency in the manner regulated by law. Such proclamation must be submitted to the Council of Representatives within the following seven days.

If the declaration takes place when the Council of Representatives is not in session, a session is called immediately in order to consider the declaration. In case the Council of Representatives is dissolved, the matter is submitted to the Shura Council, all within the period specified in the preceding paragraph. The declaration of a state of emergency must be approved by a majority of members of each chamber. The declaration is for a specified period not exceeding six months, which can only be extended by another similar period upon the people's approval in a public referendum.

The Council of Representatives cannot be dissolved while a state of emergency is in place.

A number of changes were introduced in article 148. Most importantly: (a) the new wording specifically indicated that the maximum period for a state of emergency was six months (the 1971 Constitution merely indicated that the period had to be 'limited'); (b) the new version also required for a referendum to be called in the event the president sought a renewal.

3. The Legislature

As the main representative body of the people, legislatures in emerging democracies are tasked with the enormous responsibility of representing the diverse interests present within the country while also developing the legislative framework that will govern it. Thus, the three primary, related functions of the legislature are representation, lawmaking, and oversight.

(a) Structure of the legislature

(i) Cameral structure

The first aspect of the legislative structure that impacts the parliament's representativity is its cameral structure. The basic choice constitution drafters must make in deciding upon the cameral structure of the legislature is between a unicameral or bicameral legislature. Generally, countries with significant social divisions or discrete regional affiliations opt for bicameral legislatures. This is because bicameral legislatures offer the opportunity to apply different representational systems to each chamber of the legislature. For example, the upper chamber of the legislature of Botswana, the House of Chiefs, is comprised of appointed and elected tribal leaders (articles 78–79), while the lower chamber is elected according to a more traditional electoral system. Although the upper chamber only serves an advisory role, the cameral structure helps to ensure regional and local interests are voiced during the legislative process. Other interests—including professional organizations (Morocco, article 63), agricultural groups and fisheries (Ireland, article 18), and the disabled (Malawi, article 68)—may also comprise portions of

the upper chamber and thus influence the legislative process. For the most part, constitution drafters create upper chambers in order to ensure the adequate representation of regional interests, such as states or provinces.

It is commonly believed that the establishment of a bicameral legislature helps to protect the rights of minorities at the expense of swift lawmaking. Multiple representation schemes in a bicameral system help to prevent majoritarian tyranny. At the same time, because bicameral systems generally send a bill through more than one phase of legislative scrutiny, there are several more obstacles a bill must overcome before it becomes law. The higher level of scrutiny comes with the cost of a slower legislative process. One risk for emerging democracies associated with a slow legislative process is that the state's legislative framework does not develop quickly enough to ensure the proper functioning of the state. However, a more deliberative process is not necessarily a cost, since proposed legislation can frequently benefit from the input of a larger, more diverse set of interests. Moreover, minority groups in the upper chamber of the legislature may play a significant role in the legislature's oversight function, as is discussed below.

Selection of members to the upper chamber varies significantly across countries. The mode of selection dictates to whom legislators are accountable and, therefore, impacts the horizontal distribution of power. In some systems, such as Nigeria and Mexico, the members of the upper chamber and lower chamber are elected in the same way, directly by the people. Direct accountability to the people bolsters a legislator's accountability to her constituency and promotes political party strength. Elsewhere, the sub-national governmental entity chooses the members of the upper chamber. In Ethiopia, the election of the legislators in the upper chamber is controlled by the regional legislatures.

Constitution of Ethiopia (1994), Article 61

3) Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of the Federation, or they may hold elections to have the representatives elected by the people directly.

In Germany, on the other hand, they are appointed by the sub-national government.

Constitution of Germany (1949), Article 51

1) The Bundesrat shall consist of members of the Land governments, which appoint and recall them. Other members of those governments may serve as alternates.

Some constitutions provide for selection of members of the upper chamber by the national government. In Jordan, the king selects members of the upper chamber.

Constitution of Jordan (1952), Article 36

The King appoints the members of the Senate and appoints the Speaker of the Senate from amongst them and accepts their resignation.

This structure is usually the least effective with respect to promoting proper representation of minority groups, and it also hampers adequate oversight of the government.

(ii) Electoral system

Two other mechanisms to ensure minority representation include reserved seats and candidate quotas. Constitutions may carve out a certain number of seats that must be filled by members of minority groups, such as women or religious minorities.

Constitution of Kenya (2010)

1) *The National Assembly consists of—*

- a. ...
- b. *forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;*
- c. *twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers*

Reserved seats may be used in unicameral legislatures to avoid the challenges of bicameral systems with respect to speed while also giving voice to under-represented groups. Reserved seats, like bicameral legislatures, allow minority groups to play a role in lawmaking and to exercise oversight over the executive branch, which is most likely comprised primarily by the majority group. Similarly, candidate quotas require political parties to submit a certain percentage of minority candidates on their candidate lists for elections. However, quota systems are often codified as part of the electoral law rather than as a provision within the constitution.

(b) Lawmaking Power

Perhaps the most fundamental power of the legislature is its lawmaking power. Some constitutions allocate exclusive lawmaking authority to the legislature. However, often, lawmaking authority may be more dispersed. As discussed above, in emergency situations, the executive may yield lawmaking authority in certain policy arenas. Some constitutions also allow the executive to legislate by decree outside of emergency situations. A broad dispersal of legislative power may weaken the legislature in relation to the executive, while concentrating legislative power in the legislature will allow it to exercise a stronger influence in policymaking. When allocating legislative power, it is important to consider the discussion above regarding development of legislative expertise.

One method used to disperse legislative power is to allow other entities to have legislative initiative. Although most laymen generally understand that it is the parliament's role to pass legislation, there is very little understanding of how limited the parliament's right to initiative the legislative process can be. In many countries, although parliament is allowed to vote on legislation, government often controls which draft laws can actually be voted on. For example:

Constitution of Iraq (2005), Article 60

- (1) *Draft laws shall be presented by the President of the Republic and the Council of Ministers.*
- (2) *Proposed laws shall be presented by ten members of the Council of Representatives or by one of its specialized committees.*

Thus, according to article 60 of the Iraqi Constitution, all draft legislation must first be reviewed and approved by the government or the president before it can be voted on in parliament. Even proposed

legislation that is prepared pursuant to article 60(2) must also be referred to the government or president before it can be voted on in parliament. The rationale for this type of provision is to allow the government to structure policy formation within the state; one of the main criticisms however has been that article 60 has reduced parliament's powers to merely approving or rejecting the government's proposals.

Other constitutional systems grant the power of legislative initiative concurrently to both the government and the parliament, but nevertheless grant significant power to the government to control the parliament's agenda and to influence its powers. For example:

Constitution of Morocco (2011), Article 82

The agenda of each Chamber is established by its Bureau. It includes the bills of law and the proposals [propositions] of law, by priority, and in the order that the government has established.

Article 83

The members of each Chamber of the Parliament and the government have the right of amendment. After the opening of the debate, the government can oppose the examination of any amendment which has not been previously submitted to the interested commission.

In relation to the annual state budget law, many constitutions provide both the executive and the legislature with specific roles and powers. An important consideration is how much of the fiscal decision-making should be subject to political battles in the legislature and how much should be delegated to the executive. Some constitutions assign the legislature the full authority to initiate and pass a budget. Others provide the executive the authority to assemble and propose a budget to the legislature. The legislature then has the power to accept, reject or amend the budget. However, a constitution may limit the legislature's ability to amend the budget by providing that it may not increase the budget. A constitution may also limit the amount of time a legislature has to review the budget. The rationale for such constraints on the ability of a legislature to review the budget rests generally on two notions. First, it may be undesirable to subject an issue of such significance to the functioning of the government, such as the budget, to the fickle political battles of the legislature. The risk of not passing a budget may be especially acute if the legislature is highly fractured. The second notion is that the legislature may not have the necessary policy expertise to exercise effective oversight. This applies primarily in the context of new democracies with legislatures that lack experience and expertise.

However, although legislative oversight of the budget may carry some of the risks described above, its advantages should not be understated. Budgetary manipulation is a common instrument of corruption, self-dealing and consolidation of power within the executive. The power of legislators to review the budget and subject it to scrutiny on behalf of their constituents helps to reduce opportunities for corruption and to improve policymaking generally. Many countries have addressed the problem of legislative expertise by creating independent research organs by statute to assist the legislature in its reviewing function. However, these entities are often hampered by the lack of a sufficient budget and manpower to effectively perform their functions. Establishing such an entity through the constitution could assist in ensuring proper funding and in enhancing its independence.

A constitution may also limit the legislature's legislative powers by providing for a presidential veto of legislation. The extent to which the legislature's powers are limited depends on the strength of the

presidential veto. Under some frameworks, the legislature may overcome a presidential veto with the same proportion of votes that passed the original bill. This is simply a delaying power.

Constitution of Bangladesh (1972), Article 80(4)

If the President so returns the Bill Parliament shall consider it together with the President's message, and if the Bill is again passed by Parliament with or without amendments, It shall be presented to the President for his assent, whereupon the President shall assent to the Bill within the period of seven days after it has been presented to him, and if he fails to do so he shall be deemed to have assented to the Bill on the expiration of that period.

Other constitutions provide for a stronger presidential veto requiring a higher proportion of votes in the legislature to overcome the veto. Stronger presidential vetoes come in many forms, ranging from a requirement of an absolute majority (Lebanon, article 57) to a requirement of two-thirds of the full legislature (Kenya, article 115[4]). Presidential vetoes are generally left to the discretion of the president to decide when it is best to use. It is almost always a political judgment that may have positive or negative impacts on policy and stability. Countries with histories of extended authoritarian rule may shy away from a strong presidential veto in favor of a weaker veto power that allows the legislature to exercise stronger legislative power relative to the executive.

The legislative powers of a bicameral legislature sometimes vary by chamber. Strong forms of bicameralism are characterized by an upper chamber that has legislative powers equal to those of the lower chamber. In other words, both chambers may initiate legislation, and the approval of both chambers is required in order to make a bill into law (Colombia, article 154). The upper chamber essentially has veto power over legislation initiated by the lower chamber (and vice versa). This veto power causes the decelerated legislative process associated with bicameral systems.

However, upper chambers are not always co-equal with the lower chambers with respect to legislative powers. For example, the upper chamber may only have a delaying power rather than a veto power. Once the lower chamber passes a bill, it then moves to the upper chamber for approval by majority. If the upper chamber rejects the bill, the lower chamber may still pass it. Some constitutions require a supermajority of the lower chamber to pass a bill rejected by the upper chamber, while other constitutions require only a simple majority (the same requirement to pass it initially). Under the latter design, the upper chamber acts simply as a delaying device that urges the lower chamber to deliberate further, taking into account the upper chamber's recommendations. In Malaysia, the constitution defines the period of delay by prohibiting the lower chamber from reconsidering the legislation until a year after the upper chamber rejects it (article 68). The rationale behind the delaying mechanism is to compel the lower chamber to deliberate over the legislation more thoroughly.

Constitution drafters may also tweak the substantive legislative powers of the upper chamber. For example, in Germany, the upper chamber has veto power over legislation that impacts the interests of the sub-national units. However, for legislation that does not concern the states, the lower chamber may overcome the upper chamber's rejection by approving the legislation with an equal percentage of the vote that voted against the measure in the upper chamber.

Constitution of Germany (1949), Article 77(4)

If the objection is adopted by the majority of the votes of the Bundesrat, it may be rejected by a decision of the majority of the Members of the Bundestag. If the Bundesrat adopted the objection by a majority of at least two-thirds of its votes, its rejection by the Bundestag shall require a two-thirds majority, including at least a majority of the Members of the Bundestag.

These types of provisions narrowly tailor the substantive legislative powers of the upper chamber through creative procedural mechanisms. The German upper chamber has much greater influence and control over legislation related to the interests of the sub-national units than it does over other types of legislation. This type of design attempts to achieve the representational advantages of a bicameral system without unduly delaying the legislative process for most types of legislation.

(c) Legislative oversight

Aside from representation and lawmaking, the legislature also performs a pivotal role in maintaining oversight over the executive branch. As discussed above, a major concern in countries emerging from long histories of authoritarian rule is ensuring that the executive does not consolidate power and lead the country back to dictatorship. One important way to mitigate that risk is by empowering the legislature to exercise oversight over the activities and decisions of the executive branch. Parliaments typically have at least two mechanisms to exercise oversight over the executive, including (i) investigations and interpellations; and (ii) the budgeting process. In order to satisfy both of those roles, parliament must have access to adequate information about the government's performance and of its implementation of the annual state budget law. The best way to ensure that the parliament will have access to such information is by protecting and privileging the state's supreme audit institution's independence and its relationship with the parliament.

Supreme audit institutions are the only bodies that have the authority to review all of the state's expenditure. Its auditors and investigators routinely examine all of the state's accounts, they carry out on the ground audits, and prepare detailed expenditure reports that detail waste and mismanagement throughout the state. The audit institution's reports are typically made public and referred to the parliament where they are used to hold the government accountable for its performance. In modern democracies, supreme audit institutions play a crucial role in improving government performance. Although virtually all countries in the Arab region have supreme audit institutions, they have not been allowed to play a significant role in improving government's performance because their independence was very limited. The audit institutions almost all reported to the president, who then ensured that all sensitive reports detailing corruption and mismanagement would never see the light of day. The president also determined the audit institution's budget and who would serve on its board, which guaranteed its loyalty to the very same institution that it was supposed to be overseeing. In many modern and emerging democracies, strong constitutional provisions are drafted in order to protect the audit institution's independence.

Previously, under the 1971 Constitution, Egypt's supreme audit institution, the Central Auditing Organization, was not mentioned. As a result, its entire existence, including all the details of which branch of government it reported to, who would serve on its board, and who would determine its budget were all determined by ordinary legislation. That exposed the Central Auditing Organization to significant manipulation by the political majority in the parliament, which was loyal to the president. As a result, for decades, the Central Auditing Organization played almost no role in exposing

mismanagement and corruption in the Egyptian state. Based on that negative experience, the 2012 Constitution for the first time granted the Central Auditing Organization a significant amount of protection and also broadened its mandate:

Constitution of Egypt (2012), Article 205

The Central Auditing Organization has control over state funds and any other body specified by law.

Article 201

Reports from [the Central Auditing Organization] are presented to the President of the Republic, the Council of Representatives and Shura Council within 30 days from the date on which they are issued. The Council of Representatives considers such reports and takes appropriate action within a period not exceeding six months from the date of receipt. The reports are presented for public opinion. [The Central Auditing Organization] notifies the appropriate investigative authorities of any evidence of violations or crime [it] may discover. The foregoing is regulated by law.

Article 202

The President of the Republic appoints the head of [the Central Auditing Organization] upon the approval of the Shura Council, for a period of four years, renewable once. They cannot be dismissed except with the consent of a majority of the Council's members; the same prohibitions apply to them that apply to ministers.

The 2012 Constitution therefore for the first time provided the Central Auditing Organization with a broad and specific mandate to 'control state funds', it specifically indicated that all its reports should be made public, and also provided that the president could no longer unilaterally appoint its head.

4. The Judiciary

The third major player in the horizontal distribution of power is the judiciary. Generally speaking, the judiciary is responsible for interpreting and applying the law to resolve disputes in a neutral and independent fashion. The judiciary acts as an important check on both executive and legislative power. At the same time, constitution drafters must consider the extent to which the judicial branch may assert itself into the domain of the political branches. This section focuses on two of the most important questions related to the constitutional design of the judiciary: 1) the appropriate balance between judicial independence and accountability, and 2) the judiciary's power of constitutional review.

(a) Judicial Independence versus judicial accountability

Judicial independence is an essential requirement of modern constitutions. The success of a country's judicial system depends on the extent to which judges and courts may exercise their independent and neutral judgment. The necessity of judicial independence is widely recognized in the international community and is enshrined in the Universal Declaration of Human Rights:

Universal Declaration of Human Rights, Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Most constitutions express the state's commitment to judicial independence. For example, the Iraqi and Tunisian constitutions declare the independence of both the judicial power and of judges:

Constitution of Iraq (2005), Article 87

The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law.

Article 88

Judges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice.

Constitution of Tunisia (2014), Article 102

The judiciary is independent. It ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms. Judges are independent with the law being the sole authority over them in discharging their functions.

Several considerations are important here. Firstly, decades of experience show that it is not enough for a constitution merely to state that the judiciary is independent for that to be the case. Indeed, all Arab constitutions (including Iraq's 1970 interim Constitution and Tunisia's 1959 Constitution) provided that the courts were independent, but at the same time indicated that all the details relating to how that independence would be protected would be determined by law. Given that the law in both countries was drafted by government and passed by parliament (both of which were under the control of a single political party), both constitutions in fact subjected the courts to the will of the other two branches of government without protecting their independence in the slightest.

Secondly, constitution drafters must also consider the accountability of the judiciary to the other branches of government. There are many examples of countries with courts that operate so independently as to administer justice unfairly or to encroach improperly upon political decision-making. Therefore, judicial independence must be accompanied by effective mechanisms of accountability and oversight over the judiciary.

This sub-section considers three primary elements in the balance between judicial independence and judicial accountability: (i) selection; (ii) tenure; and (iii) compensation.

(i) Selection

Constitutional designs governing the selection of judges generally vary based on how concentrated the selection power is between different institutions. Four general types of selection mechanisms exist:

- selection by political institutions;
- selection by other judges;

- selection by a judicial council; and
- direct election.

As is apparent from the discussion above, the authority to select judges significantly affects the balance of power. Most constitutions allocate this power to the political branches, generally the president or the prime minister, though it is rare that a constitution allows the president and prime minister to make appointments without the support, input, or approval of another body or branch. Nevertheless, some executives are powerful in this area. In Zimbabwe, the president, in consultation with a Judicial Service Commission, appoints judges. Yet the president also appoints most of the members of this commission, which in some ways defeats the purpose of a shared appointment power.

In some countries the legislature exercises more control in the appointment of judges. In the Former Yugoslav Republic of Macedonia (FYROM), the legislature elects members of both the Constitutional Court and the Republican Judicial Council, which proposes the election and discharge of judges, evaluates competence, and oversees accountability measures. Under many constitutions, the executive and legislative branches are both involved in the appointment of judges to the highest courts. In Hungary, the legislature alone appoints members of the Constitutional Court, whereas the president appoints members of the Supreme Court. In Indonesia, the legislature and the executive are both involved in the appointments to the Supreme Court, the Judicial Commission, and the Constitutional Court.

Even if judges strive to set aside their political or personal beliefs when interpreting the law, their experiences and perspectives will inevitably influence decisions. Political actors who appoint judges will naturally attempt to select individuals who share their first principles. The power of appointment—when involving the executive or the legislature—thus represents a political check on the judiciary. That is, constitutions that permit the political branches to appoint judges support a measure of political influence on the character and composition of the judiciary.

By delegating the responsibility for selecting judges to numerous actors, a constitution can mitigate the risk that any one individual will exert too much influence over the development of the law. Such a system may also weed out the most ideologically extreme judges, as most candidates will represent a compromise reached through political negotiation. The constitutions of both Ethiopia and South Africa, for example, involve a Judicial Council in the process of appointing Constitutional Court judges. In Brazil, the president nominates candidates for the judiciary who must then win approval by the legislature. To maximize diversity of opinion within the judiciary, the Italian Constitution entrusts the president, the parliament and the lower courts with legal safeguards may reinforce judicial independence. Many constitutions contain designating one-third of the members of the Constitutional Court each.

Legal safeguards may reinforce judicial independence. Many constitutions contain explicit selection criteria that narrow the pool of potential judges. Such criteria may include age limits, ethnicity, regional origin, legal qualifications and experience requirements. Constitution builders may select certain criteria to achieve a particular balance in the judiciary, to ensure diversity of views, or to encourage a professional, rather than political, judiciary.

Another kind of legal safeguard involves the appointment of judges by an independent, impartial body. The Constitution of Bosnia and Herzegovina commissions an international body, the European Court of Human Rights, to select three of the nine judges sitting on its Constitutional Court. Other constitutions include domestic independent bodies in the selection of judges, though such bodies usually act

alongside the political branches. In Uganda, for example, a Judicial Service Commission appoints 38 lower-court judges but, in appointing the judges of the highest court, its role is to impart judicial councils or judicial service commissions with appointment authority to safeguard and even strengthen judicial independence.

The judiciary itself can participate in, or even exclusively control, the appointment process. Such arrangements would maximize judicial independence but also aggregate power within the judiciary. While the judiciary, as compared to the political branches, might select more impartial and capable judges—although no evidence exists to support this claim—it would most likely select judges who were less representative of a nation’s citizens. Moreover, vesting appointment authority strictly within the judiciary would remove a significant political check against an already non-political institution, and may require—as a countermeasure—infringements on judicial independence elsewhere. Under the Constitution of Portugal, elected judges are authorized to appoint a portion of members to the bench. The judiciary also exercises appointment powers in Bulgaria where the judges of the highest courts may appoint members to lower courts. 40 Similarly, under Afghanistan’s Constitution, the Supreme Court recommends judges for lower court appointments.

(ii) Tenure

Another major component of judicial independence involves judicial tenure. Protecting judges from removal for political reasons plays an important role in protecting their ability to make neutral decisions in accordance with the law. Constitutions define tenure in several different ways, ranging from life tenure to fixed-term tenure.

Perhaps the strongest embodiment of judicial independence in terms of tenure is life tenure. Judges that are appointed for life are most insulated from political pressures, especially when the constitution does not list a retirement age or specific justifications for removal of judges. Although life tenure bolsters judicial independence, it reduces accountability. Moreover, life tenure may contribute to the ossification of jurisprudence so that the law is slow to develop and adapt to changing circumstances. Some constitutions mitigate these problems by imposing a mandatory retirement age, though often the retirement age is so high that it makes no effective difference from pure life tenure.

One alternative to life tenure is tenure for a fixed term. Some constitutions, such as the Guatemalan Constitution, provide for fixed-term tenure with the possibility of re-appointment (article 215). These types of provisions bolster judicial accountability to whatever entity is responsible for re-appointment. It also opens the possibility for highly political considerations to enter into the re-appointment calculus, and therefore it may encourage judges to decide cases for political reasons. Some constitutions require fixed-term tenure, but do not include the possibility of re-appointment. While this reduces the problem of political influence, it does not completely eliminate it. Judges, especially those who are appointed at a young age, may aspire to occupy other positions in government or other jobs in general after their tenure as judges. Therefore, political calculations could enter into their decision-making if they believe that they could improve their chances at attaining those positions by appealing to certain political actors.

The South African Constitution combines these different tenure requirements and includes a list of justifications for judicial removal.

Article 176

(1) A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70.

Article 177

(1) A judge may be removed from office only if—

- a. the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and*
 - b. the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members.*
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.*
- (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).*

The South Africa formula might not be the correct formula for other countries, but arguably, with the proper adjustment of mandatory retirement age and fixed, non-renewable tenure, constitution drafters can craft an optimal balance between independence and accountability.

(iii) Compensation

Fixed and protected compensation is another important aspect of judicial independence. While this constitutional requirement is fairly straightforward, it is important because protects judges from the threat of reductions in their pay by the political branches. This allows them to make judicial decisions without the fear of losing their livelihoods.

(b) Judicial Councils

(i) Competence

Judicial councils operate in very different legal environments and, therefore, we need to understand the particularities before we can compare the role and the powers of judicial councils across countries. Broadly speaking, judicial councils have three important competences:

- housekeeping functions (managing budget, material resources, operations);
- appointment of judges; and
- performance evaluation (promotion, discipline, removal and retention of judges, and judicial salaries).

For all of these functions, the key factor is effective calibration between judicial independence and external accountability. This calibration will be achieved, for example, by the composition or membership of the council, by the appointment mechanism, or by sharing certain functions with other branches of the government or other bodies (even the public in the case of elected judges). We do not assert that there is a universally optimal balance between independence and accountability, but understand that there is a limit to how far one can move in either direction within democracies.

Moving too far in either direction may trigger pressures for a shift as idealized in Figure 1. Whereas the first competence, housekeeping, is purely managerial, the second and third competences are related to career incentives and more directly contribute to judicial quality. Housekeeping functions deal with practical questions concerning the organization and the running of the judiciary. These functions can, of course, potentially affect judicial independence—for example, if material incentives are used to reward certain types of judges. Obviously managerial competences are also important for the efficiency of courts and, in that respect, shape the quality of the legal system. Nevertheless, the other two competences (appointment and performance evaluation) are more directly related to judicial career incentives. If institutions matter for judicial quality, they matter because of their impact on judicial incentives.

(ii) Composition

Councils also vary in composition. The council is composed of three possible types of members: (i) judges, (ii) members of other government bodies or their appointees, and (iii) lawyers. Judges on the council are typically appointed by the Supreme Court or by other courts, while lawyers are appointed by the law society/bar association. Members of government bodies are typically appointed by their organizations.

A general assumption in the literature is that a judicial majority on the council will ensure independence. However, even when the judges are not a numerical majority in the council, they might have a dominant or preponderant role for three reasons. First, most members of a judicial council must rely on information provided by the judiciary itself. Second, a judicial council does not exert direct control over the judiciary (which would hurt the independence of judiciary) but exercises a configuration of powers that mix authority and accountability. This configuration is usually complex and full of uncertainties that usually call for expertise by judges. Third, judges may have particularly strong incentives to represent judicial interests on the council: after their service on the council, judges will return to their professional careers inside the judiciary whereas the non-judges will go back to their careers outside of the judiciary, which may or may not have any relationship with judicial management issues.

(c) Constitutional Courts

Like judicial independence, the power of constitutional review is generally considered a fundamental requirement for a modern constitution. Constitutional review is a pivotal mechanism by which the judiciary may exercise oversight over the political branches of government. However, as with the issue of judicial independence, a court may utilize its powers of constitutional review to overstep its boundaries into the realm of politics.

(i) Who conducts constitutional review?

Two general design options exist for answering the question of who conducts constitutional review: a ‘centralized’ model of review and a ‘diffuse’ model of review. Under the centralized model, a single court—separate from the rest of the judiciary—is solely responsible for reviewing legislation and government actions for their constitutionality. This court is usually termed the ‘constitutional court’.

Constitution of Turkey (1982), Article 148

The Constitutional Court examines the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Grand National Assembly of Turkey.

Article 152

If a court which is trying a case finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it postpones the consideration of the case until the Constitutional Court decides on the issue.

The establishment of constitutional courts is a trend in modern constitutions. Countries emerging from authoritarian rule often opt for centralized models of constitutional review. Empowering a single court to conduct constitutional review serves an expressive purpose for new democracies, signalling the significance of the constitutional order. Moreover, the centralization of constitutional decision-making fosters constitutional expertise and improves legal certainty and consistency.

On the other hand, under the diffuse model, many courts have the power to review. These courts perform the normal functions of the judiciary in hearing disputes between parties, but they also may review statutes and government actions for constitutional defects. Because post-authoritarian countries often have judiciaries that are not well trusted by the populace, decentralized review systems may be seen as illegitimate in those countries. However, a similar argument could be made against centralized courts in nascent democracies, which may lack independence, legitimacy or authority amongst the ruling elite. Elected officials in these countries may be more willing to suspend the court, not comply with court decisions, or take other steps to make the court's decisions ineffective.

(ii) Timing of constitutional review

The second essential question to address when designing the constitutional review mechanism within a constitution is when can constitutional review occur. The timing of review generally occurs either before or after legislation has already been passed. Some constitutions provide the constitutional court with the authority to consider a constitutional issue before a legislative bill has actually been passed. For example, the South African Constitution permits the president to submit a bill to the Constitutional Court if s/he has doubts as to its constitutionality before it is passed (article 79[4][B]). Other constitutions go so far as to require the constitutional court to review certain types of legislation before they are passed. For example, the Chilean Constitution requires the constitutional court to review organic laws prior to promulgation (article 93). Egypt's now-defunct 2012 Constitution also provided that all draft electoral laws should be approved by the Supreme Constitutional Court before they were to be promulgated by the president and before they enter into law (article 177).

Constitutional review of legislation absent an actual case or controversy produced by that legislation is known as 'abstract' review. Some constitutions allow a constitutional court to conduct abstract review either before or after the legislation has been passed. On the other hand, 'concrete' review is the consideration of the constitutionality of a piece of legislation once it has already been passed and has produced a concrete case or controversy that has been brought before the court. Providing for abstract review of a bill before it has been passed may increase the quality of legislation, as no clearly unconstitutional bills may be passed. However, it may be difficult to assess fully the real world

implications of a given piece of legislation before it has been passed. A good example of this is the crisis that emerged in Egypt during the first half of 2013 when parliament attempted to pass an electoral law, but was confronted with a Supreme Constitutional Court that rejected the draft law on several occasions for a large number of reasons that the parliament had not anticipated.

Closely connected to the timing of review is the question of who has standing to bring a constitutional claim. Constitutions vary greatly with respect to who may bring a constitutional action. For example, in Ukraine, only certain bodies of government may bring constitutional questions to the court.

Constitution of Ukraine (1996), Article 150

The authority of the Constitutional Court of Ukraine comprises:

1) *deciding on issues of conformity with the Constitution of Ukraine (constitutionality) of the following:*

- *laws and other legal acts of the Verkhovna Rada of Ukraine;*
- *acts of the President of Ukraine;*
- *acts of the Cabinet of Ministers of Ukraine;*
- *legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.*

These issues are considered on the appeals of: the President of Ukraine; no less than forty-five National Deputies of Ukraine; the Supreme Court of Ukraine; the Authorized Human Rights Representative of the Verkhovna Rada of Ukraine; the Verkhovna Rada of the Autonomous Republic of Crimea.

The Algerian Constitution allows the president to request a binding opinion by the Constitutional Court on the constitutionality of 'Institutional Acts' once they have been adopted by the legislature (article 165). Thailand empowers legislators to challenge the constitutionality of government action by garnering the support of a certain percentage of the legislature to submit the legislation or action to the Constitution Court (article 154). Other countries, such as Honduras, allow any person to bring an action.

Constitution of Honduras (1982), Article 185

A declaration of unconstitutionality of a law and its non-applicability may be petitioned by anyone who considers himself injured in his direct, personal, and legitimate interest...

Allowing ordinary citizens to bring actions may help to ensure the protection of basic political and civil rights.

(iii) Appointing justices to the Constitutional Court

A constitutional court whose judges are selected solely by the executive, without the participation of any other political or civil society actors, stands little chance of being able to act independently. First, the executive will attempt to capture the court by selecting judges believed to be sympathetic to the executive's policies, in order to insulate itself from constitutional accountability. Second, the judges on the court, knowing that they owe their positions solely to the executive, will likely be unwilling to issue a ruling that the executive would oppose.

In the MENA region, the executive has historically exercised strong control over appointments to constitutional courts.

- In Egypt, President Mubarak was able to rein in the formerly assertive SCC by exerting his legal authority over court appointments, in particular the Chief Justice.
- In Kuwait, the Higher Judicial Council—which includes a representative from the executive branch, the Minister of Justice—technically controls the appointment of justices to the Constitutional Court. Although the Council includes members of the judiciary, the Ministry of Justice is involved in appointments to nearly all senior judicial posts. As a result, the Emir exercises significant influence over the Court in practice. This is reflected in the Court’s jurisprudence, which generally either avoids ruling on controversial subjects or does so in a way that supports the Emir’s interests.
- Morocco’s 2011 Constitution, written by a group of experts selected by King Mohammed IV and approved in a popular referendum, establishes a Constitutional Court of 12 members. The king appoints six members, and each house of Parliament elects three of the remaining six members by a two-thirds majority vote (article 130). While this procedure divides the appointment power between the king and Parliament, it still gives the king the power to appoint half of the Court’s members—which in effect allows the judges appointed by the king to block any decision with which he disagrees.
- In Syria, the president appoints all justices on the newly formed Supreme Constitutional Court for a renewable period of four years (Constitution of Syria, 2012, articles 141, 143). The appointments process mirrors that of the Syrian Supreme Constitutional Court created under the 1973 Constitution (articles 139, 141). Under this process, the executive appoints the Court’s members, who rely on continued executive support for their tenure; thus the judges have little incentive to exercise any measure of judicial independence.
- Similarly, in Jordan, the king appoints all nine members to the recently established Constitutional Court, including its president. The current president, Taher Hikmat, is a former senator who previously served in the government and as President of the Court of Cassation and the Higher Judicial Council. The king’s complete control over Court appointments will likely influence its decisions, although it is too early to make a fair assessment of the Court’s jurisprudence.

Courts that are appointed by a single political actor, particularly the executive, are at high risk of being unduly influenced by that actor. Appointments processes that are dominated by only a few actors may stand a better chance of creating a court that operates independently of external influence, but since they still exclude many segments of the political spectrum from the selection of judges they may fail to create a broad sense of political investment in the court. An appointments process that instead aims to be inclusive of all interests by engaging different branches of government, political parties, civil society organizations, legal academia, bar associations and similar groups in some element of judicial selection is best able to create a court that represents society and that is supported by many different political interests. This engagement can take many different forms, including public consultation processes, inviting nominations from various sectors, making the appointments process as transparent as possible at all levels of the process, allowing a particular group to appoint a certain number of judges on the court, allowing a group to veto appointments made by others, or tasking one group with nominating a set number of candidates and another with selecting a certain number of judges from the nominations provided. The unique political and social context of a country will determine the best ways to promote inclusion in appointments processes and foster political investment in the constitutional court.

The legislative supermajority model: In a legislative supermajority appointments model, the legislature has primary control over the process of selecting judges. Depending on a country's political system, one or two chambers of the legislature are responsible for electing judges. A defining feature of the model is the required majority that a candidate needs for election: a supermajority. Whereas a simple majority would allow a governing party to dominate appointments procedures, a 'supermajority' of two thirds (or an even higher qualified majority) guarantees a role for opposition parties in the process. By requiring a supermajority vote to approve candidates, the judicial appointments process is intended to foster a process of negotiation and compromise between government and opposition leaders. The model is used in Germany to appoint members of the Federal Constitutional Court (FCC). It has successfully promoted a widespread sense of political investment in the FCC among political parties. However, the supermajority requirement can lead to legislative deadlock in countries with a high degree of political party fragmentation, or where the intensity of partisan conflict makes compromise on a nominee difficult. At present, no country in the MENA region uses this model for constitutional court appointments. However, Morocco's new constitution calls for Parliament to select half of the Constitutional Court's appointees, and requires a supermajority vote to do so. Tunisia's proposed June 2013 draft Constitution also includes a provision requiring the Chamber of Deputies to select candidates, which are nominated by other political actors, by a supermajority vote.

The judicial council model: Judicial councils are created to insulate the appointments process from political actors by forming a council involving multiple political branches and, often, non-political groups such as bar associations, legal scholars and other civil society actors. This council oversees the appointments process, soliciting applications for court vacancies, interviewing candidates, and then either selecting a candidate or presenting a shortlist of candidates to the executive or legislature to make a final selection. A leading example of the judicial council model can be found in South Africa. Its Judicial Service Commission (JSC) plays a central role in appointments to the Constitutional Court of South Africa. The JSC includes executive appointees, members of both houses of Parliament, members of the judiciary, lawyers and law professors. The diversity of the JSC helps foster a sense of investment in the Court across the political spectrum, and it has largely succeeded in creating an independent Court whose decisions are widely respected. However, the continuing dominance of the African National Congress (ANC) in both the executive and legislative spheres allows the ANC to appoint the majority of the JSC's members, which may impact the Court's independence in the long term. Several countries in the MENA region have a judicial council, although not all such councils play a role in appointing constitutional court judges. The members of the Constitutional Court of Kuwait are selected by a judicial council composed of senior judges and political officials.

The judiciary-executive model: The judiciary-executive model divides the power to appoint judges to a constitutional court between the judicial and executive branches. In most iterations of the model, the judiciary (most often senior judges of the highest courts) nominates either one or a shortlist of candidates to the constitutional court. The executive must then select a candidate or approve the selection made by the judiciary, and formally appoint the judge to the court. Other variations of this model provide that the executive nominates either one candidate or a list of candidates to the court, and the judiciary must approve the appointment. By relying on the joint consent of the judiciary and executive, the model intentionally excludes the legislature, in an effort to insulate the court from short-term political concerns. Egypt's Supreme Constitutional Court (SCC) and Iraq's Federal Supreme Court (FSC) are both appointed under variations of the judiciary-executive model. Because the model excludes many political actors from the appointments process, especially opposition political parties, the courts in both countries struggle with a low degree of political investment, leaving the courts vulnerable to accusations that their rulings are based on political loyalties. The experiences of Egypt and Iraq suggest

that the constitutional court appointments process in a democracy requires the involvement of a broader range of actors than the judiciary–executive model permits.

The multi-constituency model: The multi-constituency model involves multiple institutions in the judicial appointments process, including the various branches of government and, in some countries, civil society organizations as well. In this model, the institutions involved in appointments may have direct or indirect power over them. Institutions with direct appointment power may select candidates and appoint them to the Court without having to consult with or gain the approval of any other actor. Institutions with indirect power are generally given either the power to nominate one or a list of candidates for the court or to approve or veto a candidate nominated by another institution, but do not have the power to both nominate and confirm a particular candidate. Most commonly, the seats on the court are divided among the various institutions that have appointment power. In contrast to the judicial council model, the institutions that have a role in selecting the court’s judges generally work independently of each other during the selection process. The Italian Constitutional Court has been appointed under a multi-constituency appointments model since 1953. The Turkish Constitutional Court’s appointments model was changed from a judiciary–executive model to a multi-constituency model through constitutional amendments passed in 2010. In Italy, the multi-constituency approach has created a strong sense of political investment in the Constitutional Court, although its experience also indicates that legislative appointments may be delayed if the parties in the legislature cannot arrive at a compromise on a candidate. The model was introduced in Turkey too recently to assess its impact; however, the change was in part motivated by the desire to create a more representative and responsive Constitutional Court. Tunisia’s proposed June 2013 draft Constitution uses a variation of the multi-constituency model, combined with elements of the legislative supermajority model, for constitutional court appointments.

Qualifications should be set to select judges with a high level of legal expertise: Specifying the required qualifications that constitutional court judges must hold is another way to ensure political investment from across the political spectrum. Setting out the level of education and professional achievement judges must have obtained, or specifying a minimum or maximum age at the time of appointment, ensures that the judges appointed to the constitutional court will have the expertise necessary to parse the complex and politically significant constitutional questions that will come before the court. It also creates an additional barrier to court packing: a political actor or party seeking to place its supporters on the constitutional court will have to ensure that the candidates it nominates possess the minimum qualifications specified in the constitution. Qualifications may also include a list of professions or offices that are incompatible with appointment to the constitutional court, usually political offices, which can help to insulate the constitutional court from political influence.

(iv) Number of constitutional court justices

If there are no firm standards set out in a country’s constitution or ordinary laws defining the number of judges on the constitutional court, or if the constitution or other legislation that sets out the number of justices is easy to amend, then the executive may be able to change the number of judges on the court essentially at will if the appointments process is largely in its hands. The executive can add judges to the bench to ensure that a majority will always rule in its favour or force an unpopular judge off the bench. Egypt’s SCC has experienced both forms of manipulation of court composition. During President Mubarak’s rule, after the SCC declared a regime-crafted election law unconstitutional, Mubarak appointed a new Chief Justice known to be a regime loyalist, who promptly appointed five new judges to the SCC, increasing the total number of judges on the bench by 50 per cent. This change in the court’s

composition transformed the SCC from an institution that to some extent offered a real check on executive power into a body that was effectively under executive control. After the fall of Mubarak, the Egyptian Constitution passed in December 2012 reduced the number of judges on the SCC to 11 from the previous 19 (including the Chief Justice). This necessitated the removal of the eight most junior judges. One of those removed was a judge who had been an outspoken critic of the Muslim Brotherhood. While it is unclear whether the provisions in the 2012 Constitution were written with the purpose of removing this judge from the court, this episode illustrates the ways in which expanding or contracting the number of judges on the constitutional court can be used to further political ends.

(v) The removal of constitutional court justices

The power to remove constitutional court justices is equally important. Constitutions that are silent on removal provisions—or constitutional provisions that permit judges to be removed relatively easily or unilaterally by the executive or another government actor—leave judges vulnerable to the influence of political actors. There are several issues to consider here.

If the same political actor or institution is responsible for both selecting and removing constitutional court judges, that actor will most likely be able to unduly influence the court. Judges will be aware that they owe their jobs to this entity. Therefore the powers to appoint and remove judges from the constitutional court should be granted to separate political actors or institutions. Some countries only permit the removal of a constitutional court justice if the court itself votes in favour of removal, which sometimes requires a supermajority vote. Other countries require a multi-step process to remove a judge, in which several different branches of government must approve the removal before it can be enforced.

Removal and appointment procedures are mutually reinforcing. If it is easy for a single political actor to remove judges, this can be used as a mechanism to circumvent even the best-designed appointments process, by enabling the manipulation of the constitutional court's membership. Indeed, the threat of removal can be used as a subtle tool of influence over the judges. To protect against this, some countries only permit the removal of a constitutional court justice if the constitutional court itself votes in favour of removal, sometimes requiring a supermajority vote. Other countries require a multi-step process to remove a judge, in which several different branches of government must approve the removal before it can be enforced.

Many countries in the MENA region are currently considering these important questions regarding the formation of a constitutional court and the appointment mechanism for its judges. The Arab Spring sparked a regional debate over constitutional reforms, providing a unique opportunity to create a strong judicial institution that can help promote the rule of law and hold all political actors accountable to the constitution. There are two regional trends. Countries such as Tunisia have proposed a procedure for appointing constitutional court judges that will involve many different political actors, thus fostering a broad sense of political investment in the court and helping to protect the court's independence. In contrast, Jordan, Morocco and Syria have all granted the executive branch an enormous amount of power over constitutional court appointments. If constitutional court judges fear that angering the executive may cost them their positions, their decisions may be influenced more by the need to please the executive than by the law's requirements. Without establishing procedures and rules that will allow a constitutional court to withstand political pressure, it will serve as mere window dressing for rulers who wish to give the appearance of respect for the rule of law without creating real checks on their power.

(d) Judicial transformation (vetting processes)⁵

The issue of judicial transformation is a major challenge. In countries that are transitioning to democracy, if the will exists to produce a powerful and independent judiciary, one must decide what to do with the existing judges. There is a natural impulse in a new democracy to want to ‘clean up’ the judiciary, removing those who were either corrupt or politically too close to the old regime. But the ‘cleaning’ must be done in a very careful way. Many old judges may be quite competent and indeed uniquely able to contribute to the development of the legal system. Judges may resist efforts to examine their record, and morale may decline. And if everyone is fired, there will be no one qualified to judge cases currently on the docket. The constitution-making process provides an opportunity to transform the judicial personnel, but if the process fails, there will not usually be a second chance.

One recent example of a successful process is currently ongoing in Kenya, where a Judges and Magistrates Vetting Board has been proceeding for nearly a year.⁶ This Board was created by the Constitution of Kenya (2010) specifically to address the problem of judicial transformation. The Board consists of six Kenyans and three foreign nationals from the region, including judges from Ghana, Zambia and South Africa. The South African is the famous dissident Albie Sachs, who survived an assassination attempt by the racist regime to become one of the first judges of the post-transition Constitutional Court. The Board meets with every judge and magistrate who had served under the old regime for an interview in private (unless the judge wants it to be in public). The procedure is fairly loose: it is not a formal disciplinary hearing about misconduct, but rather an assessment of whether the judge will likely contribute to a judiciary in which the public can have faith. The Board must issue a written opinion explaining every dismissal. Similar institutions will no doubt be adopted in other countries in years ahead. An important contributing factor to the success of judicial transformation in Kenya has been a dynamic new chief justice who has been able to communicate with the public about the project of institutional transformation.

In other countries, vetting processes have failed or broken down. For example, in the Maldives, the Constitution of 2008 required that every judge be assessed by the new Judicial Council. But the existing judges, who had very low educational qualifications, were so afraid of losing their jobs that they were able to capture the judicial council. As a result, not a single judge was removed from office, and public confidence in the judiciary remains very low.

⁵ This section draws significantly from a paper entitled ‘The Tunisian Judicial Sector: Analysis and Recommendations’, Tom Ginsburg, Working Paper No. 5, Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia, Al-Ali and Stacey (eds.) (June 2013), published by the Center for Constitutional Transitions at NYU and International IDEA, available at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

⁶ See the Board’s website at www.jmvp.or.ke

Part 3: Decentralization of Government Authority in a Modern Constitutional Context

1. Executive Summary

Effective decentralization of government authority to sub-national units can bring the benefits of increased efficiency and reduced conflict among diverse populations. A comprehensive decentralization regime treats administrative, political and fiscal components of decentralization, with special attention given to the interaction among these different components. In particular, decentralization of political or administrative authority without effective fiscal authority has been tied to negative outcomes.

Four core components govern a decentralization regime. These are: (i) the formal institutional framework through which decentralized governance is exercised; (ii) the depth of the decentralization regime, including the substantive policy areas over which sub-national units are granted authority to govern; (iii) the balance of government authorities and other accompanying accountability mechanisms that structure and manage the interaction between different sub-national units and the central government; and (iv) safeguards for the structure and implementation of the decentralization regime. Drafters should carefully consider each of these areas when deciding if and how to specify a decentralization regime, as well as what areas to leave to legislative definition.

From consideration of other countries' experiences, a number of insights arise for constitutional drafters considering decentralization. First, comprehensive accountability is essential for effective implementation of decentralization. This includes accountability both between government units and from citizens to government. Second, effective implementation requires balancing a necessarily incremental or gradual approach with citizen expectations of transfer of power at a rapid rate. Third, although obvious to drafters, the importance of clarity and specificity in regards to decentralization is also of chief importance; anything less is likely to lead to failure in implementation, or wasteful conflict among government units to define the limits of their own power. Fourth, partial decentralization that lacks a fiscal component is more likely to result in failure.

2. What is decentralization?

The Arab region is among the most centralized in the world. In the large majority of Arab countries, virtually all policy decisions are taken by the central government with some input from the parliament, and those same policies are implemented throughout the country by administrative offices that are under the direct control of the central ministries. One of the consequences of that approach has been a significant democracy gap between major cities and provinces. Because the vast majority of policymakers are concentrated in the capital, they are often detached from the problems that exist elsewhere in the country. Once again, in the large majority of Arab capitals a significant difference exists in service delivery and standards of living between the capital (and possibly one or two other cities) and the rest of the country.

One of the possible solutions that have been presented to this problem is decentralization. There is significant confusion about what decentralization actually means, particularly because the concept is in fact very similar to both federalism and regionalism. Federalism, regionalism and decentralization do share a number of common aims that distinguish these approaches from unitary systems that might also

establish local or regional branches of its centralized administration for reasons of efficiency. These aims include:

- some degree of (vertical) separation and balance of powers;
- the exercise of government closer to and more in tune with the needs of the people; and
- a measure of local or regional democratic control and participation.

In order to achieve these aims, sub-national structures of government will:

- enjoy some level of executive and (possibly) legislative, or at least regulatory, authority;
- control a share of a country's administrative assets (facilities, equipment and personnel);
- command at least some sources of (own or allocated) revenue;
- recruit administrative and political personnel from the local or regional levels; and
- offer citizens opportunities to participate in the exercise of power through elections to local and regional councils.

There may also be an attempt to represent local or regional views on the national level. Local and regional government will usually focus on:

- the provision of services (utilities such as water, energy, solid waste management, roads and bridges, transportation, general health care, or basic education);
- the regulation of local business (such as markets, tourism, private taxi companies, or restaurants and bars),
- local urban planning,
- local environmental protection, and/or
- local/regional economic development.

In addition to these areas, many central administrative services are provided, in practice, by local or regional authorities (e.g. the issuing of passports and drivers licenses, or the granting of various commercial permits).

The difference between federalism, regionalism and decentralization, then, is one of degree. There is no magic formula that might help us to distinguish clearly one concept from the other, and much will depend on the specific design of the system in question. There can be considerable overlap between these models.

Decentralization is recognized to have two core benefits. First, it allows for a given government service to take place at the level closest to the beneficiaries of the service. Thus, policy created and administered by a government close to the beneficiaries is more likely to be responsive to those beneficiaries' concerns, and therefore to be accountable to them in the event it deviates. Further, government close to its citizens can benefit from the most accurate information regarding the effectiveness of the policies it is creating and administering. The second benefit to decentralization is that it may reduce conflict by allowing different sub-national units to adjust their policies to better suit the diverse demands of their constituents.

Although this will be discussed in detail below, instituting a decentralized system of government in a new constitution does not guarantee that either of these benefits will be achieved; the relative success

of a constitutional system in delivering benefits of this type depends on a number of factors, some of them relating to the constitution itself, some of them external and beyond the constitutional drafters' ability to control. Also, if the transition to decentralization is mismanaged, it can sometimes lead to a deterioration in service delivery and an increase in corruption. These issues as well as others are discussed below.

Based on all of the above, constitutional drafters who are seeking to create a decentralized system of government will have to answer a large number of questions before the drafting can actually start. These include but are not limited to the following:

- How will the decentralized system of government be structured? This includes a number of issues, including how many levels of government there should be, how many decentralized units there should be, and how each unit will be structured internally.
- What areas of authority should be granted to the decentralized units? Should the units be responsible for: implementing the central government's policies (administrative decentralization); developing their own policies based on the will of the local population (political decentralization); or developing and financing their own policies through the use of local taxation powers (fiscal decentralization)?
- How should the decentralized units be represented at the national level?
- What type of mechanisms should be included in the constitution to protect the decentralized system of government? Common options include independent commissions, transitional provisions, and timelines, among others.

3. Vital considerations⁷

(i) Viability of local government

Local government—however defined in terms of law—must be capable of efficiently exercising any powers allocated to it. Decentralization is not an end in itself. For the concept to work well, sub-national entities require careful design—their geographical location, size, population, basic infrastructure (e.g. roads, ports, airports, schools, hospitals, water and power plants) and economic potential (among many other factors) will to a large extent determine the outcome of any decentralization effort. Fairly balanced units, whether on the municipal or regional level, are certainly desirable. A second powerful element of success or failure is the internal social coherence of sub-national entities. Local government can thrive on—and reinforce—cultural, ethnic, or religious ties among certain parts of a country's population. That said, strong local affiliations within regions (less so within municipalities due to their much smaller size) may pose a potential threat to national unity.

The outcome of decentralization efforts is not always entirely predictable. The central level should therefore retain influence on the local tiers of government and be given the possibility to intervene directly if developments so require. Intervention should be restricted to absolutely necessary measures,

⁷ This section draws significantly from a paper entitled 'Tunisian Constitutional Reform and Decentralisation: Reactions to the Draft Constitution of the Republic of Tunisia', Jörg Fedtke, Working Paper No. 3, Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia, Al-Ali and Stacey (eds.) (June 2013), published by the Center for Constitutional Transitions at NYU and International IDEA, available at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

however, and be limited in terms of time. Political and legal control of such measures (through the involvement of a second legislative chamber or other form of local representation on the national level and/or a constitutional court) is highly desirable.

Large differences in the ability of certain parts of a country to sustain efficient local government raise the possibility of an asymmetrical approach to decentralization. This is certainly possible. While most systems (especially those that follow a more federal pattern) tend to establish symmetrical relationships between the central level and each sub-national entity, the experience of countries like Spain or the United Kingdom suggest that asymmetrical structures can work equally well.

(ii) General principles of detailed provisions

A division of power—on the constitutional level—between a central authority and sub-national entities can be achieved in a number of ways.

One technique is to rely on broad principles that leave the allocation of specific powers and resources to the ordinary (national) legislator. The obvious advantage of this approach lies in its flexibility; changing circumstances, especially with a view to the ability of sub-national levels of government to actually perform certain functions efficiently, can easily be taken into account without the need for constitutional amendment. The main disadvantage is the risk that true decentralization will in fact not take place—a risk that is exacerbated if the lower tiers of government lack adequate representation on the national level. In order for a flexible constitutional arrangement to work in practice, a country would require a strong tradition of policy formation, an effective parliament and independent judiciary that can all fill the gaps left by lack of detail in the constitution.

Arab constitutional tradition in this regard is very weak. It essentially consists of very broad constitutional provisions on decentralization that leave the entire matter to subsequent law. For example:

Constitution of Tunisia (1959), Article 71

Municipal councils, regional councils and the structures to which the law gives the quality of local authority manage local affairs according to the terms set by law.

Constitution of Egypt (1971), Article 161

The Arab Republic of Egypt shall be divided into administrative units with distinct legal personality, including regions, cities and villages. Other administrative units may be created with legal personality if this is required by the common interest. The law guarantees decentralization and determines the means to empower the administrative units with regard to the provision of local services and utilities, their development and good management.

The Tunisian and Egyptian constitutions both provided almost no other detail on this issue and, needless to say, true decentralization did not emerge in either case. Although the new Tunisian and Egyptian constitutions provide significantly more detail on what role the decentralized units will be playing in practice, the relevant provisions are still short and subject to interpretation. For example:

Constitution of Egypt (2014), Article 179

The law regulates the manner in which governors and heads of other local administrative units are selected, and defines their mandate.

Article 180

Local councils are responsible for developing and implementing the development plan, monitoring the activity's different aspects, exercising the tools of monitoring the executive authority such as proposals, and submitting questions, briefing motions, interpellations and others, and withdrawing confidence from the heads of local units, in the manner organized by law.

Egypt's new constitution therefore provides no detail whatsoever on what role governors, who will be the highest executive authority in each province, will be playing in practice, and very little detail is given on the role that local councils will be playing. This leaves open the possibility that, as under the 1971 Constitution, true decentralization is unlikely to be realized.

A second technique is to allocate specific powers and responsibilities to each sphere of government. This will usually take the form of more or less detailed catalogues that set out (again more or less comprehensively) which level will be responsible for certain functional areas of governance. A clear example of this approach can be found in Spain's Constitution:

Constitution of Spain (1978), Article 148

The Self-governing Communities may assume competences over the following matters:

- 1. Organization of their institutions of self-government.*
- 2. Changes in municipal boundaries within their territory and, in general, functions appertaining to the State Administration regarding local Corporations, whose transfer may be authorized by legislation on local government.*
- 3. Town and country planning and housing.*
- 4. Public works of interest to the Self-governing Community, within its own territory.*
- 5. Railways and roads whose routes lie exclusively within the territory of the self governing Community and transport by the above means or by cable fulfilling the same conditions.*
- 6. Ports of haven, recreational ports and airports and, in general, those which are not engaged in commercial activities.*
- 7. Agriculture and livestock raising, in accordance with general economic planning.*
- 8. Woodlands and forestry.*
- 9. Management of environmental protection.*
- 10. Planning, construction and exploitation of hydraulic projects, canals and irrigation of interest to the Self-governing Community; mineral and thermal waters.*
- 11. Inland water fishing, shellfish industry and fishfarming, hunting and river fishing.*
- 12. Local fairs.*
- 13. Promotion of economic development of the Self-governing Community within the objectives set by national economic policy.*
- 14. Handicrafts.*
- 15. Museums, libraries and music conservatories of interest to the Self-governing Community.*
- 16. The Self-governing Community's monuments of interest.*
- 17. The promotion of culture and research and, where applicable, the teaching of the self governing Community's language.*
- 18. The promotion and planning of tourism within its territorial area.*

19. *The promotion of sports and the proper use of leisure.*
20. *Social assistance.*
21. *Health and hygiene.*
22. *The supervision and protection of its buildings and installations. Coordination and other powers relating to local police forces under the terms to be laid down by an organic act.*

When constitutions set out lists of powers, they are usually defined as

- *exclusive* (either to the central or sub-national levels);
- *shared* (joint responsibility of two or more levels); or
- *concurrent* (exercise by one level with the possibility of an intervention, under certain conditions, by another level).

A fourth—unspecified—category comprises those powers not specifically mentioned in the constitution (*residual*); residual powers will again rest with one or the other level of government. Residual legislative authority in Germany thus lies with the 16 Länder (States). South Africa allocates residual legislative authority to the national level.

The main advantages and disadvantages of this approach mirror those discussed previously in the context of broad constitutional principles. Catalogues are less flexible but, on the upside, provide a fairly clear allocation of powers and responsibilities. They will arguably carve out more effectively an area for local or regional administration. Some measure of flexibility can be retained within this system if one level (usually the centre) is given opportunities to intervene—under specified conditions—in functional areas assigned to other levels. South Africa and Germany provide good examples in this respect. The national level in South Africa may sometimes intervene in *exclusive* provincial powers.

The South African Constitution of 1996, Section 44(2)

Parliament may intervene, by passing legislation in accordance with section 76(1) [the procedure for ordinary bills affecting provinces], with regard to a matter falling within a functional area listed in Schedule 5 [exclusive provincial legislative competence], when it is necessary a. to maintain national security; b. to maintain economic unity; c. to maintain essential national standards; d. to establish minimum standards required for the rendering of services; or e. to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

The national levels in South Africa and Germany both enjoy the right to legislate, under certain conditions, in the area of *concurrent* powers.

German Basic Law, Article 72

(1) On matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.

(2) The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

(3) If the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities); 6. admission to institutions of higher education and requirements for graduation in such institutions. Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the Länder, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence.

(4) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law.

The South African Constitution of 1996, Section 146(2) and (3)

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met: a. The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually. b. The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing i. norms and standards; ii. frameworks; or iii. national policies. c. The national legislation is necessary for i. the maintenance of national security; ii. the maintenance of economic unity; iii. the protection of the common market in respect of the mobility of goods, services, capital and labor; iv. the promotion of economic activities across provincial boundaries; v. the promotion of equal opportunity or equal access to government services; or vi. the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that a. is prejudicial to the economic, health or security interests of another province or the country as a whole; or b. impedes the implementation of national economic policy.

Two other approaches that can be useful in distributing powers more flexibly between different levels of government are worth consideration—a general clause that expresses the principle of subsidiarity and rules that allow extraordinary intervention by the national level if particular sub-national entities fail to fulfill their executive obligations.

The principle of subsidiarity creates a general bias in favour of the lower tiers of government by committing the central level to exercise restraint whenever a certain matter can be dealt with sufficiently by the lower tiers of a system. It is, to some extent, a mirror image of the right of a central level to intervene in the lower spheres of government only if certain (specified) conditions are met.

Article 100 of the South African Constitution of 1996 allows the national executive to intervene in provincial administration when a province cannot or will not fulfill an executive obligation imposed on it directly by the Constitution or by national legislation. One example here is a failure to meet established minimum standards of service provision.

Constitution of South Africa (1996), Article 100(1)

When a province cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including – a. issuing a directive to the provincial executive, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations; and b. assuming responsibility for the relevant obligation in that province to the extent necessary to

- i. maintain essential national standards or meet established minimum standards for the rendering of a service;*
- ii. maintain economic unity;*
- iii. maintain national security; or iv. prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.*

Subsection (2) of the provision allows the second national legislative chamber, the National Council of Provinces, to disapprove of the measure and end the intervention.

4. Design Options**(i) Formal Institutional Structure**

(a) How many levels of government should the constitution create?

One of the first issues that drafters will have to consider is how many levels of government to create. Given that no modern constitution will be written in a vacuum and that all states have preexisting administrative frameworks already in place, constitutional drafters will have to take the preexisting framework into consideration when deciding how to shape the future state. In particular they will have to determine what the weaknesses and strengths of the previous framework were, and whether the changes that they will want to introduce to the previous framework are worth the financial costs.

One means of diminishing decentralization costs is to take advantage of preexisting administrative divisions and institutions, provided the previous regions these institutions created were not a source of conflict in and of themselves. An associated concern is whether the vertical distribution of power among units should be symmetric, or whether some units in a given level should receive more autonomy than others.

Successful examples of both models exist in practice. Spain's decentralization regime created two tiers of devolved authority to the provincial level, one of which granted significantly more power than the other. The advantage to such an asymmetric model of vertical distribution of authority is that it allows drafters to account for both disparities in governance capacity and demand for decentralization among sub-national units. In Spain, some regions displayed a much greater demand for autonomy, and were also economic centres that had a greater capacity for organizing their own affairs as compared to poorer regions of Spain. The advantages of a uniform, or symmetric, distribution of powers to sub-national units include ease of administration, and preventing inequalities among regions from worsening.

(b) How many decentralized units should the constitution create?

A number of factors are relevant here. First, existing regional divisions within a country provide one option for drafters. In Libya, this could correspond to the three traditional provinces of Tripolitania, Cyrenaica and the Fezzan. Other countries whose primary sub-level of government was based on preexisting regional divisions include Canada, Switzerland and the United States. However, pre-existing regions should not always be assumed to be optimal. There are a number of other important factors that can impact the viability of internal borders, including economic issues and administrative capacity, as well as existing religious or linguistic identities that might create problems if lumped together into one subunit.

A final factor to consider when creating units within a given level of government is the inequalities that will be created among the potential units. Drafters should seek to minimize income, population, and resource endowment inequalities between units at a given level because otherwise these inequalities will drive divergent national policy preferences on the part of the subunits. To the extent that policy conflicts can be avoided by minimizing inequalities among subunits, drafters should seek to do so because such conflict is inherently wasteful as compared to uses of political resources devoted to policy implementation and public service delivery.

(c) What type of government should the decentralized units have?⁸

The question here will be how to organize each unit's system of government. In particular, constitutional drafters will have to decide whether to grant each unit legislative functions, what type of executive government it should have, and whether each unit should have its own court system or whether the court system should be integrated within the national judiciary. The two extremes that exist here are:

- A system whereby policy implementation should be granted to the central government's field offices. Under this scenario, the benefits of subsidiarity are largely absent. In addition, granting the central government a monopoly over policy formation and implementation is unlikely to suit the needs of a diverse constituency.
- The opposite side of the spectrum is a system in which each unit is granted full executive, legislative, and judicial authority. Here the opposite problem can occur. Too much authority can lead to a complex web of laws and regulations that leads to considerable conflict among regions and lost economic activity. Indonesia's decentralization regime provides an example of this, with over one thousand local authorities whose conflicting and wasteful laws have led to repeated attempts on the part of the national government to correct these damaging legal inconsistencies, with little success. The Indonesian example provides a dual lesson for constitutional drafters: (i) decentralization of government institutions can be taken too far; (ii) it is difficult to correct errors in decentralization regimes after the fact, which makes it all the more important for constitutional drafters to specify things correctly at the onset.

Developing a decentralized system that is suitable for a particular country and that will encourage economic prosperity and social harmony is a significant challenge and constitutional drafters will have to consider each aspect of the decentralized system with care.

⁸ This section draws significantly from 'A practical guide to constitution building: Decentralized Forms of Government', Markus Böckenförde, published by International IDEA (2011), and available at www.idea.int.

Decentralizing legislative functions requires considering which level of government should write laws concerning particular tasks (e.g. public services) and whether that authority should be exclusive or shared between levels of government. A constitution might assign legislative authorities exclusively either to the national or to sub-national levels. Such an allocation, however, confronts two challenges. Particularly after a violent conflict caused by the marginalization of certain regions, competing factions will probably not agree to assign power exclusively to any level of government. The second challenge to the exclusive allocation of power is more practical: relying only on exclusive powers may ignore the fact that there is often inevitably a subject matter and jurisdictional overlap in many areas of regulation. Many constitutions, in a bid for flexibility, have opted to distribute legislative powers concurrently between national and regional governments.

Concurrent powers can operate differently. Given the vertical overlap of concurrent powers between national and regional legislatures, the question of which regulation prevails will arise. Generally, the constitution prioritizes the national legislature. Regional critics may argue, with some force, that areas of concurrent jurisdiction are simply areas where national legislation predominates and in the long run pre-empts regional legislation. But certain conditions can attach to national priority: the German Constitution, for example, grants supremacy only to national legislation that is ‘necessary’ and ‘in the national interest’.

Basic Law, Germany, Article 72

[I]f and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

Other constitutions hold differently. Canada provides one single notable exception to national supremacy: where provincial and national law conflict—as laws concerning old age pensions have—provincial law prevails. Another approach empowers the national legislature to draft a national framework while allowing regional legislatures to fill in details according to local circumstances (sometimes referred to as framework legislation or shared powers). Other constitutions have adopted a third approach to sorting out concurrent powers, essentially permitting both levels of government to regulate simultaneously. Only where national and regional legislation directly conflict will constitutional dispute resolution measures take effect, as applied by judges on a case-by-case basis (Sudan). The Constitution of South Africa provides a very diligently drafted set of provisions as to how to settle potential conflicts in the functional areas where concurrent powers apply:

Constitution of South Africa (1996), Article 146

1. This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

2. National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

a. The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

b. The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing

i. norms and standards;

ii. frameworks; or

- iii. national policies.
 - c. The national legislation is necessary for
 - i. the maintenance of national security;
 - ii. the maintenance of economic unity;
 - iii. the protection of the common market in respect of the mobility of goods, services, capital and labour;
 - iv. the promotion of economic activities across provincial boundaries;
 - v. the promotion of equal opportunity or equal access to government services; or
 - vi. the protection of the environment.
- 3. National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that
 - a. is prejudicial to the economic, health or security interests of another province or the country as a whole; or
 - b. impedes the implementation of national economic policy.
- 4. When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.
- 5. Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.
- 6. A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
- 7. If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.
- 8. If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

To avoid the situation in which none of the levels of government has the power to assume a specific task, one of the levels is normally attributed with the general or residual power. In some countries, the national level is vested with the residual power (Canada, India), while in others the residual power is with the subunits (Germany, the United States of America (USA)).

There are different methods by which to embody the distribution of powers in the constitution. Some countries apply a system of enumerated powers. The constitution enumerates the national powers. The subunits have the residual power; therefore it is not necessary to specifically list the subunit's powers. Probably more common is a system of schedules: the constitution lists exclusive powers of the national level and the subunit level, a list of concurrent powers and shared powers, and may propose a list for the lower level of government.

The degree of substantive allocation of powers to legislative subunits depends on the diversity of a particular country. Many criteria—geographical, historical, religious, economic and demographic—have influenced the negotiators of constitutions significantly, determining the degree of actual decentralization of legislative powers. Although several of the subject matters of legislation—international relations, national defence, currency and citizenship—are typically reserved to the national level, the dispersal of many policy areas turns on the relevant circumstances and the balance of interests at stake. In Brazil, India and South Africa, the constitution also distributes specific powers to a third, local level of government.

Prior to **decentralizing executive functions**, constitution builders should consider whether the local or regional executive will execute and implement: (a) only national law, due to the absence of a legislature at the regional or local level; (b) only regional or local law drafted by the regional or local legislature, given that the national administration exclusively will implement national laws; or (c) substantial portions of national law in addition to regional or local law—if, for instance, the regional or local level executes national regulations more effectively (often referred to as ‘cooperative decentralization’ or ‘cooperative federalism’). Experts generally agree that to ensure the most effective and cost-efficient delivery of public services constitution builders should assign authority for delivering those services to the level of government that most closely represents—and is most closely accountable to—the beneficiaries of those services (often referred to as the principle of subsidiarity). Such an arrangement fosters transparency and accountability because citizens can more easily recognize who is spending their money and how. This reasoning does not always compel the conclusion that sub-levels ought to provide particular services: determining the most efficient size of a programme can also reveal which governmental level should provide the service. For instance, some programmes, such as the weather forecast, might function efficiently only if provided to the whole country.

Regional preferences also affect which governmental level should deliver particular public services. For example, many regions might favour a primary education curriculum that includes the teaching of local language(s) and culture, which sub-national governmental units can provide more efficiently. On the other hand, constitution builders might agree that the national level of government is better able to provide certain public services, such as old age pensions and unemployment benefits, to which all citizens, for equity reasons, should have equal access no matter where they live. Moreover, to avoid economic instability or budget imbalances, the national government might retain certain expenditure responsibilities which particularly affect aggregate demand or which fluctuate with the economic cycle, such as unemployment benefits. Public demand for minimum standards throughout the country covering certain public services, such as health and education, might call for national regulation, regulation that might merely set national guidelines for regional governments which will implement the programmes.

Full decentralization of all branches of government can also involve **judicial decentralization**. In a decentralized system there usually exist several sets of law: the national law, enacted by the national legislature, and the laws of the subunits, drafted by the respective entities, be it at a regional level or even at a local level. Thus one crucial question is how the different sets of law are to be adjudicated; in other words, what kind of court system guarantees an effective and transparent way of adjudicating the different sets of law? Two basic models are therefore available in highly decentralized states: the separated/dual model and the integrated model. Both describe options for ways of sharing judicial competencies in a strongly decentralized system.

- According to the *separated/dual model*, as applied for example in the USA, both the national level and the state level each have their own three-tier court system (local courts, circuit courts of appeal and Supreme Court). The state courts generally apply the laws of their respective states only, whereas national law is adjudicated by national courts. As a consequence, national local courts applying national law are dispersed throughout the country. The separate model also affects the financing and the administration of the courts. While the national courts are financed and administered at the national level, the state courts are financed by the respective states.
- In an *integrated model* (as the name suggests), national courts and state courts are integrated in one system. Whereas the highest court is a national one, the lower courts are courts of the respective

states where they are situated. Courts have the power and the capacity to deal with both state law cases and national law cases. Judges are authorized and qualified to adjudicate two sets of law: the national law and the respective state law. In countries where the integrated model is in use, the highest court of the country at the national level only has jurisdiction over national law cases, whereas the highest court in the state is the court of last instance for state law (as in Germany and Sudan). In other systems, both types of cases, those involving state law as well as those involving national law, can be appealed before the Supreme Court (as in India).

Each system has some advantages over the other. An integrated court system usually raises fewer conflicts concerning jurisdiction or the respective competencies of the different courts. It is less expensive, since there are fewer courts and judges. With the integrated model the laws are applied more uniformly, thus providing a greater degree of predictability of judicial decisions. In contrast, the separated model ensures more independence and variety. Different entities (states, tribes or regions) have more leeway to develop their own case law. This is even more important in countries where different legal systems are applied (common law–civil law (Canada, the UK)). Hence, within a country different laws and standards can exist in its different states at the same time. The separated model also provides for some competition between the legal orders of the different states.

(d) Should the constitution create mechanisms to alleviate the risks of decentralization?

Two concerns related to the definition of the structural framework for decentralization are worth mentioning. Both deal with the definition or alteration of some aspects of decentralization at a later date. The first structural question is whether constitutional drafters should **postpone certain aspects of decentralization for a later stage**. This is particularly important in cases where local and sub-national capacity is lacking. Any decentralization regime will require post-constitutional legislative and administrative adjustment to function, and several contemporary decentralization programmes have required such adjustment due to a lack of capacity at the sub-national level. South Africa provides a compelling example of this; most commentators blame the failure of service delivery and governance on the local level on the lack of local capacity. These were also some of the reasons why Spain chose an asymmetric means of decentralization, granting greater policy responsibilities to a subset of more developed regions, while delaying for years in granting those same policy responsibilities to other regions that had less economic and administrative capacity at the onset. In South Africa's case, the failure of local service delivery has led to recentralization of some government functions, whereas Spain stands as a more successful case of decentralization implementation, in part because of the gradual nature of the process. The danger with postponing certain aspects of decentralization is of course that constitutional deadlines for the implementation of certain mechanisms may never be respected. This is discussed in some detail below.

The second way to allow for future adjustment of decentralization is to allow **modification of the structural specifications** of decentralization itself. Can the list of powers or areas of administrative authority ceded to sub-national units be altered? What does it require to do so? The lower the threshold required of the national government to alter decentralization arrangements, the less power that is actually decentralized to the sub-national units. If the national government is given the authority to alter the extent of power of the lower units without their approval, then the lower units will take this power into account when making or implementing policy. This proves to be a constraint on their level of autonomy, even in policy areas that have been formally granted to them by the constitution. Similarly,

the higher the threshold required to alter decentralization arrangements, the stronger the powers and responsibilities granted to the sub-national units by the constitution become.

A related question is whether the possibility for the alteration of internal boundaries is specified. The options here include for a national institution to do so:

- at will;
- with the possibility of a veto by the affected sub-national units;
- with the approval of a referendum in the affected subunits,
- with the approval of the affected sub-national units.

Not all such institutional alterations place sub-national units in conflict with one another or the national government, however. Iraq's Constitution permits of the possibility for the second level of government—regions—to join together into one unit from more than one unit, as well as the possibility for regional subunits—provinces—to join together to form new regions.

Constitution of Iraq (2005), Article 119

One or more provinces shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods:

(1) A request by one-third of the council members of each governorate intending to form a region.

(2) A request by one-tenth of the voters in each of the provinces intending to form a region.

Article 119 is considered by most commentators to be an extreme example of flexibility. The conditions on which provinces may join together to form a region is so loose and undefined that it is possible for two provinces that do not have a common border to form together and form a region, which would be a legal and actual absurdity.

(ii) Depth of Decentralization

As already mentioned, constitutional drafters will have to decide which level of government to grant administrative, political and fiscal responsibilities to. This issue is obviously linked to the question of what type of government decentralized units should be given, but still has to be considered on its own. For example, a constitution may grant a full system of government to decentralized units (including an elected government and parliament) but not grant it full fiscal powers. At the same time, the constitution may grant decentralized units fiscal powers without granting them a full system of government.

(a) Administrative Decentralization

Administrative decentralization involves the transfer of responsibility for public service delivery to the sub-national or local units. This can typically take two forms; one in which the local administrative unit is accountable to the central government ministry or agency, and the other in which the local agencies or ministries are minimally accountable to analogous central ministries, if at all. Administrative decentralization captures the benefit of subsidiarity cleanly: local administrative units given the responsibility and authority to implement government regulations can use their superior knowledge of

the sub-national unit to exercise discretion in policy implementation to better match local needs. A degree of administrative decentralization is present in the constitution of nearly every country above a certain size. This is due to the reality that past a certain geographic size (and population size), policy implementation and oversight must be delegated to sub-administrators. However, administrative decentralization past the bare minimum dictated by a country's size can nonetheless be constitutionally deepened by the factors treated subsequently.

There are a number of concerns for constitutional drafters that are associated with administrative decentralization. First, the clarity of roles for national and sub-national units is paramount, and has been used as a partial measure of administrative decentralization. This is because clearly specified areas of authority for the national government and sub-national units prevents conflict between different levels of government and, in doing so, allows those responsible for public service delivery to directly act, as opposed to waiting until their specific spheres of authority have been defined. Second, the extent to which actual responsibility for service delivery is located at the sub-national and local level is a core determinant of administrative decentralization. Finally, which level of government has the authority to hire and fire civil servants plays a role in who actually controls the administrative authorities, regardless of where that authority nominally resides.

A closely related concern is how public service delivery responsibilities are allocated between the different levels of sub-national units, and whether a higher level has ultimate responsibility for public service delivery, with the discretion to determine how public service delivery is treated within their domain at the local level. In the case of South Africa, too much public service delivery responsibility was granted to the local level, without sufficient oversight at the provincial level, leading to chronic under-provision of public services.

(b) Political Decentralization

The next major area of is that of political decentralization. At its core, political decentralization governs the extent to which regional and local populations can influence the units that govern them. This can vary from formal election of local legislative and executive bodies to merely electing or having some form of popular constraint on the local official who administers centrally defined policies. A greater number of elected sub-national government officials, be they executives, legislators, or administrators, implies a greater extent of political decentralization.

Political decentralization delineated in constitutions commonly involves the definition of different topical areas of policy authority. Some areas of authority are reserved to the national level, some are reserved to the sub-national level, and some are exercised concurrently through a number of mechanisms. Such dual responsibility may ensure public service delivery in core areas, but it could come at the cost of actual decentralization, in that the national level of government is more likely to assume authority it has been jointly granted given greater fiscal and administrative capacity to do so. Of course, a given constitution cannot exhaustively list the number of policy areas that a state and its sub-national units will be called to legislate upon. This implies that another important area is definition of where residual authority to legislate lies, a concern treated in the section on the formal structural definition of decentralized institutions. Another way to consider the issue is that of the decision of the default level of government at which power resides to legislate on topics not mentioned in the constitution.

A number of functions are traditionally left to the central government, even in extremely decentralized regimes. These functions include defense, foreign policy, fiscal policy, citizenship, and measurement

standards. The range of powers granted to sub-national units varies much more from country to country, and is one way to assess the extent of decentralization that has occurred. The greater the number of areas within which sub-national units may legislate or create policy, the greater the extent of decentralization. Some areas of policy, including preventive health measures such as vaccinations, and emergency public health powers, may stand as examples of powers best left to the national government, due to the need for greater fiscal and administrative capacity in administering preventive health needs to impoverished regions as well as responding to public health crises swiftly and comprehensively. A sample table of powers granted to sub-national units follows:

India	Germany	South Africa
Public Order/Health; Prisons; Excise Taxes; Libraries, Museums; Land; Intra-State Transport and Communication; Local Elections.	Civil/Criminal Law and Courts; Association; Public Welfare; Labour Law; Land/Animals/Food; Economic Regulation; Transport and Communications Infrastructure; Water and Conservation; Hospitals; State Liability.	Local Tourism; Municipal Administration; Shipping and Ships; Trade Regulation.

(c) Fiscal Decentralization

Fiscal decentralization concerns the extent to which sub-national units can manage their own financial affairs. The first insight regarding fiscal decentralization emphasizes that fiscal autonomy actually involves a number of dimensions. Before a local or sub-national authority can spend money implementing or enforcing policy, it needs a source of revenue. The source of this revenue can greatly affect the actual level of autonomy that is decentralized to the subunits. Like decentralization in general, revenue authority can be thought of as a continuum between fully decentralized and limitedly decentralized, if at all. Full authority on the part of subunits to raise their own revenue would imply the ability to tax property, income and sales of goods, as well as to charge user fees for public services such as roads and water, among others. The trouble with such a broad authority is that it can distort the national economy, especially if movement of goods into sub-national units is taxed more heavily than local goods. Therefore, a crucial balance must be struck between which aspects of taxation authority are granted to sub-national units.

Because of this, a number of decentralization regimes that cede significant revenue-raising authority to sub-national units also restrict this authority in several ways. The first of these preserves the authority of the national government to invalidate sub-national revenue laws that impinge upon the common market. Such restrictions on sub-national units recognize the damaging effects that inter-unit taxation can have on the national economy in general, as was illustrated by Indonesia's experience. Another option for national control of sub-national units' revenue-raising is that of transfers from the national level for public service provision at the sub-national level. These can take two forms: direct transfers or loans. Direct transfers can in theory diminish the level of sub-national fiscal autonomy, but too much

fiscal autonomy can lead to negative consequences, such as higher levels of public spending and corruption at the sub-national and local levels. The mechanism by which such transfers can diminish autonomy is if they are tied to specific public service delivery, or to other actions the national government desires of the sub-national units. Nonetheless, such direct transfers may provide a means by which the government can adjust inequalities among regions that are otherwise likely to create conflict.

By choosing the form and extent of fiscal decentralization, constitutional drafters can prevent conflict that is likely to accompany disputes regarding revenue and expenditures of different levels of government. First, clear assignment of responsibility for expenditure coupled with clear assignment of responsibility for revenue raising is of chief importance. Constitutional drafters can choose between all fiscal responsibilities being centralized, and all fiscal responsibility for public service provision, and ability to raise revenue accordingly, being granted to the sub-national units. Typically, decentralization regimes strike a balance between these two extremes, with some amount of taxation authority granted to sub-national units, and some amount of intergovernmental transfers in which sub-national units receive funds from the federal government for public service provision. In particular, regional imbalances can make intergovernmental transfers important as a means of correcting inequalities among the sub-national units.

A number of options exist for constitutional drafters to decentralize fiscal authority to sub-national units. As pertains to revenue-raising, sub-national units can be:

- granted the authority to tax;
- guaranteed transfers from the central government; or
- both.

As pertains to expenditure autonomy, the sub-national units can be:

- governed by spending mandates tied to particular public services;
- able to set independent budgets; and
- monitored by national ministries as regards their expenditure.

Finally, regarding the larger legal and financial framework in which public expenditure occurs, sub-national units can be:

- legally autonomous from central governments;
- able to contract debt from private lenders; and
- be the direct employer of civil servants working for them, including being able to negotiate labour costs with civil service.

This final measure of fiscal autonomy again brings to the fore the interaction between different categories of decentralization; if the central government sets the wages of civil servants at the sub-national level, it can wield a powerful tool over otherwise nominally autonomous administrators, to the possible detriment of administrative decentralization overall.

Ultimately, however, a well-specified structural decentralization framework, coupled with appropriate specificity as to the depth of decentralization, is not sufficient to guarantee successful implementation

of a constitutional decentralization regime. As the next section will highlight, an effective decentralization regime requires a careful balance of government authorities supported by the right accountability institutions.

(iii) Balanced Government and Accountable Institutions

The clear need to establish new political institutions that decentralization implies requires political will, especially on the national level, where incentives are otherwise aligned to retain as much power as possible. This also implies a fundamental adjustment in the political culture of the nation, as new sub-national centers of authority increase in prominence. Furthermore, the governance capacity of some or all sub-national units may require careful monitoring by the central authority, especially in post-conflict environments where local governance has been damaged or absent in some regions. One way to mitigate such capacity issues is to specify some sub-national levels as administrative agents of a higher level. By requiring more cooperation between the provincial and local level, South Africa might have been able to prevent the damaging capacity issues that arose with public service delivery at the local level. Another way for constitutional drafters to mitigate these problems is to set clear constitutional expectations that the central government will retain the capacity to regulate services that have been decentralized to a different level of government. The role of the central authorities, in a given decentralization regime, can shift to that of setting baseline accountability standards and monitoring the sub-national units for compliance with them.

Nonetheless, implementation of decentralization is likely to involve disagreement among different levels of government, and the necessity of legislative adjustment of the decentralization regime to account for details and circumstances unforeseen by drafters. To ensure such disagreements are treated equitably, and hence increase the sustainability of the decentralization regime specified by the constitution, drafters can choose from a variety of accountability mechanisms. First of all, the extent to which sub-national units have representation at the national level, either through the structure of elections to the legislature, or through the choice of executive and legislative powers, can serve as an accountability mechanism by which constituents in sub-national units can influence the central government.

Thus, political decentralization itself provides an important accountability mechanism for local populations to restrain authorities that might otherwise act contrary to their interests, either benignly through a lack of expertise or capacity, or self-interestedly to benefit local elites or special interests. In the case of the national government, some form of restraint on sub-national governments that have either overstepped their realm of authority or are failing to live up to their constitutional obligations is another accountability mechanism constitutional drafters can choose to include. This has taken two forms in constitutions. One specifically delineates situations in which sub-national units can be administered by the central government. The other, which is more common, is that of an adjudicatory body that is tasked with oversight of disputes between the central government and sub-national units, typically the Supreme or Constitutional Court.

It should be noted that this second more general option also serves as a mechanism of accountability from the sub-national units to the central government, in that sub-national units can bring claims against the central government in the event their authority has been wrongfully usurped. Salient areas of disagreement include natural resources, population, territorial and jurisdictional issues including counting and authority over migratory peoples, and inter-sub-national unit pollution and contamination issues, including airborne toxins. Specifying a court of last resort, or a specialized court that exclusively

treats such disputes is a way to ensure adjudication of these common areas of conflict among and between government units.

As mentioned previously, fiscal decentralization carries its own specific problems. These include an increase in the size of the public sector, as well as an increased possibility of corruption. These issues suggest that some form of oversight authority on the national level may be optimal to restrain these outcomes, including that of the ability to preserve the national economy being granted to the national government that was discussed in the depth of decentralization section. To the extent that revenue is an issue in general for a nation, some amount of restraint on the spending ability of sub-national authorities may also be advisable. An additional possibility is whether to permit sub-national units to take loans from the private sector, and if so, to what extent the national government will cover such loans in the event sub-national units become insolvent. There are two options that have been employed by constitutional drafters to restrain over-borrowing on the part of sub-national units. One is to forbid private loan sources, either explicitly, or through hard budgetary constraints on the sub-national units. The other option is to make clear the national government will not guarantee loans taken by the sub-national units. The first option aligns the incentives of the sub-national units to only take loans that are likely to pay off, while the second incentivizes the private sector to only grant loans on which sub-national units are unlikely to default, which serves as its own accountability mechanism.

Another mechanism constitutional drafters may employ to mitigate the problems associated with fiscal decentralization is that of providing for an independent auditing authority at the national level that reviews expenditure by sub-national authorities. This is in addition to the decision made by constitutional drafters as to areas of authority allocated to the national government versus sub-national units, which can be a complementary alternative to expenditure and revenue oversight by an independent authority. By limiting the number of areas on which sub-national units can legislate, administrate, tax and spend, constitutional drafters can themselves restrain some of the possible negative outcomes resultant from fiscal decentralization. Further, specialized audit courts, periodic censuses and independent commissions are all additional options for independent oversight mechanisms targeting the problems seen above.

Another concern that interacts with both revenue and expenditure autonomy is that of state ownership and taxation of natural resources, which is treated in greater depth in the chapter on natural resources. An additional point made regarding expenditure autonomy is that consideration should be given to balancing revenue autonomy with expenditure autonomy. Otherwise, if countries delegate more expenditure responsibilities to the local units than they do sources of revenues, either service levels will fall, or budget deficits will likely result. Persistent sub-national budget deficits are linked to inflation and concomitant deterioration of economic performance. If they persist long enough, such patterns can lead towards a trend back to recentralization. These problems can be greatly exacerbated if a public service backlog already exists when the decentralization regime begins. In post-conflict countries local and sub-national populations have often been subject to chronic public service shortages for years prior to the onset of a decentralization regime. In South Africa's case, this led to a major backlog of public service needs that were immediately demanded of local governments, which greatly worsened existing administrative and political capacity issues discussed earlier. These issues again emphasize the importance of accountability mechanisms tied to fiscal decentralization.

While drafting is immensely important, a carefully drafted constitution still faces numerous challenges in its implementation, and the implementation of decentralization provisions is no exception. Thus, drafters are left with a set of options regarding the durability of the decentralization regime, as well as

the creation of specific oversight mechanisms regarding its implementation. These options are discussed in the section that follows.

(iv) Protection and Implementation of the Decentralization Regime

Legal safeguards of decentralization deal with who can change the constitutional framework for decentralization. This was treated in the formal framework section when dealing with alteration of boundaries of the sub-national units, but the concern is larger in that it applies broadly to any desired alteration of the decentralization regime. The most flexible option is also the most destructive to decentralization, and that is to allow the central government to adjust the structure at will. If constitutional drafters wish to preserve the autonomy they have specified in a given decentralization framework, they can require changes to the decentralization regime to require the assent of the governments of the affected units, or a constitutional amendment itself.

Beyond adjudicatory bodies and clear specification of the spheres of authority of the different levels of government and the relationships between them, there are a number of other implementation mechanisms from which constitutional drafters may choose. First, modern constitutions often contain transitional provisions regarding the implementation of the new scheme of government created by the constitution. Typically this details how the initial phases of transition from the former government or transition authorities are to proceed. A more stringent form of transitional provisions is that of constitutionally mandated timelines associated with implementation of decentralization provisions. However, constitutional timelines are not without their own dangers, in that they provide the possibility for legal challenge of a government who is even a single day late in implementing an institution the constitution demands by a certain date.

In the case of Kenya, the eventual date that presidential elections were held was well past any judicial interpretation of the deadlines implied by the Kenyan Constitution. This led to costly legal wrangling and efforts to delegitimize the elections. Nonetheless, the Kenyan Constitution provides a wealth of examples of timelines associated with implementation, including objectives related to decentralization. A final consideration that is also embodied in the Kenyan example is that of penalties associated with failure to implement certain new institutions. To the extent that constitutional drafters see implementation of decentralization institutions as being of high priority, either transitional provisions or timelines could provide a means of constitutional assurance of implementation.

However, implementation oversight mechanisms are not limited to these options, for constitutional drafters in other countries have also tied implementation oversight to commissions. Independent commissions typically treat a specific issue area—from human rights, to civil service, to truth and reconciliation, to constitutional implementation itself—and themselves have two main design options for constitutional drafters. The first is to grant some kind of formal power to such an independent commission. This can range from the ability to review legislation for conformity with the constitutional mandates in its particular issue area, bring suits for human rights or other violations, draft legislation, and render legal findings against government officials for human rights violations. However, such power, while increasing the effective enforcement authority of an independent commission, also carries its own dangers. The increased power of the institution has led to capture in some instances, and certainly increases the incentive for other government branches to do so. Furthermore, granting formal authority to an institution that is independent from the other branches of government can be argued to alter the traditional tri-partite balance between the legislature, the executive and the judiciary. The second

alternative is to make the independent commission a review body that can report on compliance with its particular issue area, but cannot itself force action from the government. This carries the advantages of diminishing the incentives for capture by traditional branches of government, and does not alter the traditional balance of authority between the three branches of government. If drafters choose an independent commission as an authority tasked with oversight of decentralization, they will then face the choice between granting the commission formal powers, and designating it as a review body.

Finally, the power to oversee implementation of decentralization can also be granted to the traditional branches of government, and this can take a number of forms. First, constitutional drafters can allow for national level preemption of sub-level authority in the case of the sub-national units not living up to their obligations regarding public service delivery. This was discussed in the section on accountability mechanisms, but it can also serve as an implementation oversight mechanism, the very existence of which may impel more responsible behaviour on the part of sub-national units implementing decentralization policy. Similar to national intervention mechanisms, an adjudicatory body overseeing disputes between branches of government, or subunits and central government, can be specifically tasked to adjudicate disputes regarding the pace of implementation. This stands as an additional function for an authority that may already be an important accountability mechanism for resolving conflicts associated with decentralization.

Finally, some constitutions grant the authority for the highest judicial body to adjudicate claims of unconstitutional omissions on the part of government institutions and officials. These omissions on the part of government authorities can involve the failure to implement certain portions of the constitution, which could readily be extended to decentralization provisions. However, such a power to review government inaction is broader than the typical power granted to the judiciary to review government action for conformity to the constitution. Thus, some countries have limited the power to bring claims for such unconstitutional omissions to important government officials or offices. One example of how different implementation oversight mechanisms can work together is that an independent commission could be granted standing to bring claims concerning the failure of a government body to take action regarding implementation of decentralization provisions, and a court could be empowered to hear such claims.

This emphasizes the fact that none of these numerous options are mutually exclusive, and some of them are actually complementary, if not necessary complements of one another. However, constitutional drafters should focus on which of these accountability and implementation oversight mechanisms are best suited to the particular context of their nation, as well as the structure of government created by the rest of the draft constitution. What is important to take away is that other countries' experiences with implementation of constitutional decentralization regimes suggest that accountability among citizens, sub-national units and national government is paramount, and implementation oversight mechanisms may be one way constitutional drafters can foster this accountability from the onset.

5. Conclusion

Many modern constitutional drafters choose to take advantage of the benefits of decentralization including improvements in public service delivery and minimization of conflict and inequality among regions of a country. The options for doing so vary widely, and a comprehensive decentralization regime includes four characteristics.

First, the formal structure of the institutional framework for decentralization should be clearly specified, including the number of levels of government and number of sub-national units. Furthermore, the type of government institutions created at each level should be specified, as well as the relationship among levels of government. Second, the depth of decentralization should be treated from the perspective of its administrative, political and fiscal components. A related insight is that fiscal decentralization beyond a certain level is necessary for effective transfer of authority to any sub-national level. Third, the balance of government powers at the national level can have implications for the effectiveness of a decentralization regime. Additional considerations regarding the interaction among and between different levels of government have led to constitutional drafters using a number of accountability mechanisms to ensure different levels of government are held accountable to one another as well as citizens in general. Fourth, the endurance of a constitutional decentralization regime over time depends on how easily it can be changed. Implementation of such a regime carries its own challenges, which have led to constitutional drafters employing a number of implementation oversight mechanisms to deal with them.

Ultimately, the particular context of a nation and the system of government created by the rest of the constitution play a large role in defining which decentralization design options are appropriate choices for constitutional drafters. Nonetheless, constitutional drafters can benefit from informing themselves as to the extent of options that have been tried worldwide when considering which options to choose for their own context. Furthermore, some basic drafting lessons for effective decentralization regimes also become apparent from consideration of other nations' experiences. These include: (i) the importance of accountability mechanisms between different levels of government and from citizens to government; (ii) the necessarily gradual nature of implementation of decentralization creating a tension between citizen expectations in post-conflict environments; (iii) the need for clarity and specificity when choosing between the range of decentralization options available; and (iv) the central role that fiscal decentralization plays in ensuring actual decentralization of decision-making authority.

Part 4: Oil and Gas Provisions

1. Introduction

Libya's substantial oil and gas reserves present the country with significant opportunities to improve national infrastructure and help unite the country. Many risks accompany the wealth these natural resources provide, and legal mechanisms are needed to prevent these riches from being squandered or from benefiting only a small percentage of the population. When oil and gas play as large a role as they do in Libya, enshrining basic—even more complicated—principles related to them in the constitution can avoid contentious battles in the future.

This chapter begins with a discussion of ownership provisions in constitutions. Establishing which level of government or which entities own the oil and gas in Libya is imperative to preventing confusion or confrontation. Following this section, different regimes for establishing how oil is extracted and who determines when exploration and extraction occur are detailed. Though related to ownership, managing the oil is often more contentious, as certain oil-rich regions in the country are disproportionately affected by oil and gas extraction. Environmental issues are then explored, as many countries are beginning to pass laws or constitutional amendments to guarantee some protection to the lands and people affected by oil and gas extraction.

The following section concerns contracts with international companies, as these agreements have the potential to deprive countries of vast amounts of revenue if not properly conducted. The chapter then moves on to a discussion of national oil companies, as many countries (Libya included) use these state-owned companies to both participate in and regulate the oil sector. NOCs often have unclear or contradictory roles in a country's oil industry, so it is important that Libya define its own NOC's responsibilities. Systems of revenue management are then outlined, as these are often the most important aspect of the oil industry to most citizens. The large amount of revenue that Libya's oil and gas sector generates effects on all parts of the economy, and it must either be managed at the national level or be distributed to more decentralized units. Furthermore, how much oil-producing regions are to retain from the oil they produce is another contentious issue that can be addressed in the constitution. Finally, the issue of sovereign wealth funds—specifically, future generations funds—is addressed, as many oil-rich countries find it prudent to preserve oil wealth for the future, but fail to enshrine protections for these investments in law.

Libya's oil and gas sector contains much that cannot be accounted for at the constitutional level, but what it does choose to protect in the constitution can set a precedent for entire industry. Common to all aspects discussed in Part 4 is the need for clarity and transparency. Overly broad language in the constitution will be of limited use, and confusing language can lead different levels of government to claim the same responsibilities. And each article related to oil and gas in Libya's Constitution should allow for multiple levels of oversight and openness to the public. Transparency serves to keep all actors in the industry accountable to the population and prevents corruption from entering the process.

2. Ownership

Revenues and the environmental impact of oil and gas are of central importance to many citizens, but underlying both of those issues is that of ownership. Before decisions about how to extract the oil or

where the revenues will be distributed are made, the question of who owns the resources must have a definite answer. The issue is relevant to Libya because of the strong likelihood that Libya's oil reserves have been underexplored. Ownership is perhaps the simplest issue surrounding a country's oil and gas sector, which is why many state constitutions address it while remaining silent on other more complicated oil and gas questions. Establishing in the constitution which level of government owns the oil can simplify the remainder of the process, but only if the relevant constitutional provision is clear itself. How Libya chooses to establish ownership of its oil and gas will be based on its own experience and national will, but how it writes it into the constitution must leave no room for confusion.

Scholars have identified four general constitutional regimes for the ownership of oil:

- private title;
- communal or customary title;
- state ownership; or
- a mix of these different regimes.

Private title: Perhaps the most prominent example of private ownership of oil is in the United States. The United States Constitution is silent on the issue of natural resource ownership, which entitles owners of private property to the resources beneath it. The federal government owns only the oil and gas extracted from publicly-owned lands and offshore. Simply allowing for private ownership of natural resources does not resolve all potential issues, as the state may still impose restrictions on who can even own property, even prohibiting private companies or foreigners from owning property. For example, in Mexico:

Constitution of Mexico, Article 27

Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances or to obtain concessions for the exploitation of mines or waters.

The Palestinian Authority builds on this concept by prohibiting monopoly ownership of its resources. To be sure, a state can have strong private property rights while still retaining a right to oil and gas. For example, article 22 of Liberia's Constitution leaves the surface rights of property to private ownership, while granting all mineral resources beneath the surface to the 'Republic'. Because the ownership of subsurface natural resources necessarily affects the property on the ground, it is often necessary to expropriate the territory where oil is located. Article 27 of Mexico's Constitution states:

Constitution of Mexico, Article 27

Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity.

Even though this gives some level of protection to private property owners, the same article of Mexico's Constitution allows for 'limitations' to private property in the interest of the nation without any mention of compensation. Mexican courts have distinguished between expropriations and limitations, compensating landowners only when all property rights have been taken away. Contrary to Mexico, Namibia's Constitution gives the state the right to natural resources 'if they are not otherwise lawfully owned', but provides no solution in the case of an ownership conflict (article 100). A fairer option that Libya could potentially pursue is to compensate landowners for *any* limitation to their property.

Provincial ownership: Some constitutions give ownership of natural resources to the provinces or regions where they are found. Canada, for example, gives individual provinces rights over its resources. And article 23 of the United Arab Emirates Constitution states:

Constitution of the United Arab Emirates, Article 23

The natural resources and wealth in each Emirate shall be considered the public property of that Emirate.

It is worth noting that both Canada and the UAE have strong federal structures, and that granting oil ownership to sub-national units in this fashion is more likely in a decentralized, federal system. The power of provinces in Canada, however, is not unlimited. Offshore reserves found in Canada that are claimed by both the central government and a province generally yield to the Doctrine of Federal Paramountcy, in which the central state prevails. Extraction and management of oil (discussed below) is unsurprisingly related to ownership, and giving a smaller level of government rights to the oil depends on them having the capacity to manage this resource on its own. Also, while sub-national units may have absolute ownership over extraction, other parts of the oil sector that affect the entire state are governed at the national level in Canada. Less commonly, in Russia, ownership is shared between the state and the more local levels. Article 72 of its Constitution states that ‘issues of the possession, utilization and management of land and of subsurface, water and other natural resources’ are ‘within the joint jurisdiction of the Russian Federation and subjects of the Russian Federation.’

State ownership (and constructive ambiguity): More commonly, if a constitution speaks to the issue at all, it usually vests ownership of oil and gas in the state. To be sure, giving the central government sole ownership of natural resources does not remove individuals and more local levels of government from all decisions regarding oil, but it can simplify what is a complicated process. However, this is only achieved if ownership provisions are written with clarity, leaving minimal room for ambiguity. For example, Canada’s Constitution neglects to provide for offshore oil reserves, which has led to competing claims by the central government and the provinces.

The biggest possibility for confusion rests in how the state establishes its ownership over its resources. In many countries, there is a desire to establish that oil is to be used for the benefit of all citizens. But entitling everyone to the spoils of oil wealth does little to clarify which level of government (or private entity) has the right to extract it from the ground. There is a strong undercurrent of nationalism in many constitutions, and, accordingly, they may grant ownership of natural resources to the ‘Republic’, as is done in Venezuela and Liberia, the ‘Union’, as is done in Brazil, or the ‘Nation’, as is done in Mexico. In the case of Mexico, some have suggested that granting ownership to the Nation encompasses both Mexican entities and people, thus clarifying little.

A number of constitutions grant ownership not in favour of the state but in favour of ‘the people’, despite the fact that the term on its own is not particularly clear and will require significant additional legislation and judicial interpretation to bring meaning to it. For example:

Constitution of Egypt (2014), Article 32

Natural resources belong to the people.

The issue of oil and gas can obviously be very sensitive in a national context, particularly in a post-totalitarian environment and in a constitutional drafting process. Many countries have in the past

attempted and failed to reconcile conflicting visions on natural resources and in that context they have relied on a drafting method often referred to as ‘constructive ambiguity’. Where negotiating parties cannot reach an agreement on certain issues, they will often draft vague language that allows for different visions of natural resource ownership to coexist within the same constitutional wording, without necessarily reconciling them, in the hope that the negotiating parties will be able to resolve their differences at some point after the constitutional is finalized.

Iraq is a case in point. In 2005, the Kurdistan Alliance pushed for federal regions and provinces to be given ownership over natural resources, while many Baghdad-based parties insisted that ownership remain with the central government. The parties failed to reach an agreement and so compromised in favour of the following wording:

Constitution of Iraq, Article 111

Oil and gas are owned by all the people of Iraq in all the regions and provinces.

The example of Iraq is an extreme one, which is complicated further by its explicit use of ‘regions and provinces’, which suggests possible sub-national ownership, leading to tension—and even violence—between the central state and lower levels of government. It has, however, been suggested by some that a people-centered construction of oil rights could give citizens more of a legal right to challenge harmful or wasteful extraction processes. Nevertheless, granting ownership rights directly to the central state is least likely to result in confusion. Several constitutions make this distinction. Nigeria’s Constitution states:

Constitution of Nigeria, Article 44.3

...the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

This thorough article leaves no confusion over ownership even as it defers management decisions to the National Assembly. Another detailed example comes from Ecuador’s Constitution:

Constitution of Ecuador, Article 408

Nonrenewable natural resources and, in general, products coming from the ground, mineral and petroleum deposits, substances whose nature is different from that of the soil, including those that are located in areas covered by territorial sea waters and maritime zones, as well as biodiversity and its genetic assets and the radio spectrum, are the unalienable property of the State, immune from seizure and not subject to a statute of limitations.

This article leaves little room for ambiguity in terms of who owns the natural resources, what type of natural resources, or from where the resources come. This article is actually a lengthier explanation of ownership that follows the very simple, but very clear, article at the beginning of Ecuador’s Constitution:

Constitution of Ecuador, Article 1

The nonrenewable natural resources in the State territory constitute an inalienable, indispensable and imprescriptible part of its assets.

Countries can enshrine in their constitutions articles that make clear that the citizens will benefit from oil and gas resources without leaving unanswered which level of government owns the resources.

Constitution of East Timor, Article 139.1

The resources of the soil, the subsoil, the territorial waters, the continental shelf and the exclusive economic zone, which are essential to the economy, shall be owned by the State and must be used in a just and equitable manner in accordance with national interests.

Similarly, Indonesia clarifies in two parts of the same article that its natural resources are owned by the state but only for the benefit of its people:

Constitution of Indonesia, Article 33

(2) Sectors of production which are important for the country and affect the lives of the people shall be under the powers of the State.

(3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

Separating ownership of the oil from its intended beneficiaries is perhaps the best way to avoid competing claims over who has the right to extract the oil from the ground. Citizens may be right to demand that their constitution explicitly states that oil is theirs and for their benefit, but this is often manifested in how revenues are distributed. A country's oil wealth should aid in the development of the entire nation and contribute to the well-being of all citizens, but owning the right to that oil for the purposes of extraction is better left to a single, unambiguous entity. Whether that entity is the central government or a sub-national unit depends on the country. Regardless of which level of government owns the resources, it should be clearly defined in the constitution.

3. Management

Beyond the issue of who has the right to the oil in the ground is the issue of extracting it. The same level of government who owns the natural resources is often the same level that manages when, how, and where it is extracted, but not always. Oil may belong to the state and every citizen entitled to its revenues, but only certain, oil-rich parts of the country are affected by the extraction process. There is often a negative environmental impact that comes with extracting oil, and the people in the affected regions may feel very differently about the size and pace of the oil extraction process than those in other parts of the country who stand only to gain from increased production.

Another decision central to the management of oil and gas involves the contract terms with international companies. Many states (Libya included) leave these decisions to their National Oil Companies (NOCs), which often participate in the extraction process and are discussed in detail below. With few exceptions, states lack the capacity and expertise to manage the entire oil sector on their own, which makes cooperation with international oil companies (IOCs) mandatory. The details of any agreement with a private foreign or domestic company are worked out at the time of contracting, but many countries have recognized general principles that can be enshrined in the law or in their constitutions that protect against unfair contracting terms or unfavourable, long-term agreements.

Generally, management of a country's oil and gas reserves is written into the constitution in a manner similar to ownership provisions. The central question that should be answered by the constitution is

which level of government is tasked with managing the country's resources. The activities that fall under management include how the sector is organized, who has the authority to make decisions, and how the sector is regulated. It is rare that constitutions assign to any level of government duties with such specificity, but rather make clear that *all* duties belong to the state. For example, article 261 of Ecuador's Constitution provides that the 'central State shall have exclusive jurisdiction over...[e]nergy resources; minerals, oil and gas, and water resources, biodiversity and forest resources.' Similarly, article 28 of Mexico's Constitution establishes that 'the State exclusively exercises in the strategic area of petroleum and other hydrocarbons.' Though there is little detail in these provisions concerning how the central government will operate, there is also little room for individual regions or private companies to operate without first obtaining the consent of the government. Legal challenges seem especially unlikely if the constitution also specifies that natural resources belong to the state.

Using slightly more detail, the Philippines makes clear in its Constitution that:

Constitution of the Philippines, Article 12, Section 2

The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.

Even more comprehensive is Brazil's Constitution, which elaborates at length on the responsibilities of the central government:

Constitution of Brazil, Article 177

The Union has a monopoly over the following:

I—prospecting and exploitation of deposits of petroleum, natural gas and other fluid hydrocarbons; II—refining domestic or foreign petroleum; III—importation or exportation of products and basic by-products resulting from the activities set forth in the prior subparagraphs; IV—maritime transportation of crude oil of domestic origin or of basic petroleum by-products produced in the Country, as well as the pipeline transportation of crude oil, its by-products and natural gas of whatever origin.

Such an article leaves no doubt which oil and gas activities are controlled by the state, and the exhaustive list of duties leaves no room for a competing claim by a sub-national region. Some countries however, deliberately allow for lower levels of government to take an active role in managing oil resources. In Canada, for example, the Constitution provides:

Constitution of Canada, Article 92 A

(1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry.

The article goes on to give the provinces the right to 'make laws in relation to the export from the province to another part of Canada', but it places limits on prices and allows parliament to make laws regulating exports that prevail over province laws in the case of a conflict (article 92A). The dividing of management duties is found also in Australia, where the national government handles economic and international issues attendant to oil management, while the regional governments are given authority over administrative matters like granting of rights, operational safety, and tax collection. As mentioned above, Russia is an outlier in placing 'utilization and management of land and of subsurface under "joint

jurisdiction of the Russian Federation and subjects of the Russian Federation” (article 72). This provision does not explain how joint jurisdiction is to be achieved, but in practice it means that foreign oil companies negotiate with government officials at the national and republic level.

Russia’s model of shared decision-making can possibly be explained as a continuation of Soviet Union policies, but it also demonstrates a desire to give voice to the many concerns that the oil-producing regions have. Chief among those concerns are the environmental costs incurred by oil extraction. Yet other issues that should factor into which level of government manages any natural resource include efficiency, capacity, accountability, national interest, and appeasing secessionist-prone regions. Even if the central government entrusts management decisions to specially affected regions, and the region is capable of handling the responsibility, there are still risks involved. For example, regions given control over extraction may engage in a ‘race to the bottom’, offering overly business-friendly contract terms, prematurely depleting oil reserves along boundaries, or engaging in extracting oil in a way that is inefficient for the nation as a whole. There is also the concern that international agreements that a nation makes regarding oil and gas could be made more difficult if too much responsibility is left to individual regions. Also, giving individual provinces the right to extract could lead to conflict if oil reserves are overlapping between provinces. However, a qualified regional government would likely be able to better respond to the concerns of its citizens, and decentralizing authority may contribute to the legitimacy of the extraction process in the eyes of a distrustful population.

Contrary to Russia, Iraq serves as an example of the difficulties that can arise when oil and gas management is shared by central and regional governments. Article 112 of its Constitution maintains that:

Constitution of Iraq, Article 112

The federal government shall undertake, together with the oil- and gas-producing provinces and regional governments, the management of oil and gas extracted from current fields.

Some have suggested that the federal government has ultimate control, but the wording is open to interpretations that leave it unclear if either level has more say than the other. Furthermore, since only ‘current fields’ are mentioned in this clause, there exists the possibility that future fields will be claimed exclusively by one level of government. Other articles in Iraq’s Constitution do little to clarify the matter. While article 93 gives the Federal Supreme Court jurisdiction over ‘disputes that arise between the governments of the regions and governments of the provinces’, article 115 provides:

Constitution of Iraq, Article 115

With regard to other powers shared between the federal government and regional governments, precedence shall be given to the law of the regions and provinces not organized in a region in case of conflict.

How this power-sharing arrangement in Iraq plays out remains to be seen, but it has already become an example of how not to word such arrangements in the constitution. Several political and security problems have occurred precisely because different state institutions interpret these ambiguous provisions differently. If management of resources is to be shared among levels of government, detail in the constitution is especially needed to explain each party’s responsibilities and how disputes are resolved. It is worth noting that any delegation of management duties to regional authorities is likely to weaken the central government’s ability to efficiently use its oil in the interest of the entire nation.

While sub-national units can effectively manage oil, to do so in a way that contributes to the national interest depends on this level of government having significant capabilities to do so.

4. Environment

One of the primary reasons for oil-producing regions to demand and receive more control over how oil is extracted from its lands is due to the environmental damage that accompanies the process. Revenues, as discussed below, are often used as an *ex post* means of compensating affected regions, but such compensation may not be enough to counteract the devastating effects of oil exploration and extraction. Impacts can include pollution from natural gas flaring, alterations to the seabed and marine ecosystems (for offshore drilling), and, of course, oil spills.

Several constitutions contain language guaranteeing citizens of the country the right to a protected environment, assigning duties to both the government and people. South Korea's Constitution contains a typical environmental provision, which is indicative of the lack of specificity in such provisions:

Constitution of South Korea, Article 35

All citizens have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

Constitution of Tunisia (2014), Article 45

The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate. The state shall provide the necessary means to eradicate pollution of the environment.

Often lacking from these provisions are any instructions on how these rights shall be enforced. Some constitutions provide for the establishment of specialized commissions that have direct responsibility over environmental issues.

Constitution of Tunisia (2014), Article 129

The Commission for Sustainable Development and the Rights of Future Generations shall be consulted on draft laws related to economic, social and environmental issues, as well as development plans. The Commission may give its opinion on issues falling within its areas of responsibility. The Commission shall be composed of members with competence and integrity, who undertake their tasks for a single six-year term.

Broad protections for the environment are often beyond the scope of judicial review, and often citizens lack standing to sue on behalf of a damaged environment. Ecuador's Constitution attempts to correct some of these problems by giving wide enforcement powers:

Constitution of Ecuador, Article 72

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

Yet even this provision has been criticized for being unclear as to whether or not the right is self-executing and who has standing to sue. Furthermore, nature is an overly broad concept that is surely not always entitled to rights, particularly if they conflict with human rights. Often, environmental rights

are not listed as fundamental, while the right to life is. If damage to the environment becomes a threat to one's life, it may be easier to sue to stop the environmental degradation under this right. As an alternative to giving the environment unenforceable rights, Ecuador also requires restorative efforts for certain activities:

Constitution of Ecuador, Article 72

Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

This provision, too, lacks specificity, here with regard to when the environmental impact is severe enough or the adequacy of the measures to be taken. Yet this provision addresses the frequent problem of abandoned lands that lie forgotten long after the oil field has ceased to be productive. Nigeria has also enacted legislation mandating redress to landowners whose lands are damaged by extractive activities, but compensation is infrequently granted and often insufficient to compensate for the long-term damage. Restoring damaged lands can also be accounted for in contracts with the extracting company. The state will likely cover some of the costs through tax deductions to the company, but it can still include cleanup provisions in its contracts. Indeed, these provisions are becoming more common, and a state's constitution could conceivably mandate them in all contracts.

Contrary to compensation and restoration is the practice of conducting an environmental impact assessment before the damage is done. For example, in Brazil:

Constitution of Brazil, Article 225

All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations. (1) In order to ensure the effectiveness of this right, it is incumbent upon the Government to: [...] IV. Require, pursuant to the law, an environmental impact study to be made prior to the installation of a project or activity liable to cause significant harm to the environment, and the results of such study to be made public.

Requiring the study to be made public serves to involve the citizenry, and particularly damaging findings are likely to make the local population hesitant to permit the extraction to take place. In the United States, Alaska's Supreme Court has found it constitutionally required to consider all impacts of the later stages of oil and gas extraction, not just those likely to cause severe damage, as in Brazil. And Colombia's Constitution goes beyond requiring mere publication of environmental impacts, but actually requires community collaboration:

Constitution of Columbia, Article 79

All persons have the right to enjoy a healthy environment. The law will guarantee the participation of the community in the decisions that may affect it.

On at least one occasion, Colombia's Constitutional Court has interpreted this provision to require that affected indigenous populations be properly consulted before granting exploration licenses. Local native populations have also been empowered in Canadian British Columbia. Nigeria has also passed legislation mandating environmental impact assessments and consultation with local stakeholders, but enforcement of these measures has been lacking. Indeed, receiving total complicity from affected populations may be difficult and lead to the frustration of national goals, but requiring at least consultation with stakeholders is likely to make the local population more accepting of the eventual extraction decision.

5. Contracts

Distinct from who manages the oil and gas resources is the question of how those resources are managed. The decisions underlying exploration and extraction contracts are based on several factors that are beyond the scope of the constitution, but there are best practices that appear to transcend the economic considerations that go into contracting. Most countries are unable to find, extract, and refine oil without employing foreign or domestic companies, and bringing in these private actors opens up the possibility of oil wealth being used in ways contrary to the national interest. If Libya's Constitution contains language on these agreements, it can seek to ensure some minimum guarantee to the government while discouraging corruption.

Traditionally, Libya has used open bidding to award production-sharing contracts to companies. This type of agreement gives the contractor a share of the oil revenue once it has been successfully extracted. Other arrangements include joint ventures, in which the state, usually in the form of its national oil company, enters into a partnership with a private company. Countries also use concession agreements, in which the contractor is given ownership of the oil in the ground and the state relies on taxes and royalties to derive revenue. The prospect of relinquishing ownership in a concession agreement may be untenable to some countries, but doing so still allows the state to profit from as well as regulate the industry, as opposed to participating. Norway, Malaysia, and Brazil all forgo production-sharing agreements in favour of concessions.

Mexico's Constitution explicitly prohibits concession agreements: 'No concessions or contracts shall be granted for the extraction of petroleum or solid, liquid, or gaseous hydrocarbons' (article 27). Passed in a wave of nationalization, Mexico's Constitution is unique in its staunch opposition to outside participation in this field, and it remains the only democracy to exclude private companies from exploration and production. While article 27 ensures that Mexico cannot lose the rights to its most valuable resource, it severely limits the country's flexibility. For example, it keeps its national oil company from entering potentially cost-saving joint ventures that could reduce its financial risk. Though implementing legislation has allowed for private participation in distribution, storage, and transportation of natural gas, extraction is still the domain of the state, which is unlikely to change without an amendment to the constitution.

Contrary to Mexico, Brazil's Constitution allows for the participation of private companies: 'The Union may contract with state or private firms to perform the activities provided for in subparagraphs I to IV of this article [listed above], observing the conditions established by law' (article 177). Brazil stops short of explaining how the state will contract with these companies, but establishing a fixed legal basis for contracting can help protect against manipulation by companies and prevent favouritism. Other

potential protections could include an independent review process for scrutinizing oil contracts. Kenya's Constitution subjects its contracts to parliamentary oversight:

Constitution of Kenya, Article 71

*(1) A transaction is subject to ratification by Parliament if it
(a) involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.*

Egypt's new Constitution was also passed in a context of significant concern relating to ownership of state assets, and concession contracts. The following provision is the consequence of that concern:

Constitution of Egypt (2014), Article 32

Disposing of the state's public property is forbidden. Granting the right to exploit natural resources or a concession to a public utility shall take place by law for a period not exceeding 30 years.

Making each stage of the bidding process public is widely considered to be a check on corruption, as is publicizing oil and gas contracts, including the losing ones. Secret contracts can allow companies to violate national laws, permitting them to forgo taxes or neglect social or environmental regulations. In addition to adding a layer of public oversight to the contracting process, publicizing contracts can alert citizens to the size of the country's oil reserves, serving to keep the public's expectations in line with the country's actual reserves. Private companies often protest against publicizing contracts on the basis of protecting commercially sensitive information, but safeguards can easily be put in place to make sure nothing harmful is revealed. Also, final contracts do not typically reveal anything particularly private, and publishing them might help to erode the informational advantage held by private companies in negotiations with the government. A growing number of countries, including the United States and Liberia, have begun publishing contracts while continuing to attract substantial investment. Freedom of information laws have helped give the public access to these contracts, but Niger has written in a requirement to its Constitution:

Constitution of Niger, Article 150

Exploration and exploitation contracts for sub-soil natural resources and the related revenues paid to the state, disaggregated on a company-by-company basis, shall be published in full in the Official Journal of the Republic of Niger.

While many countries rely on transparency to hold governments and companies accountable and stem corruption, Ecuador's Constitution contains some novel additional ways to limit preferential treatment for the oil industry. To ensure that those in the oil industry are not too closely connected with government the Constitution provides that:

Constitution of Ecuador, Article 153

The following cannot be Ministers of State: Natural persons, owners, board of director members, representatives or proxies of private-sector legal entities, whether domestic or foreign, that have a contract with the State for the...production of natural resources, by means of a concession, partnership or any other type of contract (Article 152).

Those who have held the standing post of Minister of State and public servants at the upper echelons of public administration as defined by law, once they have left their post and for the

ensuing two years, cannot be member of the board of directors and executive management team or be legal representatives or have the power of attorney for private-sector legal entities, whether domestic or foreign, that have entered into a contract with the State, whether for the implementation of public works, the provision of public services, or the production of natural resources, by means of a concession, partnership or any other type of contract.

Ecuador also relies on constitutionally prescribed minimums to ensure fair contracting:

Constitution of Ecuador, Article 408

The State shall participate in profits earned from the tapping of these resources [nonrenewable resources, including petroleum deposits], in an amount that is no less than the profits earned by the company producing them.

To protect against getting enmeshed in unfair contracts for an extended period of time, Kuwait's Constitution stipulates that concessions for natural resources may be granted for a 'limited period', but it does not specify the length (article 152). The Philippines' Constitution goes into far more detail regarding how much the state should expect in its contracts as well as how long they will last:

Constitution of the Philippines, Article 12, Section 2

The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty percent of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law.

It is unclear whether or not these types of provisions deter international oil companies from entering these markets. It is also unclear whether countries can ensure an equitable share of oil wealth through taxation and royalties alone. However Libya decides to address contracting terms in its Constitution (if at all), it can act to advance the interests of its citizens by insisting on transparency at each level of the process.

6. National Oil Company

Libya, like many countries, manages much of its oil and gas sector through a National Oil Company (NOC). These state-owned companies have various levels of responsibility and autonomy from the state, and their duties are not usually included in the constitution. Libya's NOC has historically had a significant role in its country's oil management, both regulating the sector and acting as first party in all of Libya's production-sharing agreements. It has also taken a dominant role in exploration, refining, and marketing. Given the prominence of its NOC, it makes sense for Libya to outline its responsibilities in the Constitution if it wishes to see it continue.

The level of involvement of the state in the dealing with the NOC is perhaps the most important issue to be resolved before enshrining it in the Constitution. While many states wish for their NOC to take the place of private companies and run like a business, this goal is often impeded by efforts to use it as a source of easy revenue for social projects. That is, if an NOC is taxed too heavily, forced to sell oil at an inefficiently low price, mandated by law to provide employment to too many employees, or is constantly

required to give up its revenues to the government, it is unlikely to flourish as a company. And if social priorities are used to steer the activities of the NOC, there is the possibility that it will fail to make long-term investment goals, incorrectly assess risk, or generally lack funds for its operations.

For example, Pemex, Mexico's NOC, has lacked the funds to engage in deepwater exploration of suspected large reserves in the Gulf of Mexico. With the government taking up to 80 per cent of its income at times, Pemex has been unable to invest in new technology and expand its reserves. Pemex is also confined by strict limits regarding contract terms and compensation in its dealing with private companies in the refining sector. The close relationship between the NOC and the state can also work to the disadvantage of the government. In Kuwait, for example, members of the NOC, Kuwait Petroleum Company, are easily able to obtain favours from members of parliament.

Another related criticism of NOCs is that they too often act as regulators of an industry in which they participate while going unregulated themselves. Traditionally, Libya's NOC has regulated the oil industry in Libya while also participating. There is an obvious conflict of interest that arises when the NOC is able to give itself preferential treatment by controlling permit allocation and enforcing regulations across the entire industry. Giving NOCs a commercial role and letting other branches of government regulate the oil industry allows them to act more efficiently and eliminates potential areas of corruption.

Norway has a system of separation of powers in its oil industry that serves to limit some of these problems. Statoil, Norway's NOC, is regulated and protected by law, but its business decisions are not made by the government. For example, all licenses granted to international oil companies mandate that they enter into a consortium with Statoil, but Statoil is also listed under the stock exchange, which is indicative of its commercial status. Furthermore, Norway uses an independent body to allocate exploration licenses, while allowing the oil ministry to formulate policy and Statoil to focus on commercial activities. Thus, Statoil is allowed to operate as a business and take a 'longer-term perspective', while the state is able to regulate its production, as well as its environmental, health, and safety impacts.

Even if a state's NOC is given the freedom to act as an independent company, they can still be held accountable and their dealings can still be transparent. In effect, listing an NOC under the stock exchange acts to open up its practices to domestic and international scrutiny. There are also voluntary international standards for disclosing NOC finances, which both Norway and Algeria follow, but states could also require and enforce such reporting practices. Oversight measures can include performing annual audits and mandating that the NOC publish its profits and contracts. Mexico has required that Pemex create certain committees, including ones for auditing and performance evaluation, as well as transparency and accountability. States can also select their NOC's board membership and incorporate its budget into the national budget, but doing so takes strategic decisions away from the company. A more moderate approach may be for the state to select a limited number of board members and merely require that the NOC publish its budget.

Libya would be among the first countries to enshrine a national oil company in its Constitution if it were to do so, but it may be appropriate if its NOC is to continue its prominent role in the oil sector. No matter the level of state involvement in the NOC's operations, the citizens of Libya will be better served if the state's role is clearly defined in law or the Constitution and the NOC is forced to be as transparent as possible. Corruption occurs when NOCs are allowed to conduct their business in the dark and when leaders are given discretion to interfere with its operation or appropriate its revenue. Some level of

separation of powers can better ensure that the different actors in the oil sector are held accountable and operate more efficiently.

7. Revenue

Oil has the potential to transform a country's fortunes, but the way in which oil wealth is distributed and spent is often the source of controversy. The massive amount of revenue that oil can create for a country can be both a blessing and a curse, and certain groups or regions can fail to realize any of the benefits of the wealth. Constitutional provisions can help Libya avoid the negative effects oil can have on the larger economy and ensure that entire nation benefits from its resources. As with other issues in the oil sector, demanding transparency in how the revenues are handled can protect against corruption. The central debate concerning revenues centres on when and how they should be distributed. Specifically, countries need to decide if revenue should be managed by the central government or be distributed directly to localized levels of government. Regions that produce much of a country's oil also often demand a greater share of revenues.

Citizens should expect to benefit from their country's oil wealth, and some constitutions explicitly provide for this right. Constitutions that list the 'people' or the 'nation' as the possessor of oil arguably have an obligation to ensure that revenues go to the citizens. Other constitutions are more direct. Article 23 of United Arab Emirates Constitution provides that:

Constitution of the United Arab Emirates, Article 23

Society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy.

The preamble to Cameroon's Constitution maintains that natural resources are to be harnessed to 'ensure the well-being of every citizen without discrimination by raising living standards'. As cited above, Indonesia's Constitution mandates that natural resources be used for the 'greatest benefit of the people' (article 33).

Establishing that oil wealth is to belong to the people of the state is uncontroversial, but there are several ways this can be achieved. In many states, the central government collects and manages oil revenues, deciding how best to spend the money. The advantages to this system are that central government often has more capacity than sub-national units to manage the funds, withstand market volatility, reduce corruption through unitary management, efficiently coordinate energy sector policies with expenditures, build public infrastructure and promote financial stability. The fiscal problems that can plague oil-rich nations often affect the national economy, so it makes sense that the revenues be concentrated at the highest level of government. States that give all revenues to localized governments can be left ill-equipped to handle global price fluctuations. The central government is also better situated to spend revenues on infrastructure projects and industries that affect the entire country. For example, Chad passed a law in 1998 that designated 80 per cent of oil revenue to defined sectors that benefit the entire economy.

Giving the central government sole discretion in how to manage these revenues necessitates a high level of trust from local governments and citizens. Writing transparency measures into law or the constitution can help instill more confidence that the revenues are being spent in an equitable fashion. For example,

countries can publish each time revenue is transferred, including any amount of revenue transferred to local governments.

Publishing revenue transfers to individual regions ensures that all of the money is accounted for, but it says nothing about the adequacy of those transfers. Particularly if little trust is placed in the central government, much of a country's oil revenue can be distributed to sub-national units directly. This is especially true for areas that may be prone to secession, as giving them more control over oil revenue may keep them from breaking away from the state. Other arguments for decentralized revenue sharing are that local levels of government are more accountable to their populations and that they know better than the federal government how to spend these revenues. The central government is still likely to profit from the oil wealth by operating national pipelines and refineries, as well as controlling shipping. Of course, these arguments hold only if regional governments are in fact more accountable and have the capacity to spend funds. Another risk of centralized management is that individual regions may simply engage in a zero-sum game to acquire as much of the revenue as possible without actually improving the average quality of life for their citizens. Apportioning all revenues to sub-national units can also increase economic disparities among different provinces, as in the United Arab Emirates. To account for this risk, Nigeria apportions its revenue from the central government based on several factors:

Constitution of Nigeria, Article 162

...in determining the formula, the National Assembly shall take into account the allocation principles, especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density.

Not surprisingly, states that give ownership rights to provinces or local governments often permit them to keep the oil revenue. Canada's Constitution allows that:

Constitution of Canada, Article 92A

In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of...non-renewable natural resources and forestry resources in the province and the primary production therefrom.

Though not enshrined in its Constitution, Mexico details an exact amount of revenue that the central government gives to individual states within, setting the rate at 20 per cent. Setting aside a certain percentage of revenue to the states should ideally ensure that each state is entitled to a specific percentage so as not to concentrate the wealth in only one area.

Distinct from allocating revenue to sub-national units is the practice of compensating the oil-rich states from which the oil is extracted. Because of the negative environmental impact that extraction can have on a region, many states feel compelled to give these regions a greater share of the revenue. Extraction is not particularly labour-intensive, so citizens of affected regions are most likely not adequately compensated by increased employment. Even so, labour may migrate to oil-producing regions for higher wages, leaving some nearby regions without a diminished workforce and no compensation from the state.

Brazil's Constitution goes into some detail in providing for affected regions:

Constitution of Brazil, Article 20, Section 1

The States, Federal District and Counties, as well as agencies of direct administration of the Union, are assured, as provided by law, participation in the results of exploitation of petroleum or natural gas, hydraulic energy resources, and other mineral resources in their respective territories, continental shelf, territorial sea or exclusive economic zone, or financial compensation for such exploitation.

Though it is thorough in detailing when compensation occurs, Brazil does not include how much compensation is given. Mexico assigns 3.17 per cent by law to producing and shipping states, and Chad gives slightly more at five per cent. Nigeria is alone in enshrining a specific amount of revenue to its oil-producing region in its Constitution, guaranteeing to states where extraction occurs ‘not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources’ (article 162).

The value of this allocation has caused considerable controversy in Nigeria. Notwithstanding the large amount of wealth Nigeria derives from oil, the poverty rate is close to 70 per cent, and three quarters of the population live on a dollar a day. But this poverty is especially felt in the oil-rich region known as the Niger Delta, which contains four states that produce much of Nigeria’s oil revenue and has even higher rates of unemployment. Environmental damage in this region has been particularly severe, and the Niger Delta is far less developed than other parts of the country. Militants in the Niger Delta have waged a bloody armed struggle, demanding additional revenue. Efforts were made in 2005 to raise the 13 per cent allocation to 17 per cent, but the Niger Delta region rejected the constitutional amendment in favour of 25 per cent that would eventually be raised to 50 per cent. Though additional revenue is unlikely to fix the region completely, it is evident that 13 per cent of the oil revenues is not an acceptable figure for the secessionist-prone area.

While not widely seen in practice, many scholars advocate for distributing oil revenues in the form of dividends directly to individuals. Not unrelated to dividends is subsidization, which, much like directly distributing money, allows individuals to purchase gas or other staples at lower prices. Subsidies are often criticized because they can encourage products to be inefficiently overused, and, in the case of refined oil, prematurely depleted. Dividends, on the other hand, allow the recipients to spend the money on the things they need, perhaps more efficiently than could government and in way that may better withstand volatility in the oil market. This distribution system would also be likely to invest the people in the oil sector, as it would incentivize them to ensure revenues were not lost due to corrupt handling of the money. By the same token, citizens may be encouraged to demand wasteful overproduction in order to receive a greater share of the revenue. There are also considerable costs involved in distributing and taxing these dividends, both of which demand a capable government.

Alaska, in the United States, distributes some of its oil revenue in the forms of dividends. These dividends come from a public fund that was established by an amendment to the state’s Constitution to benefit present and future generations of Alaskans. Citizens can have their annual dividend revoked for certain criminal violations. Alaskans receive approximately USD 1,000 each year, depending on the global market, and their shares not tradable. Making the shares non-transferable prevents citizens from raising quick capital from the programme, but it also protects people from selling their shares for immediate cash and allowing only a wealthy few to eventually benefit from the programme. These dividends have become part of household budgets, and politicians would be unlikely to propose eliminating the programme now. Dividends necessarily deprive the government of a source of revenue to be used for state-wide infrastructure projects, and the decision to distribute funds in this way

depends on whether the government wishes to promote consumer spending over government services. This decision is likely to change over time, so writing a system of direct distribution into the constitution may be improvident.

Any system of managing revenue will reflect a state's economic needs and developmental goals, but all revenue programs can and should be transparently operated. Giving citizens and independent organizations the means to oversee how revenues are handled can help reduce tax avoidance, make the country more attractive to investors, and help identify and stop sources of corruption. Within the Constitution, Libya could write in an annual auditing requirement or a provision that publicly discloses all revenue transfers. While economists caution against depending on highly volatile revenues as part of the national budget, requiring that they go into a designated fund within the budget or in the central bank can better ensure that the funds are accounted for.

General financial oversight provisions presently exist in constitutions, including auditing provisions in Saudi Arabia's Basic Law:

Basic Law, Saudi Arabia, Article 79

All revenues and expenditures of the State, as well as movable and fixed assets, shall be subsequently audited to ensure proper use and management. An annual report to this effect shall be forwarded to the Prime Minister. The law shall specify details of the competent auditing institution, together with its affiliations and areas of authority.

Algeria, too, requires in article 170 of its Constitution that an audit of the country's finances be presented to the president, but it goes further than Saudi Arabia by designating a 'Court of Accounts' to have 'ex post control of the finances'. Neither of these provisions specifies the extent of their auditing institution's powers, leaving them instead to be defined in law. Also, they explicitly limit who may view the results of their audits to a single individual (either the prime minister or president). Kuwait allows for slightly more oversight by giving parliament oversight of its annual audit:

Constitution of Kuwait, Article 151

A financial control and audit commission is established by a law, which ensures its independence. The commission is attached to the National Assembly and assists the government and the National Assembly in controlling the collection of the State revenues and the disbursement of its expenditures within the limits of the budget. The commission submits to both the Government and the National Assembly an annual report on its activities and its observations.

This more comprehensive oversight provision in Kuwait has resulted in at least one oil minister being ousted for corruption. Libya has the opportunity to enshrine even more openness into its Constitution. The findings of independent audits can be made public, as can every stage of revenue transfer. Where Libya's oil money goes may change over time, but the process can always be open to ensure that none of it is seized by corrupt leaders or institutions.

8. Future Generations Funds and Sovereign Wealth Funds

When constitutions guarantee that natural resource wealth is to be used for the benefit of the people, this guarantee often extends to future generations. Nonrenewable resources like oil are finite, and many

countries have established investment funds to preserve and grow some of their oil wealth for citizens after their resources have been depleted. These future generations funds are sometimes part of the same general account as a country's sovereign wealth fund, which often seeks to protect the national economy from fluctuations in the oil market. World oil prices often change drastically, and having a stabilization fund can keep oil revenues more constant, protecting a country from the shock of extremely low prices and preventing it from spending too quickly.

Where and in what these funds invest is beyond the purview of the constitution. Particularly with stabilization funds, the macroeconomic considerations are difficult to write into law, let alone constitutions. Recently, however, South Sudan's transitional Constitution explicitly provides for payment into an 'Oil Revenue Stabilization Account', although it does not specify an amount or other details (article 176). The US state of Alaska goes further in its Constitution, establishing a minimum amount of investment in its fund:

Constitution of Alaska, Article 9, Section 15

At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments.

These funds often vary in their legal character, with some even existing as entities completely separate from the state. Regardless of how these funds are operated, they should be authorized by law with basic transparency measures and a mandate to invest.

Future generations funds are also rarely mentioned in constitutions. Niger's Constitution, for example, does little more than establish such a fund:

Constitution of Niger, Article 162

The State sees to invest in the priority domains, notably agriculture, animal husbandry, health and education, and to the creation of a fund for future generations.

Kuwait included more detail when it created the world's first future generations fund in 1976. In its Law Decree No. 106, Kuwait established that:

Law Decree Number 106 (Kuwait)

Article 1: An amount of 10% (ten per cent) shall be allocated from the State's General Revenues every year, as from the fiscal year 1976/1977.

Article 2: A special account shall be opened for creating a reserve which would be a substitute to the oil wealth 'Future Generation Reserve' into which those amounts would be credited. The Ministry of Finance shall employ these funds into investments, and the profits accruing therefrom shall go into this account. And an amount of 50% (fifty percent) of the available State's General Reserve Fund is to be added to this account, when this Law comes into force.

Article 3: It is not permissible to reduce the rate stated in Article One of this Law, or to draw any amount from the Future Generations Reserve.

Though not protected in its Constitution, Kuwait's fund is regulated by law, as well as overseen by a board of directors and parliament. The public, however, is prohibited from knowing how its investments operated on the grounds that such decisions should be insulated from public spending pressures. And

while the strong protection against contributing less than 10 per cent of revenues per year works to keep the fund from being prematurely depleted, countries with growing populations or changing budgetary needs may desire more flexibility in deciding how much revenue goes toward the fund.

Norway's future generations fund is not established in its Constitution, although its Constitution does make passing reference to the need to provide for the future:

Constitution of Norway, Article 110b

Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.

Nonetheless, Norway has established in law a fund that has been widely successful. The Government Pension Fund—Global (Global), both insulates the country from fluctuating oil prices and preserves some of the country's present oil wealth for the future. Because of its aging population, Norway uses Global investments to account for the expected increase in public spending. Multiple levels of authority ensure that the fund is both managed properly and preserved. Global is managed by Norway's central bank and included in the budget, with the legislature ultimately approving all of the fund's objectives. Global's investment selections are also approved by the Ministry of Finance's Council of Ethics, which limits where and how much the fund can invest. Transparency and oversight are also staples of Global's management. The fund is audited by the Office of the Auditor General, and annual and quarterly reports are disclosed online, detailing the returns on investment, transfers to and from the budget, and changes in how the fund is managed.

The openness with which Norway has managed Global has likely helped to preserve its resources for the long term. It is also difficult to remove money from the fund, as transfers are only permitted by parliamentary resolutions. Many other countries have been less successful in preserving their funds for future generations. Mexico and Venezuela's governments have not been held accountable and strong presidents have largely depleted their countries' funds. In Azerbaijan and East Timor, weak withdrawal protections have also left their funds open to premature depletion. Insulating future generations funds from political expropriation is often vital to preserving them for their stated use. This can be achieved through multiple levels of oversight and by making it difficult to use the fund to fill budget deficits. To counter the risk of overusing their funds for such purposes, both Alaska and the Canadian province of Alberta allow for a certain percentage of their funds to be used for budget objectives. Of course, the degree to which funds are preserved for future generations depends on the state having the sufficient resources for its existing needs, and Libya may decide to invest in current infrastructure needs before establishing a robust fund for future generations.

Part 5: Constitutional Reform and the Fight against Corruption

1. Introduction⁹

Given the demands of the 2011 uprising, the entrenchment of an anti-corruption framework should be a central issue during the drafting of any new constitution for Libya. Corruption weakens a constitutional democracy. It obstructs the enjoyment of political and social rights, and it undermines the principles upon which democratic and free societies are based. It is for this reason that constitutional drafters should determine how best to insulate a constitution from corrupt government practices; and, because constitutions aren't self-executing, it is imperative that drafters provide sufficient constitutional protection to the institutions that are responsible for its enforcement and protection.

Constitutions need not contain specific provisions relating to corruption. In most constitutional democracies, the anticorruption framework consists of provisions located in different parts of the constitution, including sections governing policy formation and implementation, oversight, judicial independence, and so on. The new Egyptian and Tunisian constitutions take this approach, with principles and mechanisms bearing on combating and controlling corruption included in a handful of discrete provisions throughout the text.

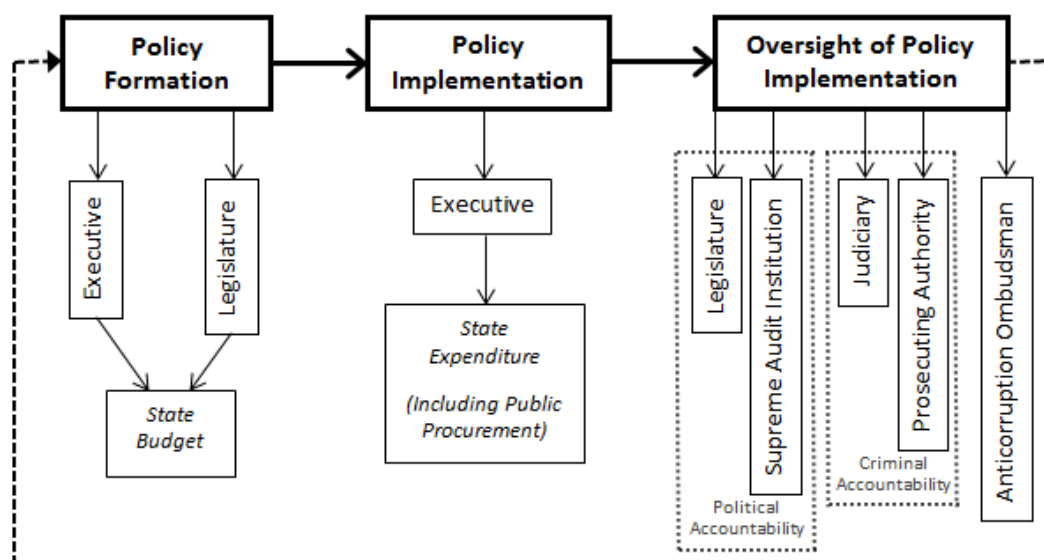
Broadly stated, constitutions adopt a three-stage process relating to the formulation and implementation of policy:

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

The purpose of this process is to encourage the establishment of a responsive and accountable government. Oversight can and should be used to improve the formulation of future policy, and it also

⁹ This Part draws significantly from a paper entitled 'Egyptian Constitutional Reform and the Fight Against Corruption', Zaid Al-Ali and Michael Dafeel, Working Paper No. 1, Consolidating the Arab Spring: Constitutional Transition in Egypt and Tunisia, Al-Ali and Stacey (eds.) (June 2013), available at <http://constitutionaltransitions.org/consolidating-arab-spring/>.

reinforces political and criminal accountability. The following diagram seeks to capture the entirety of that process:



Combating corruption is thus not exclusively, or even primarily, a function of establishing anti-corruption mechanisms. Part 5 recognizes that eliminating corruption is, in addition, a function of achieving the goals of transparent, fair and accountable government. In this light, it does not focus only on mechanisms for the prevention or elimination of corruption, but investigates the broader constitutional context in which policy is formulated and implemented, and how public officials responsible for doing so are overseen and held to account for their actions. The discussion is accordingly organized into the three sections that follow:

- Section 2 looks at processes of policy implementation and formulation, noting that the process should entail a transparent, accountable and participatory approach particularly during the formulation of the state budget. At the implementation stage, the paper discusses public procurement and the need to ensure state contracts are awarded in a fair and transparent manner.
- Section 3 looks at oversight mechanisms, discussing four institutions that are responsible for overseeing executive and legislative conduct: The legislature, with the assistance of an audit institution, ensures that the executive is politically accountable for their decisions and conduct; and the judiciary, with cases initiated by a prosecuting authority, ensures criminal accountability within both the legislature and the executive.
- Finally, Section 4 discusses the role of institutions that are not necessarily part of the traditional three branches of government. The paper discusses the advantages and disadvantages of an independent anticorruption ombudsman in Libya's anticorruption framework. Section 4 concludes by briefly indicating how human rights can assist in improving the oversight of policy implementation.

2. Policy formulation and implementation

(a) Procedures for the approval of the state budget

A country's annual state budget is more than just a law, and is more than a series of numbers. It reflects the government and therefore the state's policy for the coming year, and is designed to allocate available resources to allow for the implementation of that policy. The budget law is therefore one of the more important pieces of legislation that any state (including the Libyan state) will pass in any given year. In practice, the drafting of the annual state budget law is almost always led by the government and in particular by the ministry of finance. The manner in which the ministry manages that process is dictated either by tradition, government regulations, law or sometimes even by the constitution, depending on the country.

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

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

South Africa	Kenya	Turkey
Section 214-5 adopts a deferential approach by requiring that legislation be enacted to regulate the entire procedure. It does, however, stipulate that the budget should be allocated on an equitable basis and proceeds to indicate which factors must be considered to ensure equitability.	Sections 215-6 and 220-1 adopts a more process-entrenched approach by not only requiring that certain procedures be followed, but also requiring the creation of a commission tasked with reviewing the state budget to ensure that revenue is fairly distributed.	Article 162 requires the establishment of a specialized parliamentary committee to review the budget. All political parties that are in the Grand National Assembly must be represented in the same proportion in the committee, although the ruling party will at a minimum be allocated 25 of the 40 seats.

The tendency in modern constitutions is to impose additional requirements and safeguards during the drafting of the annual state budget law to promote a more accountable and fair process. The importance of distributing public revenue equitably almost demands it. The entrenchment of these procedural safeguards can serve an additional purpose when the political landscape is dominated by a single political party. Such entrenchment ensures that the procedure cannot be easily amended in favour of the ruling political party, and that minority parties will at least always have a platform to

publicly raise concerns. Enshrining specific procedures in the constitution itself underlines the importance of that process and instils in the political culture a sense that the procedure should be respected and not subjected to ordinary political pressures.

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

In Egypt, the procedures and rules established in these articles of the 2012 and 2014 constitutions are substantially the same as those established by the 1971 Constitution. Under the 1971 Constitution, however, the policy formation process in Egypt fell far short of the ideals of democratic, fair, accountable and transparent government. It seems a mistake to simply adopt the same provisions and the same procedures. At the same time, however, there is wisdom in refraining from entrenching too many detailed procedures and firm rules in the Constitution, given that Egypt remains in transition and that much remains uncertain, particularly the manner in which the coming political process will function in practice. The model that the 2014 Constitution constructs may be flexible enough to allow adaptation to fluctuations in Egypt's political system, yet constitutionally entrenched in a way that does not allow manipulation or centralized control of the state budget.

(b) The state's public procurement system

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

Egypt's 1971 Constitution did not deal specifically with public procurement, but did require that public expenditure be regulated by law (article 120). In that context, Law 88/1998 created what appeared in theory to be a strong framework for public procurement. The law requires that that the awarding of contracts should be based on the principles of 'rationality, equal opportunity, and free competition'. It further sets requirements including: (i) that public contracts must be awarded by means of public bidding, local auction, or direct contract—although there are exceptions that must be fully justified by the department invoking the exception; (ii) prohibiting the state from negotiating a bid once the tender process is opened; (iii) requiring the public disclosure of reasons if a bid should be cancelled; and (v) monitoring the personal assets of officials involved in a procurement process. Additionally, a specialized committee was established with the task of supervising the implementation of state awarded contracts

(Law 89/1998). A significant shortfall of Law 88 is that it does not set time limits for selection committees to meet, make decisions and announce them. Despite these laws, public procurement in Egypt was riddled with corrupt practices. This is owing to a variety of reasons including (i) a general lack of transparency in the awarding of state contracts, (ii) a culture of not investigating allegations of corruption, (iii) the persecution of whistle-blowers and journalists, and (iv) the difficulty in gaining access to state information that details corruption.

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

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

- One possibility is to elevate specific procedures traditionally included in ordinary legislation to the level of a constitutional principle. For example, the constitution provides that public contracts must be awarded by means of a public bidding process, except in certain specific circumstances that are set out in the constitution. The disincentive to this approach is that including specific procedures in a constitution introduces inflexibility to the system. If the constitution is over-inclusive, it could result in certain provisions being violated routinely, damaging the constitution's legitimacy.
- Another possibility is to adopt a value-oriented approach, as in South Africa and Kenya. This approach has the impact of guiding any future attempt at regulating public procurement by parliament or government. It is however not a panacea. Legislators and courts are left with the responsibility of interpreting general constitutional procedures and translating them into specific procedural steps. The result is far from certain.

Owing to the threat of corruption in a public procurement system, Libya would do well to consider a combination of these two approaches.

(c) Finances

Egypt's new Constitution also makes an important innovation in that it requires significant detail to be disclosed in relation to senior officials' finances. Article 138 provides that the president's finances will be stipulated by law, and imposes strict limitations on the other sources of income and remuneration the president may receive. Similar prohibitions are given in article 88 in respect of members of both chambers of the legislature and article 158 in respect of the government. This much was included in the 1971 Constitution (articles. 80–81), but no more. Article 145 of the 2014 Constitution goes on to provide

that the president ‘must submit a financial disclosure upon taking office, upon leaving it, and at the end of each year. The disclosure is to be published in the Official Gazette’. Further, if the president receives cash or in-kind gifts, they are transferred to the state treasury. Similar provisions are laid out for the prime minister and the members of government (article 166) and the members of the legislature (article 109).

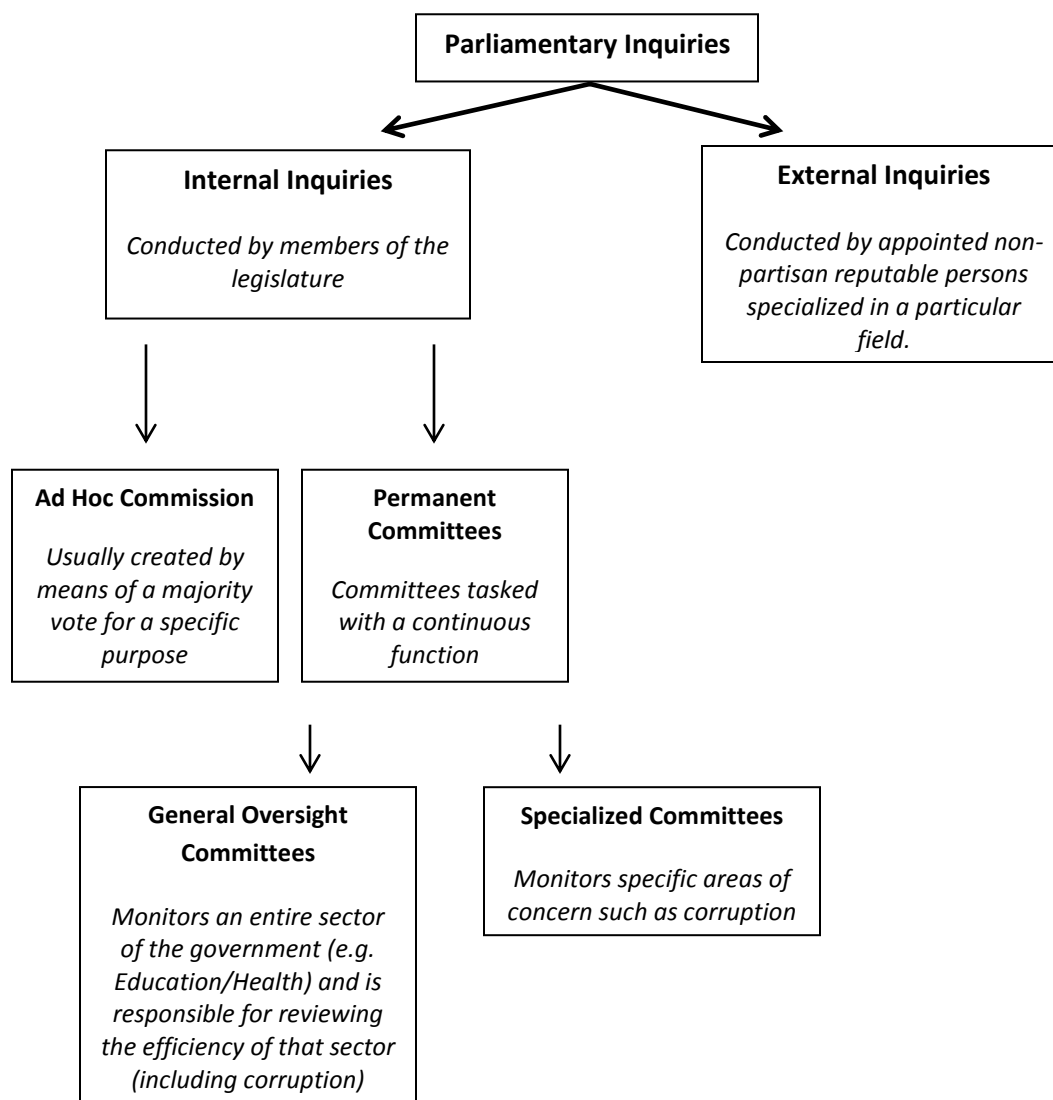
3. Oversight

(a) Increased oversight by the legislature

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

Prior to the 2011 uprising, Egypt, Libya and Tunisia had been dominated for many years by one-party states. As would be the case in any country, this affected the legislature’s control mechanisms over the executive. Unsurprisingly, as a result of the fact that the parliament was dominated by the same party that dominated the executive, parliamentary enquiries (when they managed to take place) had close to no impact on curbing corruption.

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



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

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

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

(b) Supreme audit institutions

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

The Central Auditing Organization (CAO) served as Egypt's public auditor under the 1971 Constitution. This body was not constitutionally entrenched or protected, and its mandate and powers were determined by ordinary legislation. Egyptian law stated that the CAO was to be an independent and transparent organization, but the CAO has proved susceptible to political influence and control. The legal framework reflects that the body is subordinate to the president, and the legislature provides very little overview of the functioning of the CAO. Furthermore, the president was entitled to extend the term of the Auditor-General (Law 157/1998, section 20), the audited financial statements did not

comply with international standards, and reports of the CAO were usually not made public as they were submitted only to the president, and to the legislature only if the legislature made a request to a specific department.

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

Articles 200–203 deal generally with the independent bodies and regulatory agencies, and provide some detail of how they should be managed in practice. Article 200 states that the CAO, along with the other institutions defined in Part IV, ‘have legal personality, neutrality, and technical, administrative and financial autonomy’. The article goes on: ‘These independent bodies and agencies are consulted about draft laws and regulations that relate to their fields of operation’. Article 202 is far more concerning: it provides that ‘[t]he President of the Republic appoints the heads of independent bodies and regulatory agencies upon the approval of the Shura Council’. Given that the president appoints 10 per cent of the Shura Council’s members as per article 128 of the constitution, he has been given unfair and unjustifiable leverage over the appointment process of all independent agencies, including the CAO. Given that each of these agencies, particularly the CAO, is designed to oversee the executive’s work, it is both inappropriate and worrisome that the executive should have so much power to interfere in their work.

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

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

(c) Increased independence of the judiciary

The proper functioning of any independent judiciary results in an effective system of checks and balances. This includes serving as a monitoring body of policy implementation on selected issues. The

powers of the judiciary include invalidating public contracts that were awarded improperly and holding criminally accountable government officials that use their positions to unfairly enrich themselves or others. It is therefore essential that the constitution regulates the judiciary in a manner that enables them to exercise their function without fear or favour.

A review of constitutions around the world reveals that a wide variety of systems is employed to grant the judiciary sufficient independence to carry out its work while at the same time ensuring that it remains accountable for its own performance. Section 178 of the South African Constitution establishes the Judicial Service Commission, which is chaired by the Chief Justice and further composed of senior judges, legal practitioners, a legal academic, members of both houses of parliament (including minority parties) and persons nominated by the executive. The Commission is located in the judiciary and is responsible for the nomination, regulation and discipline of judges. The president, however, is responsible for the appointment of judges and only the National Assembly may remove a judge on a two-thirds majority if the Commission finds that a judge acted with gross incompetence, gross misconduct, or is physically incapable of performing judicial functions. The Kenyan Constitution adopts a very similar approach, with the constitutional establishment of a Judicial Service Commission. However, the process for the removal of judges is different: After investigation by the Commission, the president has to establish a tribunal whose membership is set in the Constitution. This Tribunal will issue a binding decision. The relevant Judge may still appeal the decision to the Superior Courts (section 168).

In contrast, section 124(2) of the Indian Constitution states that Supreme Court Judges are appointed by the president in consultation with the chief justice. Furthermore, judges may only be removed by a two-thirds majority of each house of parliament as well with the order of the president, and can only be removed on the grounds of a misdemeanour and incapacity (section 124[4] of the Indian Constitution).

(d) An independent prosecuting body

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

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

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

Egypt's 2012 Constitution was a marked improvement over the 1971 Constitution in that it entrenched the prosecuting authority in the Constitution rather than leaving its organization and mandate entirely to ordinary law. The 2012 Constitution provided that 'The public prosecution is an integral part of the judiciary', thus rejecting the Kenyan Constitution's approach in favour of the approach taken in, for example, France, where both judges and public prosecutors are supervised by the High Council of the Judiciary (French Constitution of October 4, 1958, article 65). Article 173 of the 2012 Constitution went on to provide a detailed procedure for the appointment of the prosecutor general from among the judges of the Court of Cassation and court of appeals and assistant prosecutors general. The president appoints as prosecutor general a person nominated by the Supreme Judicial Council.

(e) Administrative Prosecutor

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

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

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

- These institutions are not elected and their accountability is extremely limited. Even the judiciary, whose members are also not elected, has appeal and review procedures.
- The mandate of the ombudsman will almost certainly overlap with the functions and responsibilities of other branches of government, particularly the criminal investigation of corruption as well as parliamentary enquiries into the executive. This can very easily lead to overlapping jurisdictions, which can lead to inefficiency and even wasted resources. The establishment of an ombudsman, in addition to the regular branches of government, could be interpreted as suggesting that traditional institutions such as the prosecution authority are incapable of satisfying their responsibilities.

- Although these institutions compile reports that usually include recommendations, a lack of political will could result in the ombudsman's investigation's being disregarded.
- Limited resources will always result in discretionary decisions on which matters to investigate, which can potentially lead to perceptions of bias which in turn will undermine the entire purpose of the ombudsman.

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

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

(f) Human rights and corruption

The framework discussed in Part 5 is centred on the procedural overview mechanisms that a constitution could employ to entrench an effective anticorruption framework in a constitution. It should not be forgotten, however, that the general public can also monitor government efficiency. This includes holding the people's government accountable for mismanagement. The rights to freedom of expression, freedom of the press, and access to information are particularly important in this respect. In this respect, the 2012 Constitution raises significant cause for concern.

The right to freedom of thought and opinion is guaranteed, in absolute terms, in article 45 of Egypt's 2012 Constitution. Every individual, the article states, 'has the right to express an opinion and to disseminate it verbally, in writing or illustration, or by any other means of publication and expression.' This expansive statement of the right is, however, subject to significant limitation in several other parts of the 2012 Constitution. Article 31, for example, prohibits 'insulting or showing contempt towards any human being'. While many constitutional frameworks around the world must balance the rights of expression with the rights of reputation and protections against defamation, it is conceivable that article 31 could be relied on by public officials to suppress accusations of corruption. Similarly, 'crimes that

harm the armed forces', of which civilians can be accused and tried for in military courts (article 198), could be interpreted to include accusations of corruption. While article 198 does not necessarily impose a limitation on the right to free speech, it does expose civilians to sever criminal penalties of their exercise of the right to free speech constitutes 'harm' to the armed forces.

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

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

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

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