Constitutional reform and the struggle against corruption

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Introduction

• Previously, Arab constitutions allowed for small groups of individuals to monopolise power and access to public funds
• Arab spring forced many countries to draft new constitutions (M, A, T, L, E, J, Y, etc.)
• The absence of an autopsy (what went wrong?). Result is that constitutions not redrafted with anti-corruption in mind
Introduction

- New generation of Arab constitutions make improvements on design flaws, but many still remain
- Consequence: high prevalence of corruption in many cases is unlikely to be resolved until new and deliberate constitutional reform effort is engaged upon
Accountability under the Constitution

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Accountability under the Constitution

• **Design flaws** in Arab constitutions have created **gaps** in the accountability framework, such that:
  – Judicial independence is not complete; and
  – parliament cannot exercise effective oversight.
Judicial independence

• All constitutions provide for judicial independence

• What does “independence” mean?
  – Freedom from interference
  – Freedom from dismissal
  – Freedom from transfer
  – Freedom from other disciplinary measures
Judicial independence

Iraq (1970):

Article 60: The judiciary is independent and is subject to no other authority save that of the law.

Article 42: The Revolutionary Command Council exercises the following competencies:

(a) Issuing laws and decrees having the force of the law.

(b) Issuing decisions indispensable for applying the rules of the enacted laws.

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Judicial independence

Iraq (2005)

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.
Judicial independence

Who controls the law-making process in Iraq?

(1) **Draft laws** (مشاريع) shall be presented by the President of the Republic and the Council of Ministers.

(2) **Proposed laws** (مقترحات) shall be presented by ten members of the Council of Representatives or by one of its specialized committees.

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Judicial independence

• Egypt (2012): Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment and disciplinary actions against them are defined and regulated by the law (article 170).
Judicial independence

• Morocco (2011):
Any intervention in the matters submitted to justice is forbidden. In his judicial function, the judge may not receive injunction or instruction, nor be submitted to any pressure whatever.
Each time that he considers that his independence is threatened, the judge must refer the matter to the Higher Judicial Council.
Any breach on the part of the judge of his duties of independence and of impartiality, constitutes a grave professional fault, without prejudice to eventual judicial consequences (article 109).
Judicial independence

• Morocco (2011):

The Higher Judicial Council sees to the application of the guarantees accorded to the magistrates, notably concerning their independence, their appointment, their advancement, their retirement and their discipline (article 113).

Higher Judicial Council is presided over by the King, and also includes 5 people appointed by the King (article 115).
Judicial independence

- **South Africa (1996):** A judge may be removed from office only if:
  - the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
  - 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 (article 177).
Parliamentary Oversight

• Parliamentary oversight is an essential function of most modern states:
  – One of two main accountability mechanisms (including judicial review)
  – Parliaments are assisted by ‘supreme audit institutions’ (eyes and ears)
  – Depends on audit institutions functioning properly and on their being truly independent
Parliamentary Oversight

• What does an audit institution’s effectiveness depend on?
  – Training
  – Standard operating procedures
  – Full access to information
  – Reporting lines
  – Independence
Oversight under the 1970 Interim Constitution

The National Council

Legislation

Oversight

The Government

The Board of Supreme Audit

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Oversight under the 2005 Constitution

• On paper, oversight was reinforced or guaranteed by the Constitution:
  – BSA granted constitutional status (art 103)
  – COR mandated by constitution to exercise oversight (art 61)
  – COR has authority to oversee work of not only ministers but also “any other official in the executive branch of government” (art 32 of the COR’s bylaws)
Oversight under the 2005 Constitution

• Unanticipated impact of changes to the electoral system:
  – Extremely permissive (30k votes enough for one seat)
  – Pmt populated by dozens of parties
  – Very large coalition government
  – COR lacking in experience, new institution
Institutional Breakdown

The Council of Representatives

Legislation

Oversight

The Board of Supreme Audit

The Iraqi Government
Institutional Breakdown

• From 2005 to 2009:
  – Almost none of the COR’s members had read any of the BSA’s reports
  – The Finance Committee was not certain how many reports it had received
  – BSA officials almost never travelled to COR for meetings
  – Not a single government official was called to provide evidence before the COR

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Breakdown in Services

• What is the consequence of this failure?

• No accountability for senior government officials

“Central ministries had spent only 4.4 percent of their investment budget as of August 2007”
Breakdown in Services

- Government inefficiency reached unprecedented levels.

While Iraq’s total expenditures increased from 2005 through 2007, Iraq spent a declining share of its budget allocations—73 to 65 percent from 2005 to 2007.

In each year, Iraq spent a greater percentage of its operating budget, including salaries, than its investment budget. For example, in 2007, the Iraqi government spent 80 percent of its $28.9 billion operating budget and 28 percent of its $12.2 billion investment budget.

The central ministries, responsible for providing essential services to the Iraqi people, spent a smaller share of their investment budgets than the Iraqi government as a whole. Further, their investment expenditure ratios declined from 14 percent in 2005 to 11 percent in 2007. Specifically, while...
Breakdown in Services

- GOI remains incapable of expending its investment budget or keeping track of its funds.

In 2009, the BSA “concluded that weaknesses in accounting for advances could result in the misappropriation of government funds, the means by which ministries exceed their annual budgets, and the inaccurate reporting of expenditures”.

The MOD and the MOI “did not spend or set aside between $2.5 billion and $5.2 billion of their 2005 through 2009 budgeted funds—funds that could have been used to address security needs”.

“Iraq generated an estimated cumulative budget surplus of $52.1 billion through the end of 2009. [...] Adjusting for $40.3 billion in estimated outstanding advances reduces the amount of available surplus funds to $11.8 billion”.

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Breakdown in Services

• Leaked US Embassy memo provides some answers.
• The US embassy investigated the state of corruption in Iraq, and made a series of damning conclusions.

Iraq is not capable of even rudimentary enforcement of anticorruption laws

Politicization and fear of accountability are serious impediments to the enforcement of anticorruption laws

The Government of Iraq is making grudging progress in capability to investigate and prosecute corruption in Iraq and not at a level that would support any reasonable time line

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Breakdown in Services

- Iraq was ranked close to bottom of TI’s Corruption Perceptions Index through the Iraqi parliament’s first term.

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Breakdown in Services

• Since 2010, some improvements not because of the constitution, but despite it
Parliamentary oversight

Egypt (2012):
- Central Auditing Organisation is mandated to control all of the state’s funds (Article 205).
- Who appoints the head? The President of the Republic appoints the heads of independent bodies and regulatory agencies upon the approval of the Shoura Council (Article 202).
Parliamentary oversight

- Composition of the Shoura Council:
  “The Shura Council has at least 150 members, elected by direct secret ballot. The President of the Republic may appoint a number of members not exceeding one-tenth of the number of elected members” (article 128).
Parliamentary oversight

President of the Republic

Shoura Council

Head of the Central Auditing Organisation

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Conclusion

• Under previous generation of constitutions, flagrant design flaws that allowed for public funds to be controlled without accountability by few individuals

• Under new generation, design flaws are more subtle, but still exist and will likely prevent new regimes from effectively curbing corruption

• Some countries have made progress, but others have not, in part because no autopsy carried out