

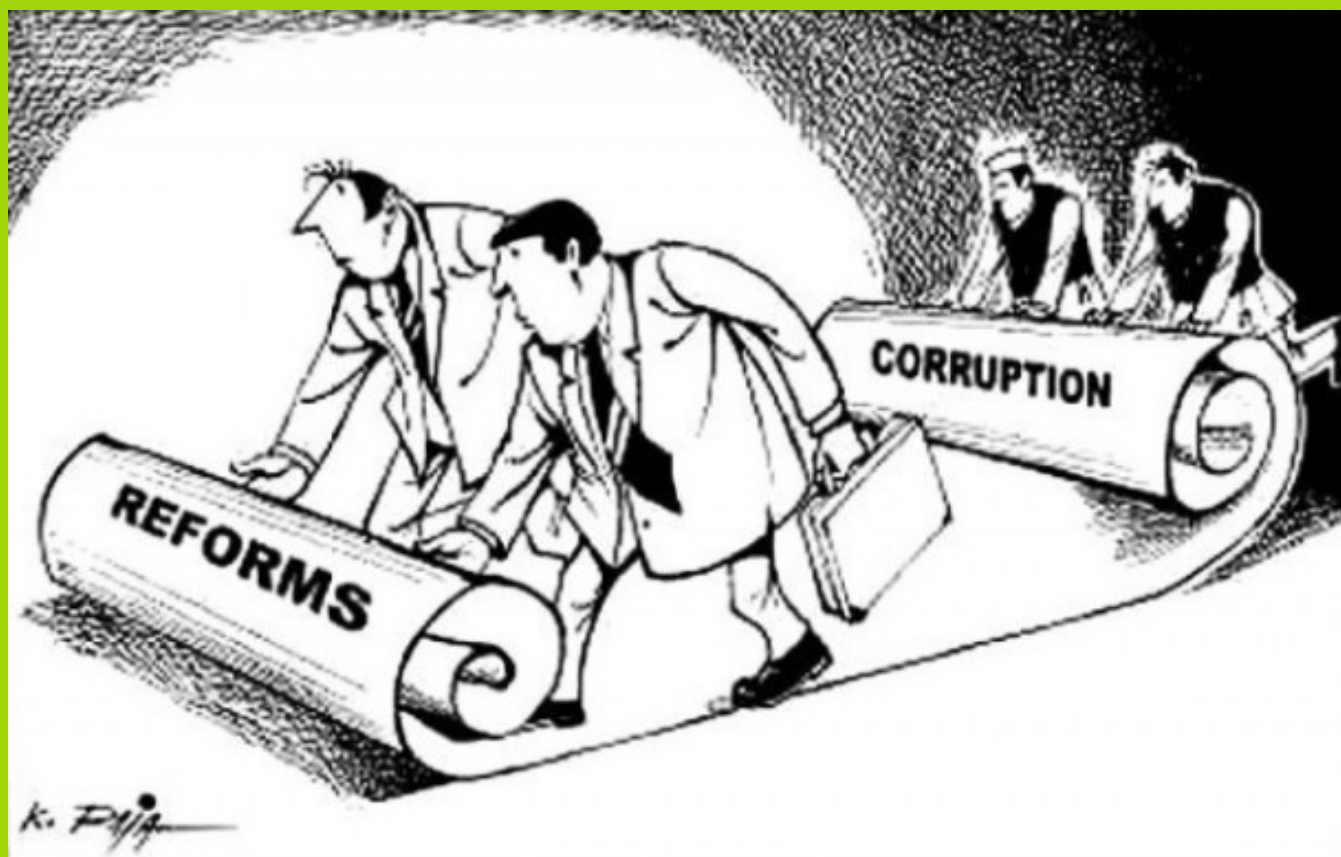
# perspectives

Issue 8  
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POLITICAL ANALYSES AND COMMENTARY

## Middle East & North Africa

### Corruption in the MENA region: Between discourse and reality



# Contents

1. Editorial	3
2. Acknowledgements	4
3. Political corruption in the MENA region <i>Transparency International</i>	5
4. No corruption committed, or no justice delivered <i>Osama Diab</i>	12
5. The Politics of Corruption in Palestine <i>Tariq Dana</i>	16
6. The environment, main collateral damage of an unusual level of corruption <i>Suzanne Baaklini</i>	20
7. The fight against corruption: A battle promised, but never fought <i>Abdessamad Saddouq</i>	26
8. The Generator Mafia Shatters the Citizens' Dream in Zahle <i>Noor Baalbaki</i>	29
9. Public-Private Partnership <i>Rachid Filali Mekkassi &amp; Mounir Zouggari</i>	31
10. The Malice of Power <i>Ansar Jassim</i>	37
11. Corrupted still? Four years after the revolution, ex-regime assets remain contentious in Tunisia	43
12. Illicit enrichment <i>Michèle Zirari</i>	47
13. The obligation of public information: A means to fight corruption <i>Okwe Ndong Vincent</i>	52

# 1. Editorial

The fight against corruption in the MENA region has gone through several ups and downs. Prevention, awareness and purification campaigns aiming to eradicate endemic or systemic corruption have had very little impact. The political will and the good intentions formulated in speeches and conferences during the democratic transitions referred to as the “Arab Spring” have hardly born results. On the contrary, in a phase of restoration of the old regimes, corruption continues to be a real impediment to the progress of our countries towards democracy and socioeconomic development that can offer living conditions that respect human rights and human dignity in a healthy and unpolluted environment.

The countries of the MENA region continue to suffer, to different extents, from the existence of corrupt practices that prevail on a large scale within both private and public sectors, as demonstrated by the Corruption Perceptions Index (CPI) that ranked the MENA countries in 2014 between 55 (Jordan) and the 170 (Iraq). This reflects the enormous difficulty faced by the region to implement effective reforms in the fight against corruption, although some countries in the region have ratified international conventions that provide a legal framework and a common strategy geared towards this goal. However, they are hardly translated into national legislation and the few existing or hastily-made national legal initiatives often remain ineffective against illegal practices such as illicit enrichment, conflict of interest and insider trading.

Some countries do have a legal arsenal that criminalizes most forms of corruption. Nevertheless, impunity and special privileges make those laws ineffective in the absence of sincere political will and practical strategies.

Four years after the “Arab Spring”, when demands to eradicate corruption took center stage, we thought it is time to shed some light on the evolution of this issue in the MENA region. The first article, derived from a study of Transparency International, provides an

overview on political corruption in the MENA region, while issuing key recommendations to overcome this issue. Following that, Osama Diab's article explains how several cases of corruption were handled by the Egyptian judiciary since the fall of the Mubarak regime. Tarik Dana's article portrays the corruption of the political elite in the Palestinian Authority. Lebanese journalist Suzanne Baaklini explains how environmental degradation has become a major collateral damage of a high level of corruption. Abdessamad Saddouq talks about the battle announced but never delivered for a genuine fight against corruption in Morocco. Our colleague from the office of the Heinrich Böll Stiftung in Lebanon, Noor Baalbaki, sheds light on the scandalous management of electricity by the state in Lebanon. In the same vein, Rachid Filali Meknassi and Mounir Zouggari analyze the various forms of public-private partnership (PPP) in Morocco, their legal structures, advantages and risks. Ansar Jasim discusses how arbitrary arrests in Syria are ever more related to a macabre practice of corruption under the regime of Bashar al-Assad. The Tunisian journalist Hnai J'mai explains how property confiscations after the revolution in Tunisia had transformed into state burden and portfolio of corruption. We conclude with two articles from Morocco written by Michèle Zirari Devif and Okwe Ndong Vincent comparing respectively illicit enrichment and the right of access to information, two fundamental pillars of the fight against corruption, to international norms.

*The articles are illustrated with cartoons by activists and artists from the MENA region.*

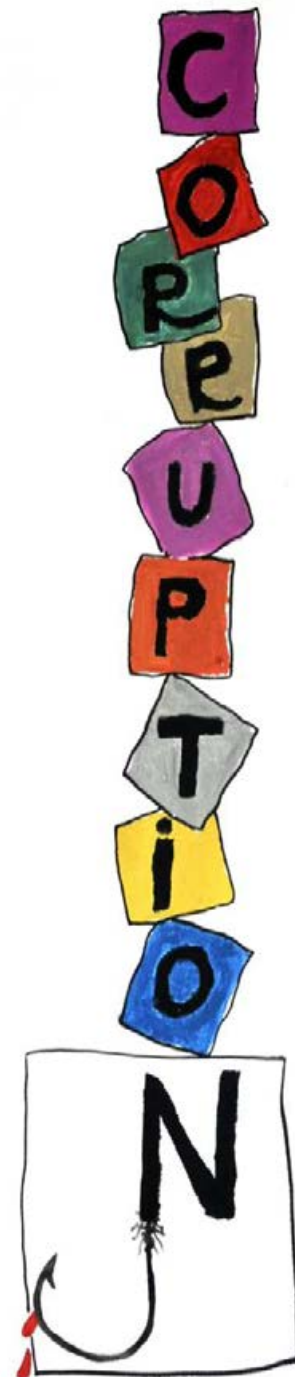
**Bente Scheller, Dorothea Rischewski,  
Joachim Paul & René Wildangel.**

## 2. Acknowledgements

The Heinrich Böll Stiftung North Africa Rabat office would like to thank all the people who have kindly accepted to contribute to this magazine, dedicated to corruption in the MENA region.

We particularly would like to thank:

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- The team of Transparency Maroc, partner of the Heinrich Böll Stiftung North Africa Rabat office, who have ensured the coordination and the monitoring of this publication,
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- As well as all the artists cartoonists who have generously participated in enriching this publication.



### 3. Political corruption in the MENA region

## *Transparency International*

The nature and manifestations of political corruption differs from one country to another. However, in all cases it translates into corruption acts committed by a specific ruling class and individuals, politicians, leaders of political parties, and members of government (ruling elites), regardless of their political affiliations and or positions. Political corruption is when this “Elite” group of individuals colludes to: exploit their position of power to influence decisions, policies, and legislations to their favor whether it is for personal interest, or to support loyalists, obtain illicit gain for personal wealth, enhance personal financial and social status, or fund election campaigns. It is also when one facilitates obtaining and legalizing bribery in return for granting the use or possession of state land, or for granting contracts, privileges, permits, licenses, or trade agreements. Such actions and behavior transform the public treasury into personal bank accounts for this elite group, including excessive spending on personal recreation activities and smuggling of public funds abroad to bank accounts and or investments.

Political corruption is also often accompanied by arbitrary use of authority against powers granted to other parties of the political system. This is done with the purpose of achieving gains and interests that differ from those that the power was granted to in the first place, hence becoming a totalitarian regime that controls the details and positions of decision making at the political and economic levels. In addition, this regime and its decisions are not subject to any legal or popular accountability or external monitoring and control. This is mainly due to: immunities granted, as well as weakness of parliaments, monitoring and or judiciary officials who are subordinate to the regime.

In order to contribute directly to the democratic process, sought by the anti-corruption movements and activists, which revolves around the basic principles and provisions of the constitutions of Arab countries, and to avoid the return of political corruption, Transparency International chapters in the region took the initiative to prepare an analytical diagnostic report that have examined manifestations of political corruption in six Arab countries: Palestine, Morocco, Yemen, Egypt, Tunisia, and Lebanon. The results of this report have led to the following conclusions and recommendations:

### Conclusions

First: The principle of separation of powers

Despite the existence of constitutions that include reference to the principle of the separation of power, implementation of this principle is ineffective. In that regard, in most of the countries covered in this report, what emerged was the following: absence of balance in the distribution of powers between authorities; predominance of the executive authority (king or president) over the legislative and judicial authorities; exclusion of the head of the executive authority and officials of subordinate institutions from accountability; and re-election of the ruler for life, which converted the ruler into an icon for resistance where partners in the ruling class seek his blessings and protection, where all became immune against being held accountable, not to mention that the principle of separation of powers does not exist as far as these officials are concerned.



**TRANSPARENCY  
INTERNATIONAL**

This report was prepared in partnership with:

- The Lebanese Transparency Association
- Moroccan Association for Combating Corruption - Transparency Morocco
- I Watch Organization - Tunisia
- Yemani Group for Transparency and Integrity
- The Coalition for Integrity and Accountability - Aman - Palestine
- Egyptians without Borders (EWB)

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## Second: The executive authority

### 1. Appointments in senior positions:

most Arab countries have not adopted written and approved conditions and procedures for appointing and promoting senior position officials. Appointments in countries covered by the report are conducted based on: consideration of personal loyalty; political, tribal, and sectarian favoritism. Also absence of a supervisory body on procedures followed such as, commitment to specific standards in accordance with the law, and in particular the principle of equality in competing for these positions, goes unabated. These traditional methods of selecting senior officials reinforced the phenomenon of loyalty to officials of this political class and their mediators, as well as reinforcing exchange of mutual interest at the expense of public interest.

### 2. Submitting of financial disclosures:

Despite the existence of legal texts in regard to financial disclosures in most of the Arab countries, the system is ineffective due to the absence of a political will among senior officials. In addition to:

>> Weakness in procedures that obligates submission of disclosures and penalty when failure to do so occurs.

>> Weakness in mechanisms that confirm accuracy of information contained in disclosures, since it is not allowed to open these disclosures without a court order and on rare occasions, hence the assigned body does not conduct inspection of the content, or follow up on changes and developments that might occur.

>> Adoption of the concept of “secrecy” instead of “transparency” in regard to financial disclosures, in most of the Arab countries. This allows those in power to hide enclosed information regarding illicit gains. Moreover, this method also does not allow for exposure of benefitting from overlapping of interests, or avoiding it if and when it is discovered.

### 3. Conflict of interest:

In most of the Arab countries, there is no comprehensive system or legislations regarding conflict of interest; nor are there adopted and applied procedures that prevent conflict of interest in public institutions. On the contrary, combining a public position or service and a direct or indirect interest in a private company in the private sector is common in a number

of countries. This broadens the possibility of mutual benefits and profiteering, as well as, legalizes and instills the concept of “scratch my back, I’ll scratch yours”.

### 4. Freedom of access to information:

The ruling class, in countries covered by the report, was devoted to the absence of the right to access to information from the texts of constitutions and legislations. And in cases where there is legislations in that regard, it is ineffective when applied, either due to the absence of an overseeing body, or because of the prevailing mentality that believes in withholding information. Until now, the culture of open records has not taken root in most of the Arab countries. Hence under the slogan of public interest, national security, and keeping law and order, information is dominated by the ruling class.

### 5. Public rights and freedoms:

Although texts of most constitutions of Arab countries, especially the new constitutions, do include principles related to public rights and freedoms in their provisions, it is the laws, however, that are issued by legislators that determine putting those principles into practice. And in that regard, most of these laws either have not been issued or existing laws are restrictive of these freedoms and rights, which means that exercising many of these rights and freedoms is either frozen or deferred. In addition, the ruling class used its influence with parliaments to prevent issuing of legislations that granted the right to establish CSOs, or to exercise the right of assembly, where it often made it conditional upon obtaining a security approval.

## Third: The legislative authority

The ruling party dominated control over the legislative authority in most of the countries covered by the report. This was executed through the majority of members it enjoyed within these parliaments, which weakened the oversight function of parliaments and made the executive authority immune against any accusations and or questioning. This was also due to the poor representation of the opposition in these parliaments, as well as their limited influence in the decision making process as they were excluded from leadership positions as well.

## Fourth: The Judicial authority

State of the judiciary in most of the Arab countries covered in this report points to the influence and interference of the executive authority in the affairs of the judiciary authority. Manifestations of this interference include playing an influential role in selection



and procedures of appointing, dismissing, delegating, promoting, and disciplining judges. Moreover, it often controls the judiciary budget. This is in addition to its authorization of establishing special courts to try civilians; lack of respect for court decisions; exercising pressure on the judges to influence their decisions when looking into specific cases, either to close the files or to decide in favor of a particular party.

Subordination of the Attorney General is to the executive authority (the president) although he is part of the judiciary. The executive authority interferes in the general prosecution apparatuses through the Minister of Justice. It is also common to see the Attorney General working as the lawyer of the regime, and not the protector of citizens.

#### Fifth: Representative elections

In many of the related countries, especially during previous regimes, the ruling party disabled the electoral process or forged election results through violence, bribery, exploiting public funds and property, unjustified security interference in the electoral process, and creating electoral systems that enable this class to control results of elections. This resulted in: loss of credibility and trust in elections among citizens; regression in citizens' participation in political life; change in parliament's image as it became the forefront of the regime. This class also controlled the electoral supervisory body whose members are appointed by the ruling class hence subject to its pressure and influence. It is worth noting that this body was neither neutral nor independent in many of the related countries, as the report indicated.

#### Sixth: Management of public funds and property

>> In regard to endorsement of public budgets, parliaments seem to be short of doing their job. In most cases this process seems a mere formality. Budgets are presented incomplete as much of the revenues and investment funds are not included in these budgets. Also budgets of many of parties present their budget as a lump sum (one total number) with no details hence it is not under the control of parliaments. Moreover, end of the year closing accounts are not presented to parliaments in the majority of cases.



>> Processes of granting concessions for utilizing public resources and utilities, expanding basic citizen's services, and management and distribution of state land constituted direct violations of the law. These processes and mechanisms also symbolized main manifestations of looting of public funds by which officials gained illicit wealth. Policies entailed contributed to reinforcing relationships between the ruling class and high officials in the military and security apparatuses, as well as reaping benefits from the private sector, where exchange of positions and locations in a cooperative fashion was conducted at the expense of the middle and lower poor classes in society.

#### Seventh: Public monitoring and control institutions, commissions, and apparatuses:

These bodies, in total, were subordinate to the head of executive authority, which affected its independence. Very often, these bodies worked with permission and supervision of the executive authority leaving its reports' recommendations hostage to this authority. Moreover, its members do not enjoy proper immunity to do their jobs properly and efficiently. In addition, these bodies are unable to submit corruption files directly to the General Prosecution. And the public has no access to these bodies' reports as they are often kept confidential.

#### Eighth: Security, Police and Military Institutions

>> In order to impose its authority, facilitate self protection, and oppress opposition, the ruling class used the security institution as its instrument. Based on the above, relationship of the president or king with these apparatuses was direct. He also assumed the position of Commander in Chief of the armed forces.

Furthermore, many regimes resorted to establishing special security forces and apparatuses such as the republican guard, state security, preventive security etc., for its own protection. In many of the related countries, the security apparatuses played a decisive role in the civil and economic lives as well as in the electoral process of these countries.

- >> The security institution, in most of the related countries, is not subject to parliaments' supervision, control, or accountability. Its budgets are presented as a lump sum figure (one total number) without details. Moreover, there is no enactment of provisions related to financial disclosures of officials of the security apparatuses.
- >> Budget for the security apparatuses accounts for more than a third of public expenditures at the expense of health, education, and social security of the people.



### Ninth: Political parties

Countries that allowed political parties placed restrictions on their formation, activities, and funding. This was done either through passing special governing legislations, or by taking control over the licensing body. This in return, reaped benefits for the ruling party and its members as well as contributed to the existence of a large ruling political party with

a majority in parliament with only few other small parties.

### Tenth: NGOs

Many of the Arab countries impose several restrictions related to procedures of establishing NGOs; most of which are in violations with the law. It arbitrarily imposes conditions and requests documents that are not required by law. It also delays issuance of decisions regarding establishment of NGOs beyond the legal time set by law for that purpose. Furthermore, governments have a negative view of NGOs, and see them as a security threat to the regime. In that regard, the ruling party sought to establish NGOs under its jurisdiction as a way to control CSOs work and activities in any of the Arab countries.

### Eleventh: Media

The state of media in most of the countries related indicates the control of the ruling party over official media, and recruiting it to its service including: ignoring stances of political oppositions; exploiting official media in facing opposition forces; ensuring the existence of legal framework that shackles the rights and freedoms of media, civil, and private work, and delineates red lines that cannot be crossed for media personnel and outlets; otherwise will suffer the consequence of being harassed, tried, and or imprisoned, and especially if they cover corruption cases. Direct censorship by official and non-official security apparatuses is imposed on newspapers, media outlets, bloggers, and the internet in general.

## Recommendations

To consolidate efforts of: activists, institutions and organizations, anti-corruption movement, in cooperation with other parties that work towards building a democratic system, which respects human rights and dignity, and strives to achieve social justice, as well as efforts of those involved in re-writing the new social contracts, to include the abovementioned principles in the provisions of the these contracts in the Arab world. This will ensure the success of an anti-corruption plan and the cooperation of all parties, official and civil, when working towards adopting the following principles for combating political corruption:



1. **Ensuring a balanced separation of powers among the three Authorities:** when drafting constitutions, the texts should include: balanced distribution of powers between authorities, and removal of all areas of possible interventions and ambiguity that provide for the executive authority to have predominance over other authorities. To also ensure that the subordination of all authorities to mutual supervision so that no official is immune from accountability, and specially those at the top of the executive authority. It is important to note that the parliament is the best system to achieve this; i.e., the government is the owner of the actual power and is held accountable before the parliament within the system, while the president hold a symbolic position, and has no executive power.
2. **Ensuring an executive authority that is transparent, fair and is subject to accountability:**
  - a. **In reference to appointments in senior positions:** to promote a parliamentary system and not a presidential system; In cases where the presidential system remains, it is vital that the president remains "constricted", and under no circumstances should he exceed two four year terms in office; adopting special legislations for appointments for management of senior positions'. The legislations should define requirements and standards needed for holding these positions. Legislations should also prohibit discriminations on bases on faction or sect affiliation, but on experience and competence. Forming a special committee on professional bases (Committee for appointments in senior positions). The committee shall take on the responsibility of ensuring that candidates meet the required conditions and standards for the job, and to also examine the extent of commitment to provisions of the related law.
  - b. **Assets and financial disclosures of high state officials:** limiting submission of asset and financial disclosures to those holding high official positions and their families, and to ensure that this is a condition for assuming these offices; in particular, the president, prime minister and ministers, speaker of the house, and parliament members etc. Otherwise they will be stripped of the granted immunity. Moreover, ensure that disclosures are submitted regularly and not for one time only, as well as ensuring that these disclosures are followed up with to confirm accuracy of information entailed and proper use of that money in order to prevent impunity in cases of accumulating illicit wealth. Finally, adopting the principle of revealing contents of these disclosures and not keeping it confidential especially for senior officials.
  - c. **Preventing conflict of interest prior to or as it arises:** draft and ratify legislations specifically to prevent conflict of interest among those who assume management of public funds, especially for those who assume senior positions; adopt understandable procedures to be implemented in public institutions. Separation of powers between positions of the public and private sectors should be explicitly illustrated. Also to clarify and specify the mandatory period which falls between leaving a civil service, or a position with the security apparatuses and assuming a private sector's position or the opposite. This especially applies to high officials. Moreover, to adopt a code of conduct for public employees that define situations where conflict of interest is more likely to occur, as well as ways to prevent it, in addition to conducting training for better implementation of the code.
  - d. **Endorsing Legislations on the Right to Access Information:** incorporating in constitutions the right of citizens to access information on public affairs. And to also issue "Freedom of Access to Information Laws", and to ensure citizens' right to access it in accordance with international standards in this area. Furthermore, deterrent measures should also be included against anyone who would hinder citizens' access to public information. In addition, to establish national commissions that will ensure implementation of, and citizens' access to information, and reinforcing of the openness culture among public employees by raising their awareness on citizens' right to information.
3. **Electing the Legislative Authority and granting it legislative powers, and control over the executive authority:** the need to adopt the principle of holding free and fair elections as the only way to form parliaments, and to have all executive institutions subject to its control, and especially the security apparatuses, presidential institution and all executive institutions and apparatuses under

its jurisdiction. Equally important for parliaments to incorporate rights for the opposition within its bylaws and systems, and especially in assuming leadership positions in parliamentary institutions, to prevent absolute domination of the majority and exclusion of the opposition.

4. **Ensuring independence of the Judiciary, and granting it necessary resources to insure effectiveness:** removal of all wording in the constitutions and legislations that allow any meddling in independence of the judiciary, and especially those related to appointing, dismissing, and immunity of judges; ensure the independence of the body that assumes supervision over the Judiciary; to consider refusal to obey implementing provisions of the Judiciary a crime punishable by law, and a reason for firing an employee from his/her job if he/she hinders implementations of these provisions. Moreover, to state clearly that the Attorney General and the General Prosecution apparatus are part of the Judiciary, hence ensuring that the executive authority can no longer interfere in their affairs; to grant the General Attorney the immunity necessary considering that he is the defender of public interest and not the ruling class.



5. **Hold fair and transparent general and representative elections at all levels:** it is vital to incorporate safeguards to ensure that the electoral process is fair and transparent by adopting electoral systems that allow representations of all segments of society and its constituents. The System of proportional representation is the best to achieve this due to: its role in promoting political pluralism; preventing interference of members of security in the electoral process with the exception of

guarding election centers; allowing local CSOs and international organizations parties as it relates to public funding of election campaigns, or benefiting from official media; establish permanent higher commissions that enjoys independence and immunity from pressures that effect the integrity and transparency of elections, to supervise the electoral process. Its tasks regarding supervision of elections should be defined, which mainly to oversee the electoral process at all stages beginning with announcement date and until announcing the results. Also it is essential to provide it with resources and powers needed to perform its job.

6. **Management of public funds and property with transparency, while ensuring public oversight over its administration:** inclusion of all state's revenues and expenditures in the public budget, and subjecting it to the parliament through the budget and end of the year financial account. Also review of legislations related to concessions in services and benefitting from public resources, public procurement, and disposition of state land. The purpose is to close gaps that allow exploitation and looting of public funds, hence promoting transparency and competition. Limit the use of state land for the service of the public interest, while disarming the executive authority from granting or selling it under any circumstances, and introduce new legislations that are transparent in regard to public procurement and tenders.
7. **Ensuring, at the high political level, that the security apparatuses do not interfere in the political life, and civil affairs of citizens; also subjecting it to official and community monitoring and control:** prohibiting the establishment of security services outside the scope of the official state's institution; building the official one on professional bases; subjecting its leaders to the higher political level and its budget to the parliament. Committing to the time allowed by law to appoint leaders in position; prevent security forces from interfering in political and civilian life. Moreover, security officials have to be held accountable for their actions and behavior, and especially when it intrudes on public rights and freedoms.

8. **Independence and effectiveness of public control institutions:** enhancing the independence and effectiveness of public monitoring and control institutions, so that it is no longer a subordinate to the control of the executive authority; provide immunity to these institutions in order to resist outside pressure that coerce it to deal with corruption cases selectively or to even out political scores. Moreover, establishing anti-corruption commissions, since they are considered an important factor in combating corruption and in compliance with the UNCAC; ensuring that these bodies are independent and are well equipped and staffed to perform its job properly.
9. **Safeguarding the freedom to establish political parties which reflects the diversity in society.** To also ensure control over its funding and campaigns: finalizing legislations relating to the right of organizing political parties, and removal of restrictions that hinder practice of this right; adopt policies that forbid exclusion of political activities of some political forces and ensure equal opportunity between them to be elected, obtain funds, and enjoy media coverage by official sources etc. Moreover, include assurances to criminalize behaviors of political parties that effect voters in illegal ways such as buying votes, and bribing voters. Finally it is also important to control on ceiling of expenditures of election campaigns, and impose mandatory financial disclosure for parties and candidates.
10. **Safeguarding the freedom to establish NGOs:** To stop putting restrictions regarding establishment of NGOs, and to consider registration, not licensing as sufficient requirement for establishment; to provide government support for NGOs to enable these institutions to play their monitoring role as well as provide services at the community level.
11. **Approval of law for media freedom and independence:** to stop exploiting official media based on the concept that it is a possession of the executive authority; also to stop exploiting it during elections campaigns for the interest of factional or sectarian interests, and to remember that it is a national media. In addition, it is important to stop censorship of media personnel and journalists when addressing corruption files by terrorizing them and detaining them under the pretext of defamation and slander.

## 4. No corruption committed, or no justice delivered

### *Osama Diab*

#### The Mubarak regime corruption trials: No corruption committed, or no justice delivered?

As part of my anti-corruption research work, I have been tracking the 33 most high profile corruption cases against members of the Mubarak regime. The 33 cases were chosen based on a few criteria including the scale of corruption (only cases of so-called “grand corruption” were included), how close the defendants are to the Mubarak political regime and whether the trials were a direct result of the January 25 revolution, or in other words, would the cases have been brought before a court if the revolution had not taken place?

The 33 corruption cases are against 17 defendants, of which 13 were top public officials mostly in ministerial positions, ten were leaders in Mubarak’s ruling National Democratic Party (NDP), and three were members of Mubarak’s family including Mubarak himself. Needless to say, the reason the total number is larger than 17 is because most of the defendants served in more than one capacity. For example, Gamal Mubarak was both a member of Mubarak’s family and an NDP leader, while Sameh Fahmy was both the Minister of Petroleum and an NDP parliamentarian.

Out of the 33 cases, not a single case has ended with a final conviction (as of April 16, 2015). Twenty four of the cases ended with a first-level conviction, three with a financial settlement before a verdict was given and only six ended with first-level acquittal. The Cassation Court ordered the retrial of all 24 cases (except seven in-absentia convictions) and did not uphold a single one. Out of the 17 retrials, seven ended with acquittals, and 10 are still ongoing. Bottom line is that not a single case whose verdict was conviction in the first-instance ruling ended with conviction in the retrial. One hundred percent of the first-instance rulings were annulled by the Cassation court, and then they were all overturned in the retrial leading to a conviction.

Two possible explanations here could be that the Mubarak regime did not commit any corruption acts and all the accusations against them amount to pure fabrications. The second explanation is structural in nature; that something in the institutional and legal mechanisms makes it impossible to have brought the Mubaraks and their associates to justice despite committing acts of corruption. Any observer of Egyptian affairs knows that latter is probably true.

How and why did the trials end without a single conviction, a fine or an official warning or condemnation? Was it the case that no corruption at all was committed under Mubarak’s supervision, or that no justice was delivered?

#### Lawful corruption

There are a several causes for such a dramatic judicial conclusion to Egypt’s glorious revolution. Due to the lack of solid laws, even an independent judiciary would have struggled in this particular legal framework to convict the defendants because any court’s job is to determine whether a certain act violates an existing law, but not to question the mechanisms by which the laws came into existence.

The parliament under Mubarak was dominated by those who after the revolution were accused of corruption through fraud and rigging elections. By buying votes and intimidating the opposition, they managed to have a monopoly over law-making which enabled them to pass laws that would ultimately ensure that they came out unharmed by possible trials.

One example of the restrictions imposed by bad laws, is the refusal of the successive governments and parliaments during the Mubarak era to pass a conflict of interests law to prevent ministers and government officials from having business interests in the same field. This was one aspect of the United Nations Convention against Corruption that Egypt signed and ratified in 2003 and 2005 respectively. One example of a blatant conflict of interests is when Egyptian billionaire and real-estate tycoon Ahmed al-Maghrabi was



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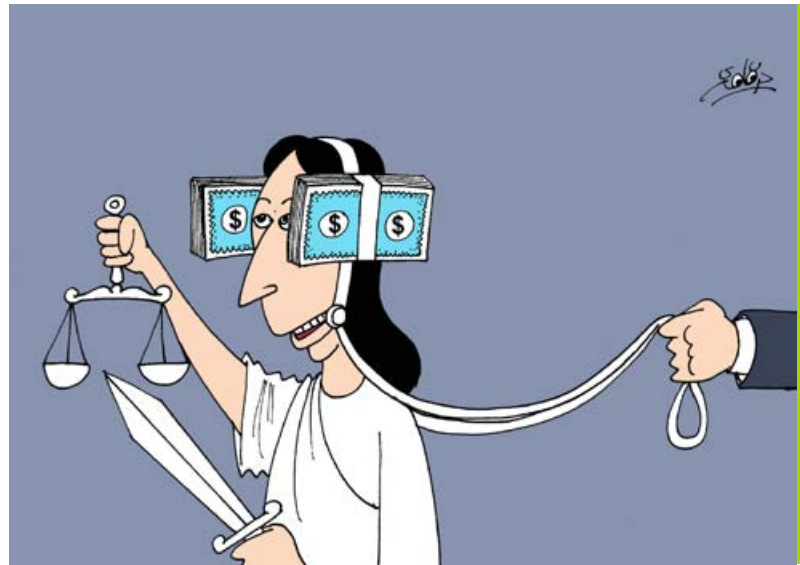


appointed as Minister of Housing. Maghrabi started granting public land to himself—in his capacity as minister and director of the governmental New Urban Communities Authority (NUCA) and in his capacity as the owner of a real estate development company—at a fraction of the fair market price and by taking advantage in a “legal” manner of the New Urban Communities Law that states, “the Authority, in its endeavor to realize its objectives, retains the right to conduct all activities and businesses aimed at fulfillment of its designated programs and priorities, and to directly sign contracts with individuals, corporations, banks, and local and foreign organizations pursuant to the codes determined by the Authority’s internal charter.”

In the absence of any conflict of interests law, Maghrabi was able to, in one case, to grant his own company—without a bidding process—a million square meter land in a strategic location in New Cairo at a price of LE 241 million, or LE 241/square meter. It is believed that the market price for this land at this point was LE 4,000/square meter as indicated by many independent NGOs and an administrative court that ruled the land was gravely underpriced. It is worth mentioning that Alaa Mubarak, the former president’s older son, owned over three percent of Maghrabi’s company.

In fact, the cabinet Maghrabi belonged to, which was appointed in 2004, is infamous for having many businessmen taking ministerial positions all in their own field such that it became known to the public as the “businessmen’s cabinet”. Other than the Minister of Housing, the Minister of Transportation was the owner of the biggest car dealership in the country; the Minister of Health was the proud owner of the country’s biggest hospital; the Minister of Industry was the chairman of the country’s biggest food factory; the Minister of Tourism was one of the biggest investors in the tourism industry.

Another questionable law that allowed the Mubaraks to walk free in one of the biggest corruption cases involving the ousted president, was when his family was offered five villas in strategic location in Sharm al-Sheikh, the top touristic city of Egypt, at a tiny fraction of its market price by a friend and a tycoon businessman Hussein Salem who is involved in many corruption cases in the US, Egypt and Spain. This was probably one of the cases that had the most compelling evidence against Mubarak and his family and was only dropped by the court because it exceeded the statute of limitation of 10 years. The catch here was that the limitation was counted



by starting at the date the villas were “sold” to the Mubaraks. However, Transparency International and agreed-on international best practice recommend that a statute of limitation in such cases should begin the day an official leaves public office, otherwise, a statute of limitation becomes more of a “countdown towards impunity” as described by Transparency International. Given the authoritarian nature of the Mubarak regime, it would have been impossible to open investigations while Mubarak was still in power—i.e. before the end of the period of the statute of limitations.

Another way an independent judiciary would have struggled to bring the Mubaraks to justice is what is described in Egyptian law as “reconciliation.” One amendment to the investment law that was passed in 2011 just after the revolution by the then-ruling Supreme Council of Armed Forces (SCAF) allowed for “reconciliation” in cases of embezzled public funds. At least three out of the 33 corruption cases ended with such a reconciliation, one of them involving Mubarak himself and the other involving his infamous minister of interior Habib al-Adly. They were both accused of receiving gifts in the tens of millions from Egypt’s biggest state-owned newspaper, and managed to get off the hook by merely paying off the equivalent amount of the “gifts” they received from the taxpayers’ money.



## Systematic and wide-scale plundering as a lesser crime

Essentially then, corruption that has plundered the country and caused the degradation of public institutions for three decades is seen by the Egyptian justice system as something you can settle by paying a few million pounds. Almost all governments since the revolution of January 2011 have expressed this sentiment. The first ruling SCAF (Supreme Council of Armed Forces) and the public prosecutor appointed by President Mohamed Morsi of the Muslim Brotherhood all said that reconciliation can happen only in crimes of squandering public funds and not «crimes that involve blood» because they are crimes of a different nature. However, this sentiment is not unique to Egypt and international law also distinguishes between the severity of violations of physical integrity and the «victimless» crime of corruption in the mandates of international courts and the scope of universal jurisdictions in countries that apply them. This happens despite the consensus that severe violations of physical integrity such as war crimes, genocide, etc. is almost impossible to be committed by a government that is transparent and corrupt free proving an almost-persistent mutually-reinforcing relationship between corruption and human rights violation. In other words, it will be very difficult for one to survive without the other. Transparency International, in a working paper from 1998, points out: "A corrupt government, which rejects both transparency and accountability, is not likely to respect human rights. Therefore, the campaign to contain corruption and movement for the promotion and protection of human rights are not disparate processes. They are inextricably linked and interdependent."

## At the judge's discretion

It is not just the issue of law restricting judges here since, in many cases, judges were obviously using their discretionary power to the benefit of the defendants. One of the biggest corruption cases against Mubarak was seen when he was charged with selling underpriced natural gas (a strategic commodity in energy-poor Egypt) to his friend Hussein Salem with the purpose of exporting it to Mediterranean countries through pipelines. It was no secret that the prices were extremely low and according to some was even below the cost of production. Many court cases in Egypt before the revolution,

NGO reports and even the Israeli recipients of gas all admitted that the prices charged were too low. Ramzi Halaby, a prominent professor at Tel Aviv University told Russia Today shortly after the overthrow of Mubarak in 2011: "We need to know that over the past ten years, importing from Egypt has been saving Israel USD 10 billion. First, the prices at which Israel buys from Egypt are very low; and second, this forces other companies to compete to lower their prices."

Another two Egyptian courts ordered the discontinuation of gas exportation to Israel in 2008 and 2009 because the prices were below internationally agreed ones and under the market value.

The judge at the retrial of Mubarak's gas corruption case ignored all this, including testimonies and reports from state authorities (such as the investigations of the police's public funds department and the Administrative Control Authority), and the previous rulings of fellow judges. He decided to dismiss all prosecution testimonies for no viable reason other than being "unable to guide the court in the dark tunnel."

What offered the needed guidance to the court instead was all defense testimonies, although they came from government officials in the Mubarak regime who were accused in other corruption cases, and were directly involved in the allocation of the underpriced natural gas to Mubarak's friend. These include the two prime ministers who oversaw the development of the dubious deal such as Atef Ebied, who had to approve the pricing decision and contractual conditions himself in 2000. The two prime ministers who appeared before the court as defense witnesses were and still are themselves involved in two ongoing cases of squandering public funds. The law in Egypt gives judges such unrestrained discretionary power.

The judge in this important case also decided to take off his robe and deliver a political statement openly flouting any regard to at least an appearance of partiality. The following is a paragraph taken from the verdict's explanatory document: "...This is indeed proven by the establishment of the international American Hebraic scheme, according to which the political order known as the Greater Middle East Project is established, which briefly relies on the division of the larger Arab countries to a number of smaller states, in order to achieve their goal of preserving the Zionist entity's position to exercise hegemony over the Middle East." The explanatory document - the only official document related to this court case offered to the public - was laden with such political gibberish.

Ultimately, the case of Mubarak highlights how in post-dictatorship settings, national courts and legislation are usually unfit, unwilling and unable to bring the former dictator - especially one who served a long tenure - to justice due to the previous co-optation and degradation of such institutions carried out by the dictator and his clique - all of which left behind weak, corrupt and failed Constitutions. This, combined with a lack of effective international mechanisms such as international courts or universal jurisdiction in corruption crimes, and violations of civil and political rights ensure the near impossibility of prosecuting corrupt dictators at home. Wide-scale corruption therefore becomes a crime that remains unprosecutable in many developing countries until further notice, and the Mubarak regime's corruption trial is just one example of that global problem.

*Translated from Arabic to English.*



## 5. The Politics of Corruption in Palestine

### *Tariq Dana*

More than twenty years after the establishment of the Palestinian Authority (PA), opinion polls persistently reveal a general belief in the presence and practice of corruption in the PA institutions, despite reports about improvement in good governance and transparency in recent years. According to a freshly released report by the Palestinian Coalition for Accountability and Integrity (AMAN) -Transparency International chapter in Palestine- 85% of the Palestinian public believe in the existence of corruption in PA institutions<sup>1</sup>.

In fact, corruption seems to be a structural dilemma within the PA despite the 'effective mechanisms' adopted to tackle it. Several possible explanations for this will be explored in more detail throughout this article: the framework governing the PA, including the power monopoly of the elite; authoritarianism; aid dependent economy; Israeli control over the PA resources and its commercial relations with some Palestinian political-business-security elite; and internal Palestinian divisions and the dysfunction of the Palestinian Legislative Council. These are all factors that stimulate and enable corruption.

Corruption siphons off scarce Palestinian resources and breeds a wide range of social problems, contributing to inequality and harming the social fabric. The effects of corruption are particularly problematic in the Palestinian context, given the Israeli occupation and systemic colonization of Palestinian resources even as Palestinians are struggling to survive economically and preserve their presence on the land. In addition, the "corruption card" is occasionally used as a political weapon by Israeli propagandists, who aim to deform the Palestinian image around the world. In some instances it proved to be an effective mechanism to pressure the PA to change its policies, or even to undergo an externally imposed "reform" to suit the Israeli government's agenda.

International organizations' reports about some improvement in fighting corruption

mostly focus on technical solutions, but often ignore the root causes, which are embedded in the very nature of the political regime itself. In contrast, this article highlights the issue of corruption in Palestine from a broader perspective and argues that corruption should not be only understood as a practice but rather as a self-enforcing system. Thus, corruption will remain a dynamic phenomenon within the PA with its 'trickle-down' effect on the society as long as Palestinians themselves do not begin with restructuring their national institutions along democratic principles and accountability, taking into consideration the moral requirements of national liberation and self-determination rather than a limited, neoliberal understanding of "good governance" that previous attempts were based on.

### Elite corruption

Elite corruption takes place at the highest levels of political authority. This kind of corruption could be the most difficult to trace given that the elite is often protected by social, political or legal (in case of officials) immunity and also because of the complexity of the process. Part of the complexity stems from the transnational nature of elite corruption whereby capital operates through black markets and money laundering, and the profit of which is generally hidden in bank accounts abroad. This type of corruption can be categorized as "illicit capital flow".

Illicit capital flow is rarely documented in the context of the PA. What we know about stash funds generally comes to light in times of internal political conflict within the elite circles, when mutual accusations of large-scale embezzlement dominate news headlines. For example, Mohammed Dahlan, the former Gaza security strongman who accumulated much of his wealth from monopolies over key imports in Gaza during the 1990s, was expelled from the Fatah Central Committee due to allegations of skimming off tax revenues into his bank account, which he in turn used to manage



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<sup>1</sup> Survey on the Perceptions of Palestinian Public of Corruption 2014, Coalition on Integrity and Accountability (AMAN), Ramallah, Palestine.

businesses in London and Dubai<sup>2</sup>. Similarly, the former economic adviser to late PA President Yasser Arafat, Mohammad Rashid, was sentenced in absentia for transferring millions of dollars out of the Palestinian Investment Fund, and setting up fake companies. In response, Rashid revealed that Fatah has a secret bank account in Jordan with a balance of \$39 millions, which is run by Palestinian President Mahmoud Abbas and two of his associates<sup>3</sup>.

PA elite corruption receives broad international attention – partly due to the above mentioned efforts of Israeli “hasbara” (public diplomacy / propaganda) – and was prominently discussed in the U.S. House of Representative’s Committee on Foreign Affairs in 2012 hearing on corruption of the PA. The hearing accused the PA of “chronic kleptocracy”, and directly blamed some key members of the PA ruling elite of lining their own pockets as well as those of their cronies.

### Misappropriation of Public Resources

The misuse of official positions to obtain personal gains remains one of the major corruption crimes within the PA institutions since its establishment. Cases involving misappropriation of public resources implicate officials of high and middle positions, and include unauthorized personal use of public resources, rent-seeking, illegal public-private deals, and theft of public property. In the 1990s, such practices were a regular occurrence and had negative impacts on local and international perceptions towards the PA. According to the first Palestinian audit conducted in 1997, nearly 40% of the PA budget (approximately US\$ 326 million) had been misappropriated<sup>4</sup>.

More recent reports don’t indicate substantial improvement in fighting this phenomenon. According to a 2008 report by the Palestinian Coalition for Accountability and Integrity (AMAN), Transparency International’s chapter in Palestine, the abuse of public position for the misappropriation and waste of public property is clearly visible in the allocation of state lands to individuals or firms<sup>5</sup>. The same trend continues undeterred as proven by AMAN’s 2011 report which shows that the waste of public funds remains the most prominent form of corruption<sup>6</sup>.

<sup>2</sup> See: Palestine Papers: Mohammad Dahlan. The Guardian (25, January 2011): <http://www.theguardian.com/world/2011/jan/25/palestine-papers-muhammad-dahlan>

<sup>3</sup> Fatah has secret \$39 million bank account in Jordan, says Arafat’s ‘moneymen’, Al-Arabiya News (10, January, 2012): <http://english.alarabiya.net/articles/2012/06/10/219711.html>

<sup>4</sup> Marie Chene, Overview of Corruption and Anti-Corruption in Palestine. Transparency International (19, January 2012)

<sup>5</sup> AMAN annual report (2008): <http://www.aman-palestine.org/ar/reports-and-studies/678.html>



### Patronage

Given the concentration of political and economic power in the hands of the PA elite, the PA has been firmly structured along a patron-client system, which contributes to the climate of corruption. This system has historically characterized the relationships between the PLO executive and the national institutions and social constituents. The patron-client system was not only inherited by the PA, but also consolidated and institutionalized. Patronage politics has been a key mechanism to secure loyalties, revive traditional ties and co-opt opposition.

Securing loyalties: The PA managed to ensure consent for its hegemony through designing a large public sector without proper planning for institution building. The PA public sector currently employs over 165,000 civil servants who are together with their families fully dependent on salaries guaranteed by international aid to the PA. The security sector is the largest with 44% of total PA employment, and it absorbs between 30%-35% of the PA’s annual budget, thus exceeding by far other vital sectors such as education (16%), health (9%) and agriculture (1%)<sup>7</sup>.

Such a large bureaucracy serves the PA to exert control over constituents and secure loyalties by using a stick and carrot strategy. In fact, employment in the PA public sector does not necessarily imply job security; if employees express a critical stance to the PA policies, they are very likely to be removed from their posts on an arbitrary basis.

Reviving traditional ties: Given that a large part of the Palestinian traditional structure is

<sup>6</sup> AMAN annual report (2011): <http://www.aman-palestine.org/ar/reports-and-studies/1387.html>

<sup>7</sup> See, Alaa Tartir and Sabrien Amrov, ‘After Gaza, What Price Palestine’s Security Sector?’, Al-Shabaka Policy Brief, October 2014

based on tribal organization of social relations, the PA sought to accommodate large families in order to insure their loyalty. When the PA established its Ministry of Local Governance, it included a special department concerned with tribal affairs. The Ministry recognizes Mukhtars (heads of tribes) and authorises them to speak on behalf of their families. In this way, the PA revived the politics of tribalism, which had been marginalized by the rise of national movement in the occupied territories in the period prior to Oslo. Furthermore, the PA appointed some representatives of grand families in ministerial posts based on tribal considerations, and subsequently these ministries became dominated by relatives and friends of the respective minister.

Coopting opposition: Patronage politics aims to coopt and neutralize political opposition leaders through offering them privileges, advantages, and access to prestigious posts in ministries and public institutions. The PA targeted leaders from PLO and non-PLO affiliated parties as well as independent figures and incorporated them into its sophisticated patron-client system.

## Israeli Political Exploitation of PA Corruption

Although failure to produce real and sustainable economic development in the occupied Palestinian territories is attributed to the Israeli policies of control over access, land, and movement, and exploitation of Palestinian resources, Israel has frequently exploited the existence of corruption within the PA to blame the Palestinians for their economic ills. Israel also exploits the card of corruption when it seeks to pressure the PA to pursue compatible policies with its agendas. In fact Israeli reports on Palestinian corruption are usually exaggerated and aim to smokescreen the profound impact of its occupation on the Palestinians.

For example, in its attempt to get rid of Arafat during the second intifada, Israel successfully pursued an international propaganda campaign to deform the PA image in order to push the donor community to exert pressure on the PA and interfere with harsh conditionalities. In particular, Israel exploited the international preoccupation with "international terrorism" by accusing Arafat of utilizing the PA resources to "finance terrorism". However, while Israel failed to provide evidence on Arafat's involvement in financing Palestinian armed groups, Israel managed to push towards a politically-motivated international restructuring of the

PA, which aimed to weaken Arafat's position, particularly through the installation of a new Prime Minister position and the restructuring of the Ministry of Finance.

## The Palestinian Internal Struggle Against Corruption

The issue of corruption has always concerned Palestinians outside the elite circles. They perceive it as an epidemic that hampers their struggle against the occupation. A recent opinion poll suggests that the spread of corruption represents the second most serious problem confronting Palestinian society today in the eyes of 25% of the public, right after the occupation and settlement activities, which stand at 29%.

The first domestic challenge to the PA corruption occurred in 1997 when the first national audit was conducted and revealed widespread corruption. The report confirmed that \$326 million had been wasted, accumulating to nearly 40% of the annual budget at the time. The audit's report was followed by another detailed report by the Palestinian Legislative Council (PLC) and contained a damning indictment of all ministries. Following the studies, 18 of the 21 ministers in office offered their resignation to the President. Despite this major corruption scandal, however, the PA failed to punish those involved in corruption crimes; on the contrary, many of the accused personalities were later reappointed in ministerial posts.

This event was crucial as it opened the Palestinian public eye to the existence of systemic corrupt networks within the PA and laid the groundwork for mobilization and demands for reform and transparency. In 1999, twenty prominent figures, including academics, intellectuals, and members of the PLC signed a manifesto titled "The Nation Calls Us", which leveled harsh accusations against President Arafat of "opening the doors to the opportunists to spread corruption through the Palestinian streets". The manifesto denounced the "corruption, injustice and despotism" that accompanied the establishment of the PA following the signing of the Oslo Accords. In response, the PA security forces arrested many of the signatories and accused them of threatening national unity. Similarly in 2004 there was a growing popular dissatisfaction with the PA's corruption and street protests erupted over some governmental appointments of corrupt personalities. With the increasing internal and external pressure on the PA, President Arafat



appeared in a televised speech to the Palestinian parliament, acknowledging the existence of corruption in the authority and promising persecution of those engaged in wrongdoing.

The issue of corruption played a decisive role in the 2006 elections, which saw Palestinian voters favoring Hamas over Fatah as an expression of popular disappointment with Fatah's corruption and its failure to build transparent institutions. People trusted Hamas due to the transparency of its social organizations which proved to be much more efficient in service provision than the PA. Meanwhile, after years in power in the Gaza strip, popular sentiment holds similar corruption allegations against Hamas, especially after their massive profits from the "tunnel economy" between 2007 and 2014.

However, popular campaigns against corruption have been vastly diminished in recent years due to the intensification of PA authoritarianism and the coercion by its security apparatuses silencing critical voices. Only few institutional efforts are being carried out by NGOs such as AMAN, which continue to document PA corruption cases. Although reportedly some cases of corruption have been brought to justice, the problem itself seems to be structural and therefore requires structural responses that involve the entire political system in Palestine instead of some limited technical treatment.



## 6. The environment, main collateral damage of an unusual level of corruption

### *Suzanne Baaklini*

Lebanon ranks low on the list of world corruption. Its environment is degrading fast. Is there a link between the two? Many, experts say.

Ever since my journalistic career began at the end of the 1990s, topics such as unregulated quarries, bad waste management, untreated wastewater or aggravated air pollution were already hot issues. More than fifteen years and many articles later, I realize that those problems remain largely unresolved, if not worsened. To understand the reasons of this unfortunate reality, one can only look for structural problems within the management of those files in Lebanon. Environmental problems are not separate from very serious complications currently affecting the Lebanese arena: political instability, insecurity, etc. However, knowing that huge amounts of money and strenuous efforts have been spent in trying to solve environmental issues, only one paradigm can shed light on this matter: the remarkable extent of corruption that weights on the country's institutions. Such corruption, present at all levels, has become institutionalized, as if it were an entity endowed with its own form of life, controlling the whole system.

In the latest Corruption Perception Index of Transparency International dating December 2014, Lebanon ranked 136th out of 175 countries. It ranked 128th on the 2013 list: things seem to get worse year after year. The effects of corruption are felt in all the aspects of daily life, according to the Lebanese Transparency Association (LTA) site, not the least being the weakening of the relation between citizens and official institutions. Moreover, a clear link has been established by the NGO Transparency International, in a study done by two American prestigious universities, Yale and Columbia, between the level of corruption in a country and the

quality of its environment. This study shows that a country with a corrupt system has 75% chance to have a degraded environment. For proof, three of the countries benefiting from the best environmental performances, namely Finland, Norway and Canada, are also amongst the least corrupt on the planet. If there is a need of another proof, we can easily notice that Lebanon, one of the most corrupt countries nowadays by all standards, also presents the unfortunate sight of a degraded environment.

The variety of forms taken by corruption (as defined by LTA) are seen in Lebanon and, as we will see later on, all lead to abuse environmental resources, i.e. misuse of public funds, sums of money unfairly extorted by public servants under diverse false pretexts, non-compliance to regulations following bribes to supervisory authorities, biased judicial decisions, payment of bribes by companies in order to win public contracts, etc. Three experts in anti-corruption campaigns and in environment share their experiences in this matter.

**“So common that nobody talks about it anymore”**

“The level of corruption has become alarming in Lebanon. It is as if there were no more means of sanction against corrupt individuals and groups anymore, neither in the judicial system nor within the political institutions.” Rabi el-Chaër, president of the anti-corruption NGO “Sakker el-Dekkaneh”, is worried. “I find that the whole political class, despite the differences between its components, has agreed on operating a putsch by extending their own parliamentary mandates and refraining from electing a president of the Republic”, he says. “In order to legitimize this putsch, they put pressure on the Constitutional Court to approve their actions, and they constantly delay the adoption of a new electoral law that would allow the Lebanese citizens to choose their representatives freely.”



**Suzanne Baaklini** a journalist in L'Orient-Le Jour, a Lebanese newspaper, since 1997, specialized in environmental reporting.

Has covered issues related to privatization of public spaces in Lebanon, mainly projects on the sea front and public gardens, since the late 90s.

For Rabi el-Chaër, the root of all problems lies in the fact that this political class fears nothing in the present configuration: on the one hand, the Lebanese divided society is not likely to conduct a revolution as was the case in other countries of the region, and, on the other hand, the officials have made sure that no regulative authority can at any time bring the corrupt to account. "The Lebanese political parties usually receive funding from abroad, and are therefore accountable only to foreign powers", he notices. "This allows them to bribe all kind of institutions, including some media, and to offer much needed social services to the population. The parties might be divided on many issues, but they easily find common ground when it comes to sharing the cake in the Council of ministers. And in case one of them is accused of wrongdoing, they politicize the matter, taking advantage of the divisions within the population that they, themselves, created."

As a result of this political combination, any controversial file that finds its way to Court is shelved indefinitely and forgotten instantly, including environmental files. "The politicians control the judiciary system", he explains. "Judges are usually nominated by leaders and political parties. They are too afraid of unpleasant transfers if they take decisions that their "benefactors" may dislike. Administrative regulatory institutions such as the Court of Auditors are also controlled by political entities, which greatly affect their work."

According to him, figures tend to prove this tendency: in 2007, Lebanon ranked 99th on the Corruption Perception Index of Transparency International. That year, the Central Inspection issued not less than 200 decisions condemning public employees (although not high-ranking officials). In 2014, this same institution merely took 87 such decisions, while it was clear that the corruption worsened."

The activist clearly considers that this configuration is ruining the environment. "When you see Beirut from a plane landing in its airport, you cannot help but being struck by the jungle of concrete it has become", he says. "Lack of urban planning and chaos in construction is one of the main causes of pollution and deforestation in Lebanon. Where does it come from? Once more, the answer can be found in corrupt practices. When one tries to obtain a construction permit from the Directorate General of Urban Planning (the fourth in the list of corrupt institutions established by "Sakker el-Dekkaneh", based on a survey among the population), the following usually happens: according to our information, the public

employee that receives the file transmits it to at least three entrepreneurs who deal with this institution, in a totally illegal manner. If one of them is interested, they would contact the person who submitted the file to the directorate. In case the latter refuses to deal with them, he will have to wait a long time for his permit to be issued. In case he accepts, things become much easier, and the money starts flowing in one of those feudal leaders' funds."

For him, the chaos in urban planning and construction is so lucrative that it is financing political parties' slush funds. "To that should be added the weak implementation of laws and, sometimes, their inexistence, as well as the lack of accountability of public servants", Rabi el-Chaër says. "Corruption has become so systematic and generalized that no one even talks about it anymore. Even citizens refrain from protesting because it often serves their interests."

## "The engine that drives all the rest"

"Corruption is the engine that drives all the decisions taken by political leaders." Naji Kodeih, an environmental expert, is an activist nowadays, but he was also employed in the ministry of Environment for ten years. When asked by which means corruption affects the environment, he has no trouble getting into specifics. "Usually, countries have an institution specialized in planning and elaborating a common vision to which all projects must conform", he says. "In my ten years in the ministry, I have seen eight ministers come and go. None of them took into consideration the work of his predecessor. It became clear to me that all projects were considered as a way to satisfy the personal interests of the group surrounding the minister, very eager to spend the money at their disposal."

One of the privileged ways to "spend" money is by conducting studies that often are never implemented. "I remember a time when one of the ministers decided to hire foreign experts to conduct a study on industrial waste", he says. "These experts held meetings with me for days on a row, taking notes of the information and analysis of the situation that I provided. They wrote a report before they went back to their country. I never heard from them or about the study again. Industrial waste was also the subject of a study conducted by a famous Lebanese consulting firm in 1999-2000, at the instigation of the ministry. This study, too, was never implemented, although it cost more than a million dollars. We had plans to manage most of the industrial waste

such as waste oils, tires, etc. We had a clear vision on industrial zones classification in Lebanon. What happened to all these studies made in the course of the last fifteen years?"

He mentions another example: that of the wastewater treatment in Lebanon. "I was a member in the committee charged with coordinating with the Council of Development and Reconstruction (CDR) on the matter", Naji Kodeih remembers. "My role was to prepare a report on the compliance with the Barcelona Convention (for the protection of the Mediterranean Sea), signed by Lebanon. At the time, in 2000-2001, the projects included nine wastewater treatment plants spread along the coast, for a cost of 400 million dollars. It is very difficult to know, fifteen years later, what was really done and how this money was spent. All we have are unfinished projects, wastewater plants completed yet still closed, because they were never connected with the sewers. Why do such absurd things happen in Lebanon? Do we lack competence? I don't think so. The people responsible for such a mess should be held accountable."

Naji Kodeih refuses to talk about mere wasting of money. "Wasting of money means that you spend 1500 dollars on a project while it should cost a thousand only", he says. "But in cases like this, money is spent on projects that lack any utility and that will never be implemented."

The expert is surprised that international donors, who often finance this kind of projects, don't react to such obvious corruption. "The financing comes either in the form of a credit or a donation", he says. "In the first case, I guess the lender is first and foremost concerned with getting his money back, with interests. In the second case, the donor usually imposes experts from his home country, making fellow countrymen benefit from the project. As for the Lebanese counterparts, they make money on commissions. One example illustrates that reality very well: a few years ago, "Electricité de France" established a protocol defining the needs of Lebanon in the electricity sector up to 2025. We can easily notice it still has no effect on our daily lives. Isn't that not corruption on the part of our institutions?"

### "A weakened civil society"

Weak enforcement of laws, including environmental ones, conflicts of interest between institutions concerned by the same files and lack of awareness on the part of municipalities and public opinion, are on top of the list of the means by which corrupt practices lead to environmental degradation,

according to Fifi Kallab, expert in socio-economics of environment and president of the NGO Byblos Ecologia. "Take for example the municipal waste issue: three ministers – Environment, Interior and Municipalities, and Administrative reform – as well as the CDR, are in charge of it", she says. "We get lost in this mess, and the conflicts between ministers get in the way of any real solution. I am convinced this is intentional as it allows the officials to escape accountability while blaming each other for the failures."

The long-time environmental activist is also sorry to observe a phenomenon that, according to her, contributes to add to the supremacy of corrupt practices in daily life in Lebanon: the weakening of militancy within the civil society. "Life in this country gets harder by the day", she notices. "It becomes very difficult to convince young people to volunteer for a cause. They have a hard time making a living, at a stage where they are often starting a family. Militancy in NGOs is just vanishing. People are increasingly interested in environmental NGOs for the opportunity of managing projects funded by donors. All I can say is that people seem to be more qualified than in the past, when we started our activism in the nineties, but they are less motivated to fight for a cause."

She adds: "This is weakening the civil society also because there is more money flowing for the projects, and the NGOs are more and more in competition with each other. This is also why political parties and political leaders are so eager to establish environmental associations, with agendas very different from ours." She agrees with Naji Kodeih on the fact that projects are a privileged way to make money. "All those projects, even if they are funded by international donors or private sector, should be submitted to the control of an authority such as the ministry of Environment, but it is far from being the case", she says. "In Hbeline, in Jbeil, was established, many years ago, a treatment plant for the waste of the whole Jbeil district. It was a composting plant due to replace a poorly managed landfill that we all complained about. This project, initiated by the Federation of municipalities of the district, went terribly wrong. The composting plant never functioned and it is still closed today. Yet no one was held accountable until this day."

### Municipal waste management, a "scandal"

The municipal waste issue raised by Fifi Kallab is one of the worst examples of corruption known in Lebanon. Only recently, the



government has adopted a new national plan based on the division of the country into six zones, every one of which will be managed, in the future, by private companies which win the public tender. According to observers, this new plan is a mere extension of the system of monopoly that prevailed for the last twenty years, except for the number of companies involved (three or four instead of one). The Lebanese people incur one of the highest costs for the treatment per ton in the whole region, for a minimal composting and recycling, and for the dumping of nearly the entire waste of the Beirut and Mount Lebanon area in the biggest landfill of the country in Naameh (South of Beirut). Meanwhile, the protests of the inhabitants of the villages close to the landfill, who say they are dying a slow death, remain unheard.

"One should work in the sector of waste in Lebanon to make a fortune", says Rabih el-Chaër, smiling. He adds: "The monopoly of one company over this whole sector for years is a big scandal. The Lebanese people pay a very high price for the treatment of their waste. Every time there were attempts to revise the contract of this company in the Council of ministers, they failed. What motivated the adoption of the new plan, according to our observations, is that more political leaders want to have their own company to run their own district the way they wish. While, in the past, a few leaders were implicated in this one company, today, everybody wants a bit of the cake."

The biggest scandal of all, say the experts, is that the huge budget given to the private sector to treat the waste comes from the Independent Municipal Fund, while municipalities are denied any role in treating or collecting waste. According to official figures given by the government, 80% of the money in this fund is being spent on the waste treatment, to pay for the private company in charge of the collection and treatment of waste. As a consequence, very little remain for true development projects.

"The spirit of corruption, which became a true doctrine in Lebanon, was born in the reconstruction period after the war, in the nineties", says Naji Kodeih. "The main political leaders of this period created a parallel administration that was directly linked to them, without a possibility of accountability through the usual institutions. Meanwhile, the official institutions fell into a state of disorganization that remains today. The waste treatment problem started at this period. My guess is that the political forces knew there was plenty of money in the Independent Municipal Fund and found a means to sneak it out."



For Naji Kodeih, "the vision remains the same today". "Nobody thinks of the problem of waste in a scientific way, or tries to deal with it in a rational manner, taking into consideration the needs of Lebanon", he says. "The debate that took place in the Council of Ministers over many sessions last January, and led to the adoption of the newest national plan, had nothing to do with waste treatment. Ministers were all concerned with their political parties' shares. They were asking this simple question: why should one private company take all the credit and benefits? Let's get more companies in the game and divide these benefits. Nobody, meanwhile, answers the essential question on where and how the waste will be treated, in the absence of any strategy."

Fifi Kallab also criticizes the lack of vision of political leaders who, according to her, are strangely alike in their search for their personal interests. "The private company in charge of the waste treatment was required initially (in 1997) to collect 800 tons a day, compost 300 and dispose the rest in the landfill", she says. "It didn't respect the initial contract and yet nobody held it accountable. Why? Because one political leader insisted, at that time, to add new villages to the contract. As a result, the company would collect 1200 tons a day instead of 800, and would not increase its capacity for composting the organic waste. It was a catastrophe waiting to happen."

"In the new national plan, one sentence was added although it wasn't approved by all the ministers: it concerns the introduction of incinerators in the country in a seven year period", she adds. "To the officials I met since then, I asked one simple question: what will you do with the toxic ash that will result from the operation of incineration, knowing that only two countries in Europe have the technical knowhow to treat such ashes? Nobody would answer that question."



It seems the incinerators' deal is particularly dear to one of the ministers. Meanwhile, we don't have a possibility to appeal against such decisions taken by the government."

As for Naji Kodeih, he thinks that the future companies that will take charge of the different zones will necessarily be proxies used by the political forces in order to better control the population of these areas. "This example shows that corruption is deeply rooted in the administration and the political class, and carried out by a system of mafias that lives on it", he says. "Environment has been, and still is, one of the main collateral damage of corruption because, in the mentality of our leaders and of our people, environment is a plentiful resource that belongs to nobody, and can be looted by anybody. The privatization of public maritime domain provides a great example for this. But this is wrong. Environment is the main resource of Lebanon. Whatever we destroy today, we will deprive future generations of."

### Civil society, public opinion, media

The NGOs don't have a possibility to appeal against decisions taken by the government, says Fifi Kallab. But then, what does that say about their capacity to put pressure on the government? "The NGOs have gathered recently to protest against this last national plan", she says. "I feel that since then, some municipalities have voiced their concern, and the public opinion is better informed."

What then about the municipalities? Local authorities have a good knowledge of their areas and can react to environmental concerns. Yet Fifi Kallab doesn't believe in their capacity to play an effective role in the current configuration. "The municipal councils are often elected on basis of the influence of local families instead of the competence of the members", she says.

Naji Kodeih is not of this opinion. "Recently, the minister of Environment said that municipalities were given a chance to prove their capacity in treating their waste, and failed at it", he says. "I would remind him that he cannot judge the capacity of the municipalities as long as they are denied the budget that is rightfully theirs in the Independent Municipal Fund."

Corruption is depleting the natural resources, and costing the Lebanese citizen much more than it should. Shouldn't the public opinion get hold of this matter and ask for its

rights? "Public opinion seems totally absent", says Rabih el-Chaër. "It is constantly under pressure: if it rebels, security threats suddenly pop up. As for the political class, it knows very well how to manipulate public opinion. Yet our statistics show that only 13% of the Lebanese people have a positive image of the politicians."

Fifi Kallab doesn't have many illusions either: "The public opinion is neither well informed nor interested in such matters. It is often manipulated on communitarian basis, which explains why it remains divided although environmental problems affect everybody equally. All it takes is to politicize the hot issues, and that would motivate people to keep out of trouble."

Media is the last stakeholder of the civil society to be able to play a significant role in combating corruption and promoting environmental practices. Does it? "The media sector is not homogeneous", says Naji Kodeih. "Some media are owned by politicians and have an agenda of their own. Others are manipulated in order to provide a forum to spread specific ideas. Some media are only interested in sensational news, and do not raise issues unless they are hot. Journalists who do their jobs thoroughly and practice investigative journalism are not very effective, I'm afraid, the same way all sincere people, including activists, are not being heard nowadays. I think, however, that they should collaborate with each other."

Rabih el-Chaër thinks media are not active enough in investigative reporting on corruption, most of the time because of lack of funds and/or freedom. "It is true that access to information remains limited in Lebanon, and that the journalists are not well protected in the absence of an effective judicial system, but it is sometimes enough to disclose information even when there is only a presumption of corruption", he says.

### A shared responsibility

In the light of the environmental degradation, the situation seems very dark. If corrupt practices are largely responsible for the abuse against natural resources, and if corruption is so deeply rooted in the institutions and mentalities that it has become an institution in itself, how can it be possible to escape this vicious circle?

Asked about solutions, Naji Kodeih says he has a radical opinion on this matter: "In order to consider saving the environment, we should do no less than change this whole

system. Meanwhile, in our day to day life, we can only face the present system and disclose whatever information we get."

"We should refuse to let go", insists Rabih el-Chaër. "The key to reverse the tendency lies in the judicial system: if, as it happened in Italy already, judges start taking courageous decisions and enforcing the laws, we can hope to break this vicious circle."

Fifi Kallab is convinced the key lies in the civil society. "We should encourage voluntary work and activism", she says. "In parallel, awareness campaigns should be conducted on a long-term basis."

So, solving environmental issues implies a successful fight against corruption? That can hardly be considered as good news. Seen from this perspective, the fight for preserving natural resources is extremely hard. It will take relentless effort in order to restore accountability, and an acknowledgement that this task is a shared responsibility. If urgent action is not undertaken, it is obvious polluters would roam free indefinitely, protecting each other from harm. Fifi Kallab tells an anecdote that illustrates well the present situation: "I once told a politician that corruption files implicating his own brother were piling up. His answer to me was: "When they arrest others, let them arrest him." Very eloquent, don't you think?"



## 7. The fight against corruption: A battle promised, but never fought

### *Abdessamad Saddouq*

On June 26th 2014, the cabinet approved the bill establishing the creation of the new Agency for Integrity, the Prevention, and the Fight against Corruption. The bill, which stirred up the civil society's strong reaction, is well below the Constitution's dispositions, and is clearly in regression as regards the first version of the bill that was released by the same government in October 2012. An important mechanism of the fight against corruption would be canceled if the bill is passed.

Is it a drawal of the State from its constitutional commitments? Does the government intend through this bill to resign from the fight against corruption that it had declared previously? Amid an anti-corruption governmental rhetoric, though much less audible recently, there is room for doubt on the sincerity of the public authorities' commitment.

For several years, the state has been swerving, hesitating, looking away and procrastinating. It does not seem to have the desire, even less the boldness to lead the fight against corruption which has reached alarming levels in our country. The state's line of conduct in the fight against corruption, throughout the last years remains unchanged: small scale reforms and control of the time of reform, both combined with a worn out discourse on transparency and good governance. Here is a Flashback.

On June 1999 "The National Committee for the fight against Corruption" was established during the era of the government of alternation headed by Abderrahmane Youssoufi, with the ambition of leading a program for the fight against corruption. The committee was led by Ahmed Lahlimi, the Minister of Social Economy, SMEs (small and medium sized enterprises), and General Affairs. Along the way, the committee was renamed "The National Committee of the Moralization of Public Life", getting therefore rid of the disturbing words and the burdensome mission. The committee finished

its mission by realizing a communication campaign that was quickly forgotten, because it was ill-timed and completely useless. It was its only achievement.

On December 2003, Morocco was among the first signatories of the United Nations Convention against Corruption in Mérida, Mexico. That was seen as an encouraging sign. However, the ratification of the Convention that was supposed to enact this commitment occurred until 2007, three years later. In the meanwhile, the Convention had become effective in December 2005. It is thus obvious that the State takes its time, it does not rush things.

These three episodes which, chronologically mark the last fifteen years, seem to reveal the behavior of the circles of power: hesitation, announcements, retreats, one step forward, and two steps back. The consistency of their policy did not prevent nevertheless the realization of unquestionable advancements, some of which are:

The reform of financial courts which led, among other things, to the publication of the reports of the Court of Auditors.

The removal of the Special Court of Justice. A court that was specialized in corruption crimes: Stigmatized by both anti-corruption and human rights activists, it was considered a tool for the management of impunity for the first group, and a special court violating human rights for the later one.

Nevertheless, by examining the past history and without pretending to analyze it in a methodical way, we can say that the public authorities' apprehension of the issue of corruption has progressed. Previously, the mode of governance was heavily marked by corruption. Its use was two-fold: On the one hand it was used to maintain the political customers of the political power. John Waterbury<sup>8</sup> rendered a brilliant description



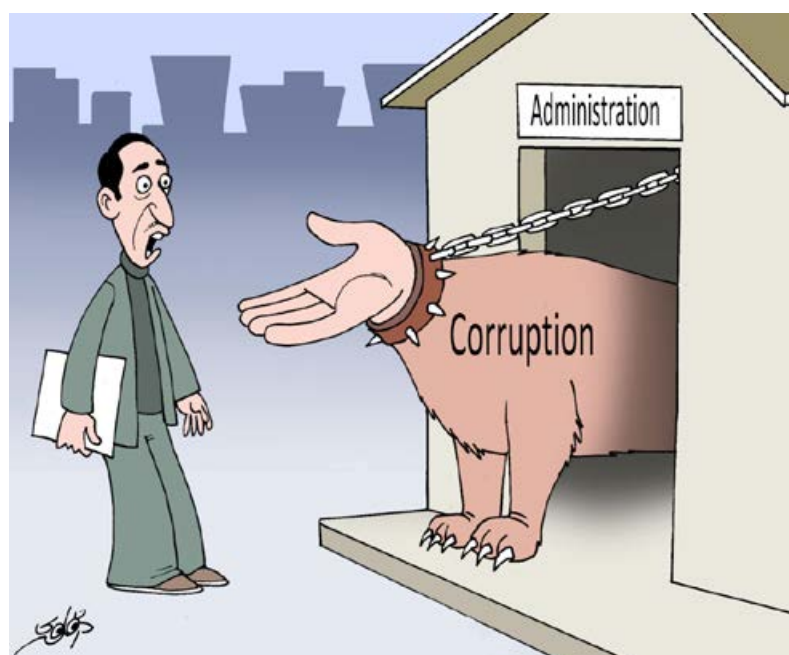
**Abdessamad Saddouq** has been Transparency Maroc's Secretary General since January 2012. He has been a member of the association since the first years of its inception. He was President of the ethics commission of the General Confederation of Moroccan Companies (CGEM) from 2008 to 2012, and a former member of the Central Agency of the Prevention against Corruption (ICPC). He is an energy engineer and holder of an MBA in business management. Currently he is a senior executive at a public company from the energy sector.

<sup>8</sup> John Waterbury served as President of American University of Beirut since January 1998. Mr. Waterbury served as Member of International Advisory Board of National Bank of Kuwait. Before joining AUB, Mr. Waterbury was, for nearly twenty years, professor of politics and

therein. On the other hand, it was used as a weapon to control or even domesticate its political opponents. We can recall in this regard Driss Basri, in the middle of the nineties, at the parliament, before the TV cameras, and the petrified members of the parliament, threatening to release hundreds of cases involving, according to him, all the political parties. The fight against corruption, according to the political power's conception, had to remain a sovereign prerogative of the state. A kind of regal function, an instrument of control in the hands of political elite that is usually unpredictable. This perhaps what explains the hostility with which the creation of Transparency Maroc, the first Moroccan association for the fight against corruption, was received. It was in 1996, in a context marked rather by political opening. Violating the law, the ministry of interior refused then to deliver the certificate attesting the creation of the association<sup>9</sup>.

Today, civil society expresses itself more, is more present in the public debate, and has once and for all integrated the struggle for integrity and transparency in its commitment. The 2011 Constitution recognizes and strengthens its role. However, concretely, it is kept away when it comes to elaborating public policies or controlling their implementation. The public authorities usually use fake contributors<sup>10</sup>. Its freedom of action is also usually thwarted<sup>11</sup> in this field as in others.

Even if the state's approach seems to have progressed, and a display like that of Driss Basri before the members of the parliament seems unlikely today, the political function of corruption does still exist, and public authorities have never broke with their leaning towards the total and exclusive control of the anti-corruption policy. That is what explains the hesitations of the political power which is under the pressure of the national public opinion that has become more demanding, and to that of foreign partners who are now more critical than ever. The reports of the latter, give accounts of the perception they have on the worrying situation of corruption in our country<sup>12</sup>.



Indeed, corruption continues to increase rapidly: the numerous revelations of cases, as well as the international indicators confirm it. Transparency International's corruption index ranked Morocco in the 91th position out of 177 countries in 2013, with a score of 37/100. Throughout the last ten years, Morocco had been either in stagnation or in regression. Although it is questioned, usually for bad reasons, this indicator, which was created ten years ago, is still credible. Transparency International's index converges, in Morocco's case, with other economic indicators, like the World Bank's Doing Business, or the World Economic Forum index on the attractiveness of countries of foreign investment, which ranked Morocco in 2013 at the 77th position out of 148 countries. The study mentioned bureaucracy and corruption as the first causes, among 16 other causes, that explain the bad results of a country possessing several assets to be among the most attractive countries of foreign investment in the region. This clearly shows that the toll of corruption is enormous.

At the first level of analysis, persistent and generalized corruption in Morocco is related to the neo-patrimonial organization of the state, developed by Jean François Métard. It is a system that extends the functioning of the historic patrimonial state in which there was a complete confusion between the public and the private goods. It was the traditional Makhzen mode.

The structures of the modern state have put an end to this confusion, in theory. In reality however, the exercise of public office, at all the levels of responsibility, is usually synonymous of monopolization, enrichment,

international affairs at Princeton University's Woodrow Wilson School of Public and International Affairs. He specialized in the political economy of the developing countries with a special focus on the Middle East.

<sup>9</sup> The document was delivered until 2004. Five years later, the association was recognized "of public utility".

<sup>10</sup> The bill establishing the creation of the new Agency for Integrity, the Prevention, and the Fight against Corruption, mentioned in the present article, is in this regards relevant. In October 2012, the government published a draft bill which was generally well received, on the General Secretariat of the Government's website for comments. Twenty months later, the government passes another bill that has no relationship with the first one, without submitting it to the public consultation.

<sup>11</sup> In 2010, Transparency Maroc was banned from organizing the integrity prize ceremony. In 2013, its poster campaign against impunity was censored.

<sup>12</sup> See, in this regard, the last report of the Council of Europe published in January 2014.

and the distribution of profit and liberalities. The positions of power become positions of enrichment. Corruption is the manifestation of this interference between the public office and the private interests, at all the levels of the State.

The second level of analysis considers corruption as the natural product of a failing mode of governance. The harnessing of the state in its extreme form: the State as the maker of laws and standards is hijacked to serve private or even individual interests. Some countries of the former USSR have experienced similar situations. Closer to us, in Tunisia, the World Bank has just published a surprising document in this regard. In our country, numerous symptoms highlight the failure of governance: impunity, low effectivity of laws, lack of accountability, failure of the judicial system, lack of transparency... Many malfunctions show how much distance separates us from the rule of law. In such an environment, corruption practices, the distribution of privileges, and the exchange of services organize the public space more than the rule of law.

The new constitution which offers good governance a central role, and which establishes accountability as a fundamental principle, and which also provides a legal framework for conflicts of interests; is it able to provide the necessary impulse, is it capable of provoking real commitment by the State against corruption ?

Three years after its adoption, it is still not the case. On the contrary, we are witnessing a retreat of the political choices from the constitutional framework which is supposed to lay the foundations of good governance. The bill mentioned in the introduction of the present article is a manifestation therein.

The dismantlement of the system of corruption and the end of impunity, which constitute the main claims of the protests movement, are it seems, no more on the agendas of our decision makers. Have they ever been? The question is legitimate. The fight against corruption is today seen as a challenge of political positioning, rather than a political challenge. Rhetoric remains the leitmotiv. Disappointment is as big as the expectations brought about by the party political discourse that followed the euphoric brief episode of the 20th February. By the way, was it an ephemeral brief episode, or the expression of a deeper dynamic that society is experiencing? The future will tell us.

*Translated from French to English.*



## 8. The Generator Mafia Shatters the Citizens' Dream in Zahle

### *Noor Baalbaki*

#### The Generator Mafia Shatters the Citizens' Dream in Zahle

The saga of electricity in Lebanon seems to be endless. Ever since its fifteen-year civil war, which erupted in 1975, the State, through Electricité du Liban (EDL) has been unable (according to some, unwilling) to provide electricity to its citizens on an uninterrupted basis. Power cuts range from a minimum of three hours daily, to about fifteen hours or more in some areas, let alone that rain, increasing demand for air conditioning in summer, and delay in importing fuel oil are often cited as reasons for days of much harsher rationing. Although the State has sustained about ten billion dollars in loss over electricity, power supply is still far from normal and the vast majority of Lebanese end up paying two bills for their electricity: one for EDL, and another for the owners of generator companies which have mushroomed throughout the country and have been part of the daily life of the Lebanese.

For those who take for granted a twenty-four hour supply of electricity, the suffering of the Lebanese may be hard to comprehend. Yet, interruption of power brings about daily suffering in households, not to mention the adverse effect on the environment caused by generators which spread their deadly fumes in densely populated areas.

The lack of reliable and continuous power supply is having an impact on industry and service providers and it makes Lebanon a less attractive country for foreign investors. Thus, it must particularly welcome news, when a regional private electricity company, which is independent from EDL but operates under a concession agreement with the government, promises its subscribers uninterrupted power supply at relatively low prices. This is exactly what the Electricité de Zahle (EDZ) promised its 53,000 subscribers would take place as of February 2015 by reviving an old power plant which they own. The project was estimated to

cut down the cost of power per household by an average of fifty percent.

A number of citizens interviewed by the Daily Star (December 19, 2014) expressed their support for EDZ and said that for them, 24 hours of electricity was a dream come true. Yet, in Lebanon, this prospect was doomed to fail, not because it is technically unachievable, but simply because the legacy of the civil war continues. Elizabeth Picard, in her book "Lebanon, a shattered country: myths and realities of the wars in Lebanon" (2nd ed., N.Y. 2002) argues that "the breakdown of the militia economy soon led to the appropriation of the state economy through a system that made room for a culture of corruption to manifest itself". She adds that "the disintegration of the state and the rise of the factionalist 'mini-states' during the Lebanese civil war, initiated the breakdown of the connection between the states (which could not protect them and the community). This was further compounded in the post-war period when former warlords became part of the legitimate state system, and often maintained their wartime followers and supporters. Gradually, the government became the agent of individual and sectarian financial interests rather than being accountable to citizens as a whole".

As it seems to be regularly the case in Lebanon, dreams do not come true, particularly when mafia interests are at stake. As soon as EDZ made its announcement in December 2014, local generator owners openly protested the move by blocking roads and burning tires. More seriously, there has been in February of this year an attack on four transformers used by EDZ, putting them totally out of service and reducing the daily electricity supply by EDZ to a mere 12 hours per day. Although officially no one was caught in the act, the general view among the citizens is that it was carried out by those who would stand to lose their lucrative business if EDZ's plans were to be implemented. The irony is that generator owners use poles and grids provided and owned by the Lebanese government, in a



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clear defiance of its authority. The State's inability to put an end to the generator mafia meant that citizens of the capital of the Bikaa valley, Zahle, as well as eighteen Bikaa villages, will still have to suffer blackouts, pay two separate electricity bills, and endure the noise and pollution caused by generators which are notoriously hazardous to public health and to the environment. This is a great disappointment to the citizens of the area who lost the chance of ridding themselves of the monthly generator bills -- which are issued at the exorbitant rate of \$125 for every five amperes<sup>13</sup> -- as well as of being captive to the generators owners, or even worse, to the single available power provider with whose condition they have no choice but to comply.



Those who argue that the aftermath of the Lebanese war still impacts the business culture, among other things, are probably right. It seems that the political will to put an end to the outright exploitation of the citizens is simply not there. The Lebanese are convinced that the generator mafia would not have dared to stand up to EDZ, and indeed to its 53,000 subscribers, had they not enjoyed the cover provided by corrupt politicians. No matter how the game of power and business is run, there is little doubt that the ones who truly suffer are the ordinary citizens who progressively lose faith in their government. Many citizens even argue that because of the prevalent culture, they themselves have in turn to practice corruption wherever they can (through bribery, cheating, tax evasion, etc.) in order to compensate for the "bad deal" on whose receiving end they always find themselves. Corruption as usual breeds corruption.

EDZ has been working hard since March 2015, to provide electricity to its citizens in Zahle on an uninterrupted basis despite the setbacks.

<sup>13</sup> A normal home would need at least 10 amperes to run a refrigerator, a television, and an air conditioner simultaneously.

## Fact box

1. Lebanon's main electricity provider, the Électricité du Liban (EDL), is a public institution fulfilling industrial and commercial tasks. It was founded by Decree No. 16878 on July 10th, 1964 and is subordinated to the Ministry of Energy and Water. EDL controls 90% of the electricity sector in Lebanon and thus enjoys a monopoly position. The few existing private energy providers sell their production to EDL. Despite its monopoly position, EDL is facing serious economic difficulties, with an accumulated debt amounting to \$27 billion<sup>14</sup>. This is to a considerable extent imputable to administrative inefficiency, which is illustrated by the fact that EDL's uncollected bills alone account for \$1 billion.
2. Forecast of Power Shortages (EDL 2011) (Gap between supply and demand)  
2011: 800 MW (33%) deficit, corresponding to 8 hours a day  
2013: 1330 MW (47%) deficit, corresponding to 13.5 hours a day  
2016: 1909 MW (58%) deficit, corresponding to 14 hours a day
3. Lebanese citizens are dependent on electricity supply by private generator owners. In 2009, private generation was estimated to account for around 30% of energy production. Generator owners provide Lebanese citizens with electricity in exchange for a monthly subscription fee. The annual subscription costs paid by the Lebanese is estimated at \$1.2 billion.
4. With \$0.23 per kw/h, the costs for electricity production in Lebanon are the highest in the world.
5. Despite the recurrent power shortages and the immense costs of electricity production, Lebanon ranks 57 out of 189 as concerns obtaining electricity in the World Bank Group's Doing Business-Report of 2014.
6. An App has been developed with which citizens can see at what time power cuts will affect their respective area.

<sup>14</sup> <http://www.al-monitor.com/pulse/originals/2015/01/lebanon-electricity-supply-debt-disaster.html#>

# 9. Public-Private Partnership

## *Rachid Filali Meknassi & Mounir Zouggari*

### Public-private partnership

The term «public-private partnership» is used in reference to any form of cooperation with private companies towards the implementation and exploitation of public works or projects. In the legal sense however, the term has exclusively referred to a contract under which a public contracting authority agrees with a private third party on the completion and maintenance of works necessary for the operations of the public authority, in return of the payment of a compensation throughout the amortization period, after which the ownership of the property goes to the contracting authority. The French Ordinance of 2004 which introduced this process into the management modes of public service, made it possible to include this objective within a larger mission entrusted to the private enterprise. The Moroccan law of 2014 borrows the French Ordinance's terminology, but leaves the contract with a certain degree of flexibility that installs a lot of confusion with other public service management processes.

Actually, the use of private actors to run public services is based on grounds that vary depending on whether this occurs within an institutional framework governed by the administrative law or within a common law system. In the first case, the creation and operation of the public service traditionally fall under direct management, and complementarily under delegated management in the form of concession, leasing and management, particularly in activities that lead to the collection of service user's fees. The public institution and the public enterprises also contributed significantly to the achievement of economic and social objectives of public policies. But the movement of economic liberalization has led not only to the privatization of public enterprises but also to entrust private operators with activities that do not fall within the core tasks of the state. Consequently, delegated management of public services had to reform its terms in order to take in the best deals.

However, in the Anglo-Saxon system, the range of activities that fall under public law is more limited. It is a traditionally common practice to see the population's current affairs managed and public infrastructure developed by private companies on behalf of public collectivities. The operation of public service is thus constantly fertilized by private management. In the context of budgetary restrictions, the scarcity of public investment was faced by funding the modernization of hospital infrastructures through private operators, using the process later introduced in France under the name of PPP contract. However, while in the English context this method represents a new variant from those that the market is developing steadily, its introduction into French law required a specific legal framework that enables it to make a place for itself among the modes in force that govern public commissions on the one hand, and the management of public service on the other. Before analyzing the aforementioned process, it is necessary to remind the reader of the various public service management modes that are known in administrative law and in Anglo-Saxon practice respectively, and to highlight the governance issues inherent in the transfer of this operating method to Morocco.

#### 1. Partnership agreements compared with other public service management modes

The succinct definition of the various modes and processes of public service management should not obscure the differences that their implementation involves, depending on the institutional and political contexts, the potential combinations they lead to, and especially the various paths offered by the contracted activity backed by legal rules.

- **Direct management:** This is the classic form of administration in which public servants administer a public service through a series of administrative acts in accordance with the law, using the funds assigned by the budget of the public authority.



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Founding member and current member of the first National Bureau of the MOHR (1990) then Transparency Maroc (1996) which he directed from 2009 to 2012, he is UN expert in the implementation of the UNCAC<sup>1</sup> (Vienna), Board member of the ILO<sup>2</sup> experts on the application of conventions and recommendations (Geneva) and member of the High Council of Education, Training and Scientific Research (Rabat).

He is the author of some sixty publications on several topics including employment law, human rights, the environment and public governance.

<sup>1</sup> UNCAC : United Nations Convention against Corruption

<sup>2</sup> OIT : Organisation Internationale du Travail



**Mounir Zouggar** has developed a wide expertise in public service management delegation. He has participated in important operations of service management delegation initiated by the Moroccan State as a financial adviser to several ministries (the delegation of water management, sanitation and electricity of Casablanca to SUEZ, of Rabat in favor of VEOLIA, of Sidi Said Maachou in favour of ELYO-SUEZ, of the Port of Tangier Atlantic in favor of Bouygues). He also prepared the response to the international call for tenders for the lease-up of SNEC (National Water Company of Cameroon) on behalf of the group ONEP / DELTA HOLDING and CDG Développement who won the case against VEOLIA, SAUR (BOUYIGUES) and SEM (Société des Eaux de Marseille). In all those cases, he covered the entire process: financial analysis of the tenders, contract negotiation, management operations, the set up of management teams, funding applications, and the set up of monitoring committees.

- **Technical assistance:** The term is used narrowly to refer to specialized participation in the management of an activity, with a skills transfer obligation.
- **Outsourcing:** In return of fixed remuneration, the operator uses the human resources and / or equipment of an external service provider to complete a project, study or reform of its management system.
- **Subcontracting:** In return of fixed remuneration, the operator entrusts to an external service provider the management tasks that do not fall within the core of its business (e.g. connections set up, leakage detection, etc.).
- **External management:** At their own responsibility and risk, the delegator entrusts an external service provider (manager) with the management tasks, in return of a flat rate regardless of the results of the operations.
- **Management contract:** It differs from external management in the sense that the manager is involved in price setting and remuneration varies depending on achievements.
- **Leasing:** At their own risk, the leaser manages and maintains the facilities that are made available by the delegating authority. The leaser receives remuneration directly from the service user after negotiating rates with the delegating authority.
- **Concession:** In accordance with a business plan, the concessionary is responsible for the creation and / or development of a public service as well as its operation, at their own risk, in return for the collection of fees from service users. Concession is implicitly coupled with a public works concession.
- **Alliance contract:** cooperation between a contracting authority and a private operator with shared risk and profits in respect to investment and operation. (e.g. Adelaide in Australia and to a lesser extent Algiers in Algeria by SUEZ).
- **Management contract:** A type of interim management that sets performance indicators that determine the compensation and penalties based on agreed performance.
- **Performance-based contracts:** A management mode close to Management Contracts that allows setting a fixed remuneration for the contracting authority so as to ensure substantial profit in case of high performance, and a level that does not allow covering the costs otherwise.
- **Lease contracts:** The delegation holder pays lease compensation to the delegator, and collects revenue at the rate agreed with the service user. His compensation is the difference between the lease cost and the amount of revenue. Investments and losses fall under the contracting authority's responsibility who resorts to subsidies or revision of tariffs.
- **B.O.T.:** Build, operate and transfer. This contract is comparable to concession contract, with variations sometimes excluding operating at risk, in particular by providing a fee paid by the contracting authority, or the guarantee of a minimum cost recovery, or a minimum activity level (the number of vehicles operating on a dam, the quantity of water or electricity sold from a hydroelectric project, etc.).
- **B.O.O.T.:** Build, operate, own and transfer. This form of intervention is different from the B.O.T. in the sense that the works belong to the delegation holder for the duration of the contract, allowing them for example to mortgage the works in order to mobilize funding.
- **B.O.O.S.T.:** Build, operate, own, subsidize and transfer. It differs from other B.O.T. by the subsidy provided by the contracting authority to ensure profitability.
- **D.B.O.:** Design, build, operate: This form of partnership is akin to the institutional framework in which a public company is responsible for the financing and construction of works, whose operation is entrusted to a private operator. The design and construction of the work is entrusted to a private partner and funded by the delegator. Service management is entrusted, according to another contract, to the same private partner or to another private partner. This contract type differs from the B.O.T. in the sense that the financing of the work is the responsibility of delegator, while its design, construction and management are entrusted to the private partner.

From this list, one can see how open the negotiation of private participation in the financing and operation of public service has



been in the Anglo-Saxon system. Conversely, placing public service operation within the framework of administrative law requires special legislation for the admission of the public-private partnership among the forms of delegated management of public services and to clarify, accordingly, its scope of application, its modalities and objectives.

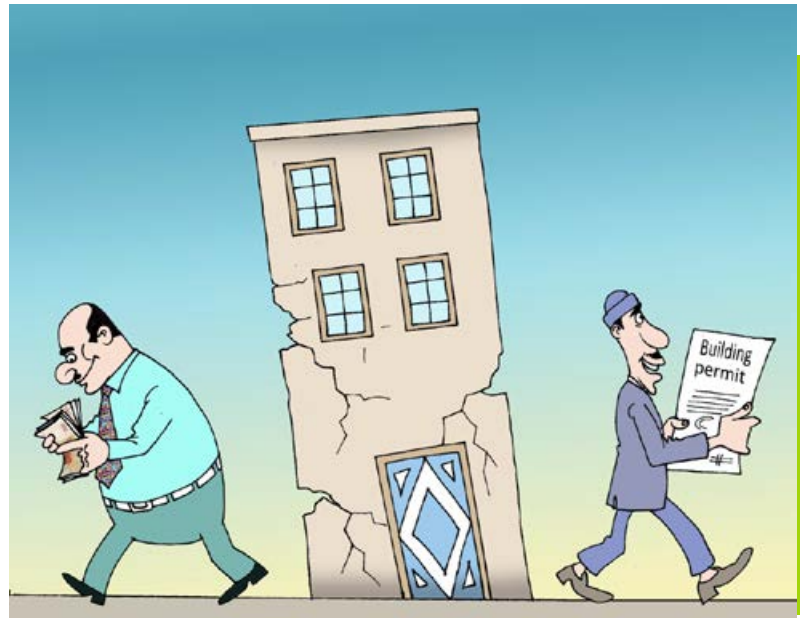
## 2. The legal formulation of public-private partnership

While the practice has developed in England in the 80s, it was not introduced into French law until the 2004 Ordinance, after the draft text was initially censored by the Constitutional Council, and was followed by amendments in 2008, 2009 and 2010. Moroccan law No. 86-12 is inspired from the French Ordinance's terminology and rules, but allows virtually all forms of contracting involving public operators.

Under French law, the partnership agreement is the «administrative contract» by which the contracting authority «entrusts to a third party, over a period of time determined by the period of amortization of investments or the financing arrangements agreed upon, with an overall mission related to the financing of investments (...) necessary for public service (...) and their upkeep, maintenance, operation or management, and where appropriate, to other services contributing to the exercise, by the public body, of the public service mission entrusted to it. The management of the works shall be carried out by the private partner, who is entrusted with entirely or partly designing the works. The private partner's remuneration shall be subject to payment by the public entity throughout the duration of the contract. It may be related to performance objectives.»

Moroccan law deviates from this conception, at least on certain key points.

1. It implicitly excludes territorial collectivities from its scope, reserving the conclusion of the contract to the state and public entities and enterprises under its control;
2. It does not limit the status of contracting party with the public party to private partners, but extends it to any legal entity organized under private law, including public institutions active in the economic sector and economic enterprises whose capital is subscribed wholly or partially by public persons: it thus accepts that a public-private partnership be constituted without a private partner;
3. While the main objective of partnership is constituted in the French definition



by the allocation of the private partner's financial contribution to the overall mission entrusted to them (the design, implementation, maintenance, operation, and the management of equipment and works agreed upon), making it necessary to set the amount of the investment and the subsequent period of the contract based on the amortization possibilities, Moroccan law dilutes this objective into a «global mission to design, fully or partly fund a construction, or rehabilitate, or maintain and / or operate a facility or infrastructure, or provide a set of services necessary for the completion of a public service.» This extreme flexibility is confirmed by Article 13 which provides that the contract period is established depending on the amortization of the investments to be made, the financing terms and the nature of services, and may vary from 5 to 30 years or even 50 years;

4. French law requires the existence of a direct relationship between the object of the partnership and the mission of the public contracting authority, while the Moroccan text provides only that it shall be useful for a «public service»;
5. Project management is necessarily assigned to the private partner in the French text, while Moroccan law does not mention that;
6. The remuneration of the partner is at the expense of the contracting authority throughout the duration of the contract according to the French text, while in the Moroccan text it may be formed by the service user fees and revenues generated by the exploitation of the project carried out;
7. The biggest difference however does not stem from the terms of the 2004



Ordinance, but rather from the decision of the French Constitutional Council of June 26, 2003 that stipulated that the range of these partnerships is limited to circumstances in which the project concerned presents an urgency and / or complexity that justifies recourse to a private partner, to avoid that the process is a means of diverting public finance rules or stake holders' responsibilities. Consequently, the preliminary assessment of each project as prescribed by the Ordinance must prove the urgency or complexity of the case and take place under the control of the administrative court. Moroccan law also establishes a screening assessment of the partnership project, but gave it the objective of benchmarking other «forms of project implementation, taking into account the complexity of the project, the total cost throughout the contract duration, the performance level of the service, the satisfaction of users' needs and of the need for sustainable development, and the financial arrangements of the project and its financing methods.»

It becomes clear that there are two different approaches to these contracts: In the French model, a Public-Private Partnership is an unlikely process that the authorities resort to in order to meet a pressing equipment need for public service. In the Moroccan model, the legal framework authorizes any form of association of companies, administrations and public institutions among themselves or with private companies for the realization of all works, programs and projects and their funding in any form agreed by the parties. The law seems to fit into the continuity of previous contractual agreements regarding major projects of the state that gave rise to serious problems of public governance and created confusion of roles and responsibilities between private companies and public companies, the latter being the funding party.

### 3. The advantages and risks related to the recourse to public-private partnership.

As much as the involvement of private operators in the development of public service deserves to be supported, it has to be subject to good governance, capable of facing the challenges engaged at the levels of financing, performance of services, and their social and economic impact. Far from changing the nature of public service, the contribution of the private operator to the implementation of its missions shall strengthen its continuity, its non-discriminatory accessibility and its

efficiency. The public contracting authority is agreed to support, directly or through a fee imposed on users, the guarantee of these benefits by providing the private operator with the necessary economic security and the legitimate profit they seek. In this respect, risk sharing among the parties is not meant in the commercial sense, but rather in the quest for service performance and the potential sanction for failings that can be attributed to one or the other party. Technical standards, benchmarking and the achievements of national experience must enlighten the conception of projects, their negotiation, implementation, follow-up and control. Transparency, the systematic call for bids, and accountability must be more rigorous within the context of partnership than other modes of public service functioning, given the risks of political unearned income, conflict of interest, power abuse and usurpation of administrative responsibilities.

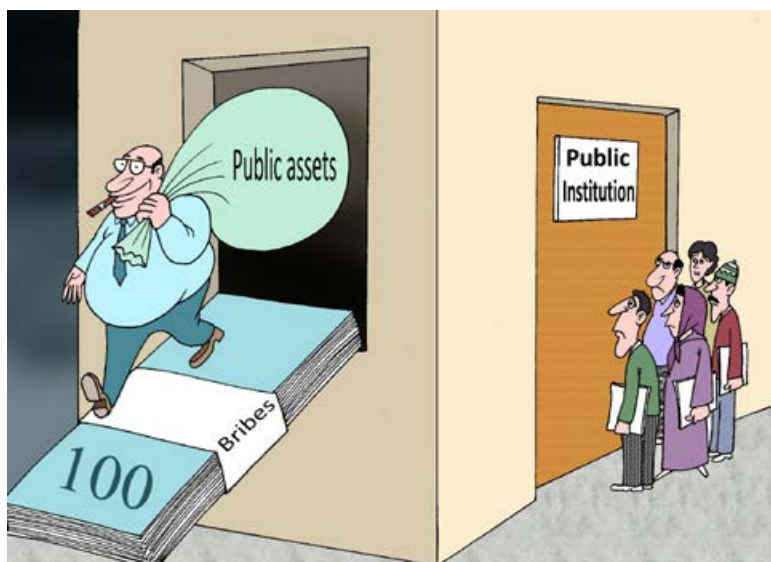
Some basic principles must be recalled in this regard:

1. Even when the delegation holder of a public service is considered as public manager, they remain primarily an operator who undertakes the follow-up in compliance with the agreed contractual terms. Their objectives are primarily focused on getting the best return on capital contributions in accordance with the contractual clauses.
2. That PPP covers the operation of a public service or a development program conceived within a promotional framework, it must be based on a clear and accurate definition of mandates and must include an effective and independent mode of assessment and control.
3. The form of action chosen by the private operator depends on the allocation of risks between the partners and the objectives sought by the contracting authority:
  - If the objective sought is the improvement of capacities and operations, an intermediate mode of management should rather be opted for: technical assistance, management or external management contract, and subcontracting eventually;
  - If the goal is to improve profitability, it is the management that must be targeted through leasing and its multiple derivatives;
  - If the goal is to ensure large amounts of financing and amortize them by fees, concession must be opted for along the alternatives it offers.

4. Public Private Partnership is not a way to be freed from the management of the service or development program, but rather a way to mobilize additional resources in order to improve performances. The public authority must remain mindful of the results and attentive to the factors external to the private partner's management in order to enable them to grow in an environment that encourages the expansion of their expertise and to interact positively with other players in the sector. The following aspects should remain exclusively under the responsibility of the contracting authority:

- Institutional organization;
- Political stability; the behavior of the authorities in charge of the service;
- Organization of civil society.
- Integration in the economic and financial environment.

5. Apart from the follow-up and control of PPP, the existence of an independent regulatory authority is likely to improve the conception, evaluation, transparency, relevance and results of contracts as well as PPP policy.



The appropriate use of any of the delegated management processes provides the benefits of its methods in terms of the conception, drafting of subsequent conventions and specifications, choice of tools, control procedures and sanctions. However, any institutional structure that is complex or that uses public partners with no direct relation with the subject of the public service or development field in question may deviate, under the name of partnership, a diversion of the public service from its purposes.

*Translated from French to English.*

## Type of risks by form of intervention

	Operation risks	Investment financing	Remuneration	Public service responsibility
<b>Direct management</b>	Public collectivity	Public collectivity	Covering costs	Local collectivity
<b>Customized management</b>	Public collectivity	Public collectivity	Covering costs	Local collectivity
<b>External management</b>	Public collectivity	Public collectivity	Flat rate	Local collectivity
<b>Management contract</b>	Public collectivity	Public collectivity	Flat rate plus profit-sharing	Local collectivity
<b>Leasing</b>	Leaser	Public collectivity	Profit or loss	Local collectivity
<b>Concession</b>	Concessionary	Concessionary / service user	Profit or loss	Shared
<b>B.O.O.T.</b>	Concessionary	Concessionary	Profit or loss	Concessionary

## Growing complexity of risks by form of intervention

	Subcon- tracting / Out- sourcing	External management	Leasing	Concession
<b>Operation</b>	<ul style="list-style-type: none"> <li>No risk</li> </ul>	<ul style="list-style-type: none"> <li>Risks limited to the interruption of the contract and compensation (mismanagement or serious mistake)</li> </ul>	<ul style="list-style-type: none"> <li>Risks related to the trade,</li> <li>Risks related to income and expenses,</li> <li>Risks related to the relationship with service users (including recovery rates).</li> </ul>	<ul style="list-style-type: none"> <li>The same as Leasing, but accentuated in case of possible deviation from reality with respect to price equilibrium of initial business plan.</li> <li>Partial or total responsibility for continuity of public service depending on contract terms.</li> </ul>
<b>Investment</b>	<ul style="list-style-type: none"> <li>No risk</li> </ul>	<ul style="list-style-type: none"> <li>No risk</li> </ul>	<ul style="list-style-type: none"> <li>No risk</li> </ul>	<ul style="list-style-type: none"> <li>Risk related to initial investment program,</li> <li>Risk related to the relationship with local suppliers and group suppliers,</li> <li>Risk related to the implementation of works,</li> <li>Risk related to breakages, force majeure,...</li> </ul>
<b>Financing</b>	<ul style="list-style-type: none"> <li>Contractor deadlines</li> </ul>	<ul style="list-style-type: none"> <li>Payment of compensation</li> </ul>	<ul style="list-style-type: none"> <li>Short and medium term loans to finance operations and acquisition of assets.</li> </ul>	<ul style="list-style-type: none"> <li>Full funding of the business plan.</li> <li>Increased complexity in complex cases such as Project finance</li> </ul>
<b>Estate</b>	<ul style="list-style-type: none"> <li>No risk</li> </ul>	<ul style="list-style-type: none"> <li>No risk</li> </ul>	<ul style="list-style-type: none"> <li>Reposessed property</li> </ul>	<ul style="list-style-type: none"> <li>Reposessed and returned property</li> <li>Issues of contract termination and interruption.</li> <li>Increased complexity in the case of B.O.O.T.</li> </ul>

# 10. The Malice of Power

## *Ansar Jassim*

### Arrests in Syria as part of a politico-economic rationale

"I was shocked when I learnt Naser had been arrested. I did not want to believe it at first. To be arrested is the worst thing that could happen to you in Syria. No matter how you die – the main thing is not to die this way – that is what most Syrians will tell you. 'I need to get hold of one of these pills that kill you instantly,' Naser had said to me shortly before. He was planning ahead on how to elude an arrest. And then he was arrested in the Foreigners' Registration Office, as he is Palestinian. The images of tortured dead bodies entered my mind at once," Samira explains. "My uncle, however, reassured me that Naser would walk free within a few days. He said he knew someone inside. With high hopes, we started to collect the money that was being demanded from us. That was back in October 2014. At first, we were to pay 4,000 dollars, and then it increased to 20,000, in the end the sum had multiplied to 60,000 dollars. We have not been able to trace him since January 2015. Even though they continue to demand more money from us, we do not even know whether Naser is still alive."

The number of people that have been arrested in Syria since 2011 is unclear. Syrian human rights organisation Violations Documentation Center (VDC) estimates the number to be around 200,000 people. As neither an arrest warrant is issued nor the family informed, the term used for these arrests is "enforced disappearances". The majority of those disappeared is made up by young men in their 20s and 30s, however, the VDC has also documented cases in which underage boys and girls were taken. In 2011, the regime began pursuing those who were planning anti-regime protests. The more violent the conflict was fought out and the worse the supply conditions became, the more humanitarian and medical personnel were affected. «By now, it is estimated that 90 % of those arrested by the regime or regime militias had nothing to do with the revolution," says Amer, a former officer in

the Syrian military. The "Caesar" report – named after the deserted Syrian military photographer – counts at least 11,000 people who have died in detention centres, either through the torture itself or as a result of the intentionally catastrophic prison conditions.

People disappear in government agencies or at checkpoints of the military or the Jesh al-Shaabi, the "People's Army". These are paramilitary units that consist of armed civilians who have been equipped by the regime. They were known as the shabiha at first and have since informally been annexed to the Syrian military. These are the first groups in a long chain of people profiting from the business of arrests in Syria.

Arrests are now taking place at a large scale. Those affected are brought to official prisons that had already been overcrowded before the revolution set in and to the confidential interrogation centres of various secret services. The increasing number of arrests is not only the expression of a regime that takes forceful action against the civil population, but also demonstrates that this regime had been counting on a "safe solution" from the very start: violence in place of politics.

Free reign when it comes to arrests is one of the ways in which the regime renders it possible for various parts of its security apparatus to enrich themselves. That way, the regime secures support for its actions in times of economic demise. The ones who are left to suffer are the thousands of disappeared Syrians and their families. On the one hand, the issue is actual corruption [Fasad] in which money serves as a means to obtain a service and on the other hand it is sheer fraud [Nasab], in which a service is promised in return but the promise is not kept.

*"When the arrests started people were much more intimidated about asking to ransom their family member. In 2011, arrests were far more targeted, nowadays anyone can be taken. Before, there was still such a thing as being innocent. Now, you can be robbed at any checkpoint and then you just disappear," Amjad, media activist.*



**Ansar Jasim, 27**, studied political science with special emphasis on the Middle East in Marburg, London and Damascus. She specializes in the civic movement in Syria and supports civil society activists in Syria through solidarity work, especially to link them with German civil society. She is currently living in Lebanon.

## Profits for the lower ranks in return for loyalty

There are many ways to “disappear” in Syria. For instance, if a house or an office is searched, all of the people present are taken. The families of those arrested are not informed. If they can find out where the person was last seen, they can trace which security agency took their relative. Every secret service controls a certain district of a city; information on who controls which parts is contained in the store of knowledge of many Syrians or can be inquired about. However, the most frequent and random arrests are made at checkpoints. Checkpoints have been set up at the entrances to every village, and even at the access points to every district in cities. “Most checkpoints at the village entrances of Jaramana are controlled by the jawiya, the secret service unit of the air force. Within the district however, the shabiha are in control,” Lama, a human rights activist, tells us. She herself was imprisoned for a long period of time. “When I was arrested, I was glad it happened at an official regime checkpoint. That way, I was taken and my husband was arrested at home – but at least our house was not ransacked and my daughter was not raped.”

Shortly after the arrest, the person is taken to the interrogation centres of the various departments (*Fira'*, pl. *Fur'u*) of the secret services. Most of them have a regular personnel structure: a director, division leader and those in charge of conducting interrogations. Furthermore, there are several confidential internment centres and the “People’s Army” again have their own prisons. The arrests they make are random, and sometimes by order of the security departments. An especially notorious place is the secret internment camp of the shabiha in Nesreen Street in the Damascus district of Tadamon. In Syrian law, the *Fur'u* are responsible for the detection of crimes and for the correspondent gathering of evidence. In practical terms, the *Fur'u* are the centrepiece of secret service torture chambers. Some of them, for instance *Fira'* 215, generate especially brutish images of torture amongst Syrians. The Syrian regime, anxious to be perceived as a modern administrative government, has regulated imprisonment within its legal framework. In theory, a *Fira'* is authorised to detain a prisoner for up to 60 days, given that the arrest warrant is renewed every 48 hours whereafter the prisoner has to be brought before a court. “But nobody complies with these regulations. In reality, you disappear once you are brought to a *Fira'*. You have no legal assistance and no attorney can

do anything for you, not even find out where you are,” Jamal, a lawyer himself, explains. He left Syria in March 2015.

“Oftentimes, they (the *Fur'u*) arrest a person and keep him or her in custody for four or five days. They request the phone numbers of family members, and then the blackmailing begins,” Feras tells us. He also is an attorney from Damascus who now lives in Beirut. Even if you pay, that does not mean that the release of your relative is secured. After exploiting the families financially, the shabiha oftentimes surrender the prisoner to the secret services. The unofficial and official structures of Syrian secret services therefore do not only coexist, they cooperate directly.

This is all part of a macabre trade. “Because we know what happens with those under arrest, families will always be willing to pay, even if that means they need to sell their houses for the money. You buy the hope that your relative will not die from torture – even if it is clear to you that they will not be released,” says political scientist Rawan. The families grasp at any last straw. The issue is not simply corruption that takes place within a system. Even more than before the insurgence, the regime has an interest in creating space for corruption, blackmailing and self-enrichment. Already before 2011, the regime had the most extensive security apparatus of the region. Since the beginning of the revolution, it has multiplied – through the many checkpoints and the development of diverse militias loyal to the regime. At the same time, the economic situation has become devastating, which means that the regime is not able to support the increased expenses for the security sector with state funds alone. 100 dollars, about 20,000 Syrian pounds, is the current income of a regular officer in the regime’s security apparatus. “A packet of coffee costs about 2,000 SP and diesel for two days is about 5,000 SP,” explains media activist Amjad. “As the regime facilitates arrests and the blackmailing of families, shabiha as well as regular soldiers of the regime can generate a secondary income for themselves. Soldiers no longer have confidence in the regime but now they see their opportunity to profit.”

By the end of 2012, the country’s economy had already suffered the loss of 1.5 million jobs. “The Syrian economy has been almost entirely destroyed [...]. [It] has almost entirely developed into a wartime economy that consists of crime, smuggling, trading in arms and people, as well as the theft of subsidies etc.. A small class of people has emerged who were able to profit in the context of this economy, whereas at the same time, millions



of youths are left unemployed, unable to support their families," says political scientist Sabr Darwish. To enable corruption and extortion is a strategic decision made by the regime – an adjustment of its system in light of changed circumstances.

How long a prisoner has to endure in a Fira' is uncertain, both lawyers Jamal and Feras confirm. From there, people are transferred to one of the prisons. "The condition of those who are brought to central prisons from the Fira' is dreadful," Jamal knows after witnessing the transfer of thirty prisoners on his way to court. "None of them weighed more than 40 kilogram. The stench was unbearable, even from a distance. The security personnel escorting them were wearing gas masks. The injuries of those imprisoned were evident: burns caused by electricity and stubbed out cigarettes... Every time we say to judges that we need to document this and that we need a legally accredited physician, they, of course, refuse. It would not be possible to release someone home in that state. That is why I have come to think that the prisons are a kind of stopover on the way of recovery. The conditions are still terrible – but not comparable to those in the *Fur'u*."

The transfer to a central prison also entails a change in those responsible for prisoners within the system, and another group of profiteers receive the opportunity to blackmail families. The transfer alone lends itself to corruption: "In some cases, officers in the *Fur'u* will contact families and promise them to transfer their son to a central prison in exchange for a certain sum of money. Even though he would have been transferred nonetheless," activist Kifah has learnt. It is not traceable which court a prisoner is sent to. "Sometimes five different people are arrested and charged with the same offences – but they are sent before different courts," the attorneys explain.

Arbitrary arrests can strike anyone: "We know of cases in which the shabiha raided our area and simply arrested young men, regardless of their background. That explains, why several young men who are actually supporters of the regime are imprisoned as well," reports Lama, who has committed herself to the experiences of female prisoners after having been incarcerated herself.



## Psychological warfare and disappointed hopes

"The reasoning behind this is not only material enrichment," Rawan states. "It is a war of nerves. On the one hand, corruption pricing is adjusted for poorer families. On the other hand, money is squeezed out of families at all levels. They are being strung along and put off again and again. They are promised the release of their son from prison once they pay a certain amount of money. Instead, what they receive in the end is a dead body. In some cases, families are prepared to pay for the knowledge of the location of the mass grave in which their son lies buried. They cannot even go there," says Rawan. When families are informed of the death of their child in imprisonment, they either sign a form stating that the death was caused by "medical reasons", heart failure for example. Or they sign a statement saying that "armed forces" were the cause. That way, the regime ensures they have - by the families themselves - the insurance in writing that it is not responsible for committing a crime."

"Families are prepared to pay for any small detail of information: Is their son still alive, how is he doing?" Once a son disappears, his family tries their best to find out his whereabouts. Anyone who starts asking questions is susceptible to fraud or in danger of risking their own safety. All sorts of promises are made to families. In the end, the director of the Fira' decides when and if a person is released.

The families under compulsion to choose this path are denied any form of safeguard - apart from the option to additionally search information through other channels. One element that eludes full control by the regime comes in form of the reports given by other

prisoners. For this reason, a network of human rights activists and lawyers has developed, whose members record the statements of those released from imprisonment – for instance the VDC or the Missing Syria group. Prisoners learn names and telephone numbers of their cell mates' families off by heart. Due to the fact that cells are oftentimes hopelessly overcrowded, inmates in many cases memorise 70 or more names and phone numbers, Missing Syria activists have come to learn. Once they are released, they either try to contact families directly or they share their knowledge through human rights organisations. This is where Syrian public figures, such as Yara Sabri, assume an important role. She is perceived as a person of trust and makes contact with the families. On her Facebook page, she adds a new list of names of disappeared people on a daily basis. Many times, a statement issued by Yara Sabri has helped families uncover the identity of their blackmailers. If they were notified that their family member could be released from the Fira' by means of a certain lump sum and Yara can tell them that their son was, however, last seen elsewhere, they can still freeze the payment.

Albeit there are many cases in central prisons that are presumed to be forgotten, it is here that the "disappeared" emerge from oblivion. There are daily updated lists laid out publically in courts containing the names of those who are on trial. "I was arrested for putting the names on these registers online in an attempt to combat corruption and the exploitation of families. I contacted the families and informed them of what charges were being brought forward against their children. In some cases, viewing the charges, it is clear that the accused will be released immediately – if this information is made publically accessible, nobody will be able to extort money from these families. A large part of our work as honest lawyers is elucidation."

The value of attorneys is measured according to their contacts. Jamal and Feras reveal: "When it comes to freeing someone in court who is charged with a violation that is rated as a grave offence by the regime, a *Simsar* is needed. He is a kind of broker, an attorney who secures their clients' freedom through money and contacts. That way, a charge for smuggling ten tons of explosives can quickly turn into a charge for smuggling ten litres of diesel," Jamal tells us.

## The Anti-Terrorism Court

"The Anti-Terrorism Court is the most distinct expression of this corrupt system and trade with the prisoners," Rawan says. It was established by presidential order and sits regularly since 2012. This court denies the accused any defence. Judges are appointed by decree and explicitly have full power of authority. "Some of these judges are actually convinced that the accused are terrorists. Most of them have simply bought their position as judges with money," Jamal explains and Feras adds: "In a position where everything is at your own discretion, you are virtually urged into corruption." He further explains: "This month, this court will make a judgement in 3,000 cases. That is an enormous number. The documentation used is primitive which leads to a situation in which we do not know how many people have been convicted and how many have been cleared from charges." The VDC counts 70,000 cases that have been transferred to this court up until 2014.

The Anti-Terrorism Court is the judiciary of a regime that claims to be leading a war against terrorists since March 2011, and that renders it a strong symbol of a trend in regime ranks: those in key positions have abandoned the motivation of defending an alleged anti-imperialistic, socialist system long ago. In fact, the interest in personal profits predominates political motivation. The regime has created an elaborate structure of profiteers who have a selfish, not an ideological, interest in the regime's survival.

The omnipotence of this court reveals that corruption in the business of life and death is not restricted to the lower ranks alone: in this case, judges are the ones who benefit in the chain of beneficiaries. Suspended sentences are their personal commodity, and amnesties offer a basis for wide-ranging corruption. These are general amnesties which bring remission of certain penalties with them, without determining the individuals it is issued for beforehand. Payments are made in order to receive a place on a list of those granted an amnesty. "You need a truly powerful intermediary in order to be added to one of these lists. As soon as an amnesty is announced, prison officers start to promise families to place their sons' names on the list. Many are not aware of the fact that, regardless of the corruption, amnesties are only valid in prisons, not for the *Fur'u*," Feras details.

## Impacts at all levels of life

The extreme fear of arrests and the knowledge of the level of violence that awaits following the arrest is one of the driving forces which compels families to pay lump sums which cause them to find themselves in a dire financial situation. Amjad recounts how the arrest of his uncle had an impact on the entire family. His uncle was subject to a random arrest at a checkpoint. He was not presented with any charges and he was not searched before. "After my uncle was arrested, I went out in search for a 'key' in an attempt to find out where he was being held. A high-ranking officer charged 60,000 SP for that at first, about 300 dollars. Upon receipt of payment, he told us that my uncle is in department 720. Then he demanded 340,000 SP, which was about 2,600 dollars at the time. We scraped the money together, and sold his car and all of my aunt's jewellery. As we had no guarantee that my uncle would actually be freed, the money was deposited with a third party. We are not aware of this officer's rank, but he obviously had contacts. My uncle was indeed released the next day – from the Fira'. He was immediately transported to the central prison in Damascus, Arda. The officer accepted the money and was brazen enough to claim that that had been the agreement," Amjad recalls. My aunt was permitted to visit him in prison – even though you have the right to this visit, she needed to bribe staff in order to see him. He looked incredibly exhausted, they had badly tortured him. We had no other choice but to ask the same officer for his help again, this time he demanded an additional 1,500 dollars. Everyone in the family started to sell property. My uncle was freed two weeks later: he had no property left and he had been terminated from his job.

## The moral dilemma – "This is what we took to the streets against"

Even though Rawan, whose husband has been imprisoned since 2012 and has been transferred to central prison in the meantime, is aware of torture practices in prisons, she is not willing to pay – precisely because her husband had been politically active. She believes that corruption in the last couple of years has led to an even more corrupt system, and that it has fuelled the dynamic of more and more arrests – as a replacement for regular income. "Corruption begins with us. We are the reason. We took to the streets in March of 2011 and protested against the corruption in

Syria... But as soon as the arrests started, we were the first to be prepared to pay. We have given the regime this power. If I pay, I only invigorate the regime. We should have taken a stand in the very beginning and denied them bribes [rashwa]... Instead, bribery has now even increased and it has become more widely accepted. If you deem it legitimate now, why did you protest against it in the first place?" Rawan passes critical judgement on those who, in an attempt to save the lives of their relatives, support corruption. However, she also recognises that not only political activists are being targeted: "The many bystanders who have been taken from checkpoints – of course I understand that their families want to free them," she says and adds: "Families are the victims, but through these arrests, the regime reels them into its circle of corruption and its own survival. That is the malice of its power."

It is a moral dilemma from which one cannot withdraw oneself in circumstances where deaths in interrogation centres and prisons have become a daily occurrence. "Save the rest," Feras, in his role as a lawyer, says in reference to a campaign of the Syrian civil society, for which the case of the disappeared is more than just a politico-economic file. One of the flyers that they secretly distributed in Damascus reads: "Not everyone underground is dead, there are thousands of lives waiting to be saved."

## The political economy of arrests

Is the wide-spread corruption in the security sector an indication of state disintegration or a technique which ensures the regime's survival? There are conflicting views in this respect. Political economist Jihad Yazigi argues that the "informal economy comprising looting, kidnapping and smuggling" has established itself as a crucial source of income because the security situation had rapidly deteriorated. "Entirely new business networks, often illicit, are emerging and new groups and individuals are being empowered at the expense of the traditional business class," Yazigi writes.

In alignment with Elisabeth Picard's (1996) comments on Lebanon during the period of the civil war, this outbreak of violence does not seem to be a by-product of state disintegration, but rather seems to point to the opposite: It seems the Syrian regime has created a system of corruption and self-enrichment within the political economy of the war as a means to secure its survival. Arrests and disappearances are part of

an entire set of post-2011 mechanisms to facilitate self-enrichment. Already before 2011, corruption belonged to what Bassam Haddad referred to as „crony capitalism“. New, however, are the militias. To allow them free reign thus secures their loyalty to the regime.

However, the significance of violent excesses exceeds the realm of economy. They are part of a government *modus operandi*: in line with the period preceding 2011, information from the depths of torture chambers is to be spread amongst the population. This way, the people are to be rendered submissive even without the direct application of physical violence. Obedience in place of appreciation, intimidation in place of legitimacy is to secure the continuity of the regime's reign. At the same time, the apparent corruption at all levels without exception – and especially at the level of the Anti-Terrorism Court – suggests that the bearers of the regime act less and less for ideological reasons.

“The regime is not collapsing. It has simply developed into a regime of cliques. The military and safety institutions are now militias and gangs. Every gang leader has been appointed by the regime. The regime no longer has full control over these groups,” that is the assessment made by activist and political analyst Kifah. “And yet, if it chooses it can easily shut them down. Bashar al-Assad has simply become the leader of the largest militia.”

*Translated from German to English.*

### **This text is dedicated to all those arrested and disappeared in Syria**

*This article is based on personal contact with the subject matter and eleven qualitative interviews with people affected, activists and legal practitioners. The individual point of view and experience of the people concerned is the focal point as, even though the system of corruption is part of a political economy at a larger scale, every arrest and every disappearance impacts immensely not only on the life of the disappeared person, but also on the lives of their family members.*

# 11. Corrupted still? Four years after the revolution, ex-regime assets remain contentious in Tunisia

## Editor's note:

The Tunisian public welcomed decree-law no. 2011-13 issued on March 3, 2011 that called for the confiscation of assets acquired by the former Tunisian President Zine el Abidine Ben Ali, along with 143 of his family members and close associates during his rule. The period in question lasted from July 11, 1987 until January 14, 2011. At the time it was issued, the confiscation decree was regarded as an act that embodied the fulfillment of one demand of Tunisia's "Dignity Revolution." Among the most prominent revolutionary slogans were those calling for the recovery of assets plundered by the ruling family<sup>15</sup>. Political discourse around the confiscation of these assets took advantage of popular support for these measures as well as for a liberation from the power that "the ousted family had held over the national economy". Furthermore, confiscation was celebrated as a step towards enacting the equitable redistribution of wealth among individuals and other entities.

Unfortunately however, the Tunisian public's anger towards the ruling family prevented any public discussion around the obligation for the confiscations to comply with the right to a fair trial. Likewise, the Tunisian Constitution neglected to protect revolutionary procedures from judicial oversight. Four years after the revolution, The Legal Agenda wishes to raise questions about the effectiveness and legitimacy of the confiscation measure in the hope of soliciting a response from the Administrative Judiciary, which has committed to take on legal cases that seek to overturn the confiscation orders.

## Who Administers Confiscated Assets?

Our inquiry into the management of the confiscated assets began with an examination of the confiscation order issued under decree-law 13 stated above. This led us to the Confiscation Commission of the Ministry of State Property and Land Affairs. We met with the president of the Commission, Judge Riadh Boujah, who told us that the Commission had overseen "the confiscation of 530 real estate properties, 650 companies, 24,739 items of movable property, 73 billion dollars and 1.5 million Euros, and 173 luxury cars, among other items." He also said that, "the operation included expropriating all material gains acquired since July 11, 1987, with the exception of property gained through inheritance" (an exception that was added later). When we asked about how these confiscated assets were being managed, he informed us that the disposal of the property fell outside the purview of his Commission, and fell under the responsibility of the "National Commission for Management of the Assets and Funds Subject Confiscation or Recovery in Favour of State" (hereafter, "Management Commission"). This Management Commission was established through decree-law no. 2011-68, dated July 14, 2011.

We asked Boujah about his opinion of the division of labor between his confiscation commission and the management commission. He said that, "the choice to establish two committees was ill-advised". The disagreement between the two committees over who is responsible for transferring the properties to the state is, in Boujah's estimation, evidence of the poor choice to create two committees.

Thus, Boujah revealed the presence of overlaps and a conflict of jurisdictions between the frameworks of the two commissions. He mentioned that the overlap had led to disputes between the commissions, and that the Administrative Court had ruled, in an advisory opinion, to attribute responsibility for transferring real estate holdings to the Management Commission. He told us, "that the issue of who should take responsibility for the expenses and procedures for transferring

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<http://www.legal-agenda.com/article.php?id=1056&folder=articles&lang=ar>

and later in English under

<http://www.legal-agenda.com/article.php?id=1056&folder=articles&lang=en>

The Legal Agenda is a Beirut - and since 2015 Tunis - based independent non-profit organization that addresses issues of legal activism, reform, and transformation in the context of social and political change in the Middle East and North Africa. This article was written by Legal Agenda's team in Tunisia.

Interviews for this article were conducted by the Tunisian journalist Hnai J'mai.

<sup>15</sup>The first section of decree-law no. 2011-13 dated to March 14, 2011 states: "Confiscate on behalf of the Tunisian State in accordance with the conditions stipulated by this decree and on the date of its issuance, all assets, movable, real estate, and rights acquired after November 7, 1987, and belonging to the former president of the Tunisian Republic Zine el Abidine Ben al Haj Hamda Ben Haj Hassan Ben Ali, and his wife Layla Bint Muhammad Ben Rahuma al-Tarabulsi, and the other individuals specified on the list attached to this decree, and others of whom it has been established that they attained their movable or real estate assets or rights due to their relationship with those people."



registered real estate property alone, had obstructed the transfer of 120 real estate properties to the state<sup>16</sup>.

The work of the Confiscation Commission thus appears to be namely administrative. The commission is in charge of preparing lists of those whose assets would be confiscated and taking inventory of those assets based on their documented value. This explains the magnitude of the estimates of the value of the confiscated assets, and the absence of a reference to them in the public budget. It also leads us to believe that the estimates of the value of the confiscated assets compiled by the Confiscation Commission are not reliable.

As a result of these findings, we sought a meeting with a representative of the Management Commission. During five different attempts to contact the commission's president, we received the same reply: "The official is in a meeting. If you wish to speak to him, you must supply a written agreement from the supervising ministry (i.e., the Ministry of Finance)." We attempted to obtain such an agreement from the Ministry of Finance, but despite an earlier promise to do so, the ministry refused to grant us an appointment with the president of the Management Commission.

Convinced that there was a decision to disguise the commission's work, and in the hope of better understanding the commission's refusal to talk about it, we sought to investigate how confiscated assets were being dealt with and who managed them. It became clear to us that the Management Commission was not, in fact, managing anything – which may explain its circumspect behaviour. We discovered that the actual administrators of the majority of confiscated assets were members of the judiciary<sup>16</sup>.

A source within the judiciary, who asked not to be identified, explained the connection between the judiciary and the Management Commission's portfolio regarding the confiscated assets. He stated that, "in 2011, the General Rapporteur for State Disputes issued judicial decisions ordering that judicial administrators be named to oversee the confiscated property, until such a time that the state was able to take charge of them". The same source revealed "that the judiciary assumed a temporary obligation to administer the confiscated properties, in order to guarantee the rights of all parties, including the state. Upon the creation of

the commission to manage those assets, the judiciary asked those who were in charge of their disposal to make contact with the Management Commission and request that they initiate proceedings to hand over the confiscated assets, so that the commission could assume management of them. However, the Management Commission and the Ministry of Finance both refused to reply to any correspondence. The commission's inaction led to continued judicial management of the confiscated property".

We asked about the managers' handling of the confiscated property, and about the reliability of information stating that, "poor management led to the bankruptcy of a number of institutions and the damaging of a number of items of movable property". Our source within the judiciary confirmed that the large number of confiscated assets, and the complexity of the measures taken to secure them had led to difficulties in their management. He noted that the judiciary's management of the assets had been assumed to be only a temporary measure. Because it seemed to us that this was a sensitive question, we decided to go directly to the judicial officials who had been managing the confiscated property.

## Some Confiscated Companies Nearing Bankruptcy

We posed our question about the financial status of the confiscated properties to Nabil Abdelatif, the person that the court had entrusted with the management of one of the confiscated companies. He replied, "that a number of the confiscated institutions placed under the judicial administration are suffering from financial difficulties and are on the verge of bankruptcy". He pointed out, "that falling revenues of some of the confiscated institutions, and others nearing bankruptcy, is due to the fact that their previous owners had unrestricted powers and were selectively accommodated, both in legitimate and illegitimate ways, in order to increase revenues and achieve a high rate of profit. Judicial administrators do not enjoy such powers or [accommodations]; consequently, it is only natural that revenues should decrease. This explains, to some extent, the financial problems facing some of these companies".

In Abdelatif's view, the deteriorating state of some of these institutions is due to the fact that the law regulating the [confiscation] operation was impromptu and imprecise. "It was necessary to specify a period of time for

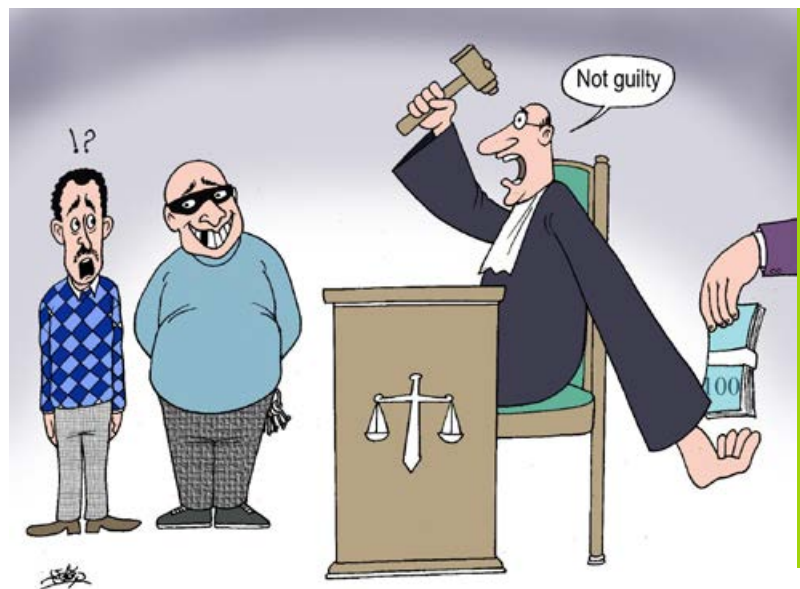
<sup>16</sup>Judicial administrators control close to 80% of confiscated companies, i.e., around 400 companies, in addition to their management of all seized assets and estates. The remaining confiscated companies are overseen by state-appointed administrators that operate under an unclear criteria.

confiscating assets that did not exceed a year, to avoid opening the door to haphazard management of those properties, he explained. "Subsequently, a decision was adopted in these companies either to sell them, in the presence of representatives of the Confiscation Commission, the Management Commission, and judicial managers of the assets (or their judicial trustee and creditors), or to incorporate them into companies experiencing financial difficulties, or to sell them or place them on the market so that they can meet their expenses and preserve some of their profits rather than continue to fall behind."

Abdelatif confirmed that, "during the four years which have passed since the Tunisian revolution, [public] general directors were placed in charge of managing the affairs of institutions whose state ownership levels exceed 80%, and they were granted broad administrative powers. These appointments have opened the door to excesses and to irresponsible management". Abdelatif also revealed that those directors were not employed in accordance with the law regulating public service, which determines the powers of the officials responsible for public institutions and specifies how they work.

Abdelatif's claims in this matter were also confirmed by the General Rapporteur for State Disputes. Judge Emad Abdali told us that, "some of the property, such as boats, yachts, cars, and planes, is partially damaged because, for four years, it has been exposed to the elements of nature and a lack of maintenance". He added that, "those properties were overseen by court-appointed administrators who did not have the legal right to sell or liquidate the assets, nor to manage them in any way". He added that, "failing to lift judicial trusteeship [over the assets] was ill-advised", and asserted that the confiscated companies were placing a serious, material burden on the state.

In sum, the process of confiscation had become a burden on the state, and the state administration of confiscated property had been transformed into a case of corruption. The reasons behind this corruption are numerous and are linked to practices of bureaucracy, opportunism, and negligence. One such reason was the administrative bureaucratic decision to split the confiscation responsibilities among different commissions that were not coordinated in their work. Another was the reliance upon commissions made up of a limited number of people, the majority of whom were part-timers. Other reasons included: A lack of oversight by the entities executing the confiscations over the actions of those who were actually managing the confiscated properties; opportunist



management of the properties, particularly in the case of larger companies that were sold; as well as, the avoidance of administering portfolios of confiscated properties that deserved effort and labor.

Consider for instance the process of confiscation conducted by the Minister of Finance. The ministry selected some of the largest and most iconic Tunisian companies, made up mostly of banking institutions (or institutions with shares in banking institutions), as well as transport and communications companies, and singled them out for special treatment by placing them under the Al-Karama Holding Company, in order to subsequently sell them off to private investors<sup>17</sup>. It remains unclear as to how Al-Karama Holding managed 58 large confiscated institutions. The debates about its management, particularly its subdivision concerned with selling, did not lead to questions about carrying out confiscations with the aim of an equitable redistribution of resources. This is despite the fact that the process of selling off assets benefitted major businessmen connected to the confiscated companies, given that in many cases, there was no competition when the companies were placed on the market.

It appears then that the state failed to manage the confiscated properties, and was more interested in selling off large companies for quick profits, while overlooking other confiscated companies. The administration of these companies is characterized by mass corruption, turning it into the country's largest case of corruption since the revolution. At the same time, the Constitution's neglect in insulating confiscation procedures from judicial dispute is a source of real danger

<sup>17</sup>The founding of Al-Karama Holding Company was announced on July 26, 2012.[4] Laws 136 and 137 of 1959 concerned the confiscation of real estate properties of a group of those close to the Beys, i.e. the Hussein family.

vis-à-vis the confiscated assets, since those individuals whose items were confiscated are now attempting to recover them – raising questions about the future of the revolutionary decree.

## Waiting for the Judiciary's Ruling: The Legitimacy of the Revolutionary Confiscation Decree

We learned that a significant number of individuals whose assets were designated for confiscation have brought legal cases to the Administrative Court, challenging the legitimacy of the confiscation decree. A number of these cases will soon be forwarded to the Administrative Courts of First Instance. This prompted us to ask about the seriousness of the appeals, and whether the Administrative Court will actually rule on the legitimacy of the confiscation orders or merely declare that it lacks the jurisdiction to do so.

We asked Emad Abdali about the facts of the cases and their prospective outcomes. He declined to reveal details, citing his work on behalf of the general authority for state disputes, which represents the state in cases relating to confiscation. However, he speculated that, “the Administrative Court would not respond to the challenges to the confiscation order, as it was a legislative decree, which falls outside of the jurisdiction of the court”.

We posed the same question to Yussef al-Rizqi, a legal researcher and lawyer. He was of the opinion that “the confiscation decree was issued under the influence of public pressure, and did not include objective measures specifying what constituted the corrupt assets subject to confiscation. The decree was aimed at those who were close to the head of the former regime, rather than looking into financial corruption per se; it specified the date Ben Ali took power as the start of the confiscation of the assets he acquired, and suspicion of corruption of others affected by the decree is presumed to begin from the start of their relationship with the Ben Ali regime”.

Al-Rizqi also pointed out that, “the confiscation decree does not comply with the United Nations Convention against Corruption (UNCAC), as it does not respect the most important of the convention's conditions – which states that assets [targeted] be the result of corruption, and not the result of a person's ordinary, natural actions”. He confirmed that, “the decree can be considered flawed because of the fact that it did not refer to the matter of verifying whether or not the

assets had been legitimately obtained by the judiciary – something that makes the text [of the decree] an infringement upon the right to property ownership”. He added, “it is possible to compare the confiscation decree to the 1959 law on confiscation to illustrate its faults. The 1959 law specified an Administrative Commission to calculate the assets and take inventory of them, limiting their roles to these tasks alone, and allowed judicial challenges to decrees of confiscation.[4] Consequently, its statutes constituted sound legal procedures that respected the principle of the right to appeal and established the soundness of the source of assets whose confiscation was sought. The new confiscation decree was not in compliance with these matters”.

Al-Rizqi concluded by stating “that the confiscation decree came to serve the interests of those who put it into place – the head of the government and the then-president of the republic, both of whom were emblematic of the old regime – and with them, entities which were in control and governing at that point in time. Consequently, the text of the decree should not be read at face value, and is far from serving the interests of the Tunisian people; it was not intended to fulfill the goals of the revolution”. For those reasons, al-Rizqi concluded our discussion by saying that, “the fortunes of those who have brought legal cases to lift the confiscation orders are ample enough to restore the assets”.

In conclusion, the process and procedures of confiscation have turned into a portfolio of “shifting sands.” Moreover, everyone we talked to agreed that it included corruption – although they differed in how they defined the form and extent of that corruption. Some, who asked not to be named, pointed to suspicions surrounding the transformation of the confiscated assets into a cash cow for the political class, as well as for the well-connected, influential individuals with connections to that class who have been provided with whitewashed assets in exchange for their silence on their corrupt origins. Thus, confiscation has transformed from a revolutionary event to a portfolio of corruption; what we have managed to discover and publish here is only the tip of the iceberg.

*Translated from Arabic to English.*

# 12. Illicit enrichment

## *Michèle Zirari*

### Introduction

The UN Convention against Corruption recommends in its Article 20, the criminalization of illicit enrichment:

«Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offense, when the committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.»

But what is illicit enrichment? There are various offenses under the Penal Code that criminalize illicit means by which a form of enrichment is obtained. This applies to theft, fraud, breach of trust, corruption, influence peddling, etc. In these cases, it is the means used that is sanctioned: the fraudulent removal of something that belongs to others in the case of robbery, the act of misleading a person to obtain illegitimate financial profit in the case of scam, the fact of charging for services that are normally free of charge in the case of corruption... Enrichment is only the consequence of an action that was observed and is not sanctioned as such. Being the result of an offense, if the latter is defined as such in trial and the perpetrator is convicted, the decision may provide for the confiscation of the enrichment, restitution and damages.

If no offense was established however, would it be possible to prosecute and try the holder of an enrichment that seems excessive? In other words, can enrichment be punished even when the origin remains precisely unknown? This inevitably raises some challenges. The UN Convention uses the term «illicit enrichment.» Therefore, only illicit enrichment can be criminalized.

The first issue to resolve is the definition of «illicit».

### Defining illicit enrichment

In order to reach such a definition, it is necessary to specify the criteria that would justify describing enrichment as illicit. Indeed, in order to create an offense, it is necessary to provide a precise description as imposed by the principle of legality of offenses and sentences – a principle that can be considered universally recognized since it is enshrined in the Universal Declaration of Human Rights (Article 11-2): «No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.» The principle is repeated in the same terms by Article 15 of the covenant on civil and political rights.

This principle has featured in all Moroccan constitutions. In its first paragraph, Article 23 of the 2011 Constitution stipulates that: «No person shall be arrested, detained, prosecuted or convicted except in the cases and forms prescribed by law». Similarly, Article 3 of the Penal Code stipulates that «no one shall be convicted for an act that is not expressly provided for as a criminal offense by law, nor can they be punished by sentences that the law has not established.»

This is a fundamental rule in criminal law that constitutes a safeguard against arbitrary judgment, since it precludes the judge from punishing for a behavior that is not expressly prohibited by criminal law and / or from imposing a higher sentence than the one provided for by law. Accordingly, respecting the principle of legality does not exclude the criminalization of illicit enrichment but makes it mandatory to give it a precise definition.

### An attempted definition

Enrichment can be defined as the fact of increasing one's property; the fact of making a fortune. This is the definition of the dictionary. Enrichment in this sense cannot constitute a criminal offense. In order to consider enrichment an offense it must be illicit. But how can illegality be proved? Proving illegality relies on demonstrating the illicit act



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causing enrichment, be it theft, fraud, breach of trust, corruption, etc. This, consequently, cancels any interest in the creation of a new offense, since it entails the obligation to prove an offense that already exists in the Criminal Code.

In this context, it is necessary to propose a new offense that says «enrichment that is too fast and difficult to explain», and use the definition given by the United Nations Convention against Corruption: a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

The illicit nature of enrichment would therefore consist of the person charged merely being unable to prove that their assets correspond with their revenue. Is such criminalization possible? Establishing as a criminal offense the behavior of individuals who cannot reasonably justify the detention of estate in relation to their legitimate income has raised the concern of many legal practitioners and human rights defenders, to whom such a proposal is contrary to the principle of presumption of innocence.

### Implementation challenges

If any enrichment that is difficult to explain is taken to court, the explanation can only come from the one who got enriched. This, therefore, involves asking the person who got enriched to prove that they did it by lawful means.

However, just like the principle of legality of offenses and sentences, the principle of presumption of innocence is one of the bases of criminal procedure. The Universal Declaration of Human Rights (Article 11-1) reads: «Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.» This is also reflected by the Covenant on Civil and Political Rights (Article 14-2). The presumption of innocence is enshrined in the Moroccan Constitution – “the presumption of innocence and the right to a fair trial is guaranteed» (Article 23, 4th paragraph) – and in the Code of Criminal Procedure. Under the presumption of innocence, anyone charged is presumed innocent, and it is up to the plaintiff in the criminal proceedings (Prosecution) to prove the guilt of the accused.

This is a well-established procedural rule stipulating that in any trial, the burden of proof is on the applicant. Within criminal trials, the Prosecution, which plays the role of the applicant, holds the powers bestowed

on it by the State, while the person charged is a private individual reduced to their own possibilities. Additionally, the Prosecution is not a party like the others (accused, civil party, civilly responsible person). As a representative of society, it has a preeminent position and enjoys much broader rights throughout the course of the procedure. This preeminent position explains and justifies the presumption of innocence. However, asking the person prosecuted for illicit enrichment to provide justifications of their fortune can lead to reversing the burden of proof and would therefore be contrary to the presumption of innocence.

Another issue raised by the criminalization of illicit enrichment is the determination of excessive enrichment that will be considered illegal. On the one hand, it is almost impossible to count all the people who got enriched and how they did it. While some people like to show off their wealth, others who are more cautious prefer to hide, or export it. On the other hand, it would be ridiculous to take to court all those who got rich. Only those who got rich by illegal means should be brought to court. It is therefore essential to determine what enrichment can be considered illegally obtained and who is responsible for the decision to prosecute.

Denunciation, be it individual or through the press, that leads to prosecution must obviously be avoided. It is not desirable either to leave it up to the Prosecutor to decide who to prosecute simply because the Prosecution has doubts about the legality of the assets acquisition. Such power given to the prosecutors would imply a substantial risk of arbitrariness. The existence of reliable means of detection is a prerequisite for sanctioning illicit enrichment.

- **Assets control of officials** most vulnerable to corruption can be an illicit enrichment detection means.

A rigorous and reliable mechanism of assets control would allow considering the criminalization of illicit enrichment. The establishment of an unexplained increase in wealth during periodic controls would result in the creation of a specialized commission mandated to investigate more thoroughly. In the event that a thorough investigation shows an imbalance between the assets of the reported person and their income, this would reverse the burden of proof and the person could then be brought to court on the basis of the findings of the investigating body and will have to justify any doubtful elements.

The establishment of such an organization



requires careful thought. It is first necessary to determine to whom the control should apply. Targeting too many people would make it ineffective, while targeting too few people would make it uninteresting. One can imagine a mandatory inspection for certain officials and random inspections for others.

As a second step, the monitoring bodies should be organized in such a way to fulfill their task independently and efficiently, in particular the committee whose investigations could lead to a reversal of the burden of proof.

- The control means aiming to **detect money laundering operations** could also serve to detect illicit enrichment.

Money laundering can be defined as the act of acquiring, holding, using, converting or transferring assets for the purpose of concealing or disguising their origin, when they are the result of a criminal offense.

In Morocco, the law on money laundering provides for the monitoring of capital movements. The Financial Intelligence Processing Unit is in charge of collecting and processing information related to money laundering, of ordering inquiries, and constituting a database of recorded offenses. The work of the said Unit does lead to illicit enrichment detection, but not to direct incrimination. The law does not provide for a reversal of the burden of proof that would make the person against whom suspicions arise at risk of being condemned if they fail to justify the legal origin of their enrichment. When the Unit refers the case to the prosecutor, if the latter decides to bring the suspect to court, it is up to the prosecution to prove the illegal sources of enrichment in order to punish money laundering, and consequently prosecute offenses that led to it.

Nevertheless, the law expressly stipulates that the prosecutor and the judge may request the disclosure of all documents and information gathered by the Unit, which facilitates proof of enrichment and the offense that led to it.

## An overview of comparative law

Some states punish illicit enrichment with no restrictions. Others criminalize illicit enrichment but under the condition of proving it based on a precise prior item, or consider it as evidence.



### The offense of illicit enrichment punishable by law

Argentina introduced illicit enrichment in its Criminal Code in 1964. Under Article 268 of the Code: «Whoever, after being duly required, does not justify the origin of a considerable assets enrichment... posterior to access to a position in public service will be punishable by two to six years' imprisonment and disqualification from public service for three to ten years. The proof of enrichment will be kept secret and will not be used against them for any other matter...»

This law has faced serious criticism with regard to the unclear definition of the offense on the one hand, and to the reversed burden of proof on the other hand. According to criticism, the law underlies «a presumption of guilt. Indeed, the law presumes that the increase in the assets is of illicit origin, and then makes it the responsibility of the person under investigation to reveal their lawful origin... It seems logical to conclude that this is a reversal of the burden of proof and therefore a violation of the presumption of innocence.» According to the author of this 2001 article, no conviction was made on the basis of this law.

According to a Transparency International document, an amendment to the Penal Code in 1999 allowed prosecuting officials for illicit enrichment. Penalties included imprisonment, fines and dismissal from public service. But jurisprudence has subsequently claimed that the measure punishes failure to justify the enrichment but does not reverse the burden of proof. Therefore it is the prosecution's responsibility to prove the absence of justification – a negative type

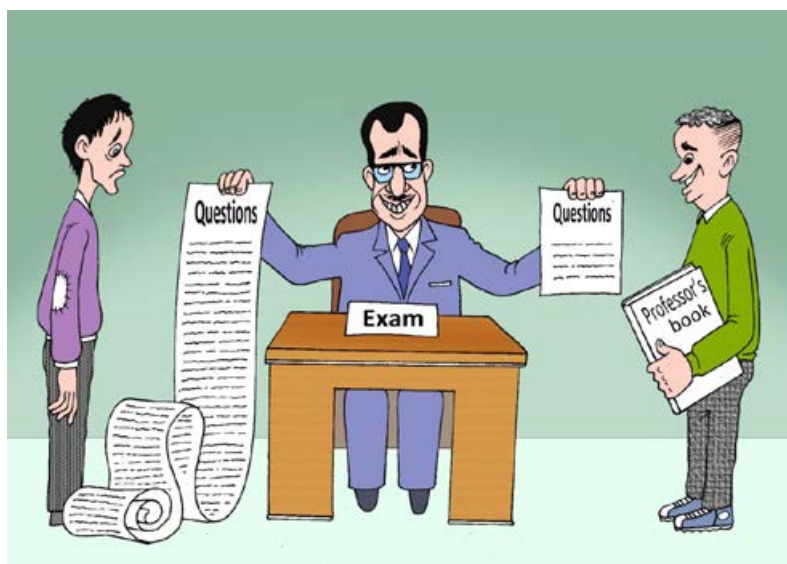
of evidence that remains always difficult to provide.

In 1981, Senegal decided to punish illicit enrichment with one to five years in prison, and provided the following definition: *"The offense of illicit enrichment is constituted when, upon notice, one of the persons designated above, is unable to prove the legal origin of the resources that allow them to be in possession of assets or to have a lifestyle that is unrelated to their legal income."*

There is no indication of the presumptions that would prosecute a person, and no indication of the authority in charge of making the decision.

The same reproach can be addressed to Algerian law No. 06-01 of 20 February 2006 on the prevention and the fight against corruption, whereby article 37 punishes by two to ten years in prison and a fine «any public official who is unable to reasonably justify a substantial increase in their assets relative to their legitimate income."

The law sets up a provisional control (Articles 4 to 6 and Article 36), the terms of which must be in the most part defined by regulatory means. But the law does not set the link between assets control and the offense of illicit enrichment, and it also remains silent on the decision to prosecute. Given the definition of the offense, one can fear a deviation from the principle of the presumption of innocence.



Morocco seems to embark on the same path since a draft penal code recently made public by the Ministry of Justice provides in article 256-7 for the punishment of illicit enrichment: «any civil servant who, after holding their position, showed a substantial and unjustified increase of assets compared with their legitimate income, and who have not proved the legitimate source of the increase."

## Illicit enrichment: Evidence or a worsening factor of another offense?

The French penal code does not criminalize illicit enrichment as a specific offense. However, in some situations, enrichment is punishable because the legislator considers it a consequence of specific circumstances that cast serious doubt on the legality of its origin. In such situations, it is up to the Prosecutor to prove the said circumstances in order for the enrichment to be sanctioned. However, it is noteworthy that this legal text does not concern illicit enrichment by public servants at the expense of public funds, and that the offense it concerns has nothing to do with corruption.

What the code covers is the case of a person who is unable to justify resources in relation with their lifestyle while living with a minor who engages in offenses against assets. There is actually a reversed burden of proof because if the person is unable to justify the resources corresponding to their lifestyle, they will be sanctioned (up to five years in prison and a fine), but this reversal is conditioned by prior evidence by the Prosecution that the charged person lived with the minor and that the minor did commit the offenses.

The same mechanism applies to the persons living with someone engaged in prostitution, to the persons living with someone engaged with begging, and to the persons who holds a usual relationship with persons belonging to a criminal group. In these cases the inability by the person to justify their revenues may result in conviction.

Canada considers illicit enrichment as a piece of evidence that can be presented at the trial of a person charged with corruption but not as a specific offense.

In Ireland, the Proceeds of Crime Act is intended to fight against organized crime. The Criminal Assets Bureau (CAB) was created as a special police unit that can request a high court's decision to seize and confiscate the proceeds of crime. Confiscation can take place without criminal conviction, but evidence remains the responsibility of the CAB to prove that the property was acquired illegally. In 2005 the same legislation was made applicable to public servants, but a corruption conviction is required before prosecution for illicit enrichment. However the burden of proof may be reversed if the prosecutor proves a predicate offense.

## Conclusion

The above argumentation shows the challenges facing the criminalization of illicit enrichment if one wants to abide by domestic and international rules that must apply to the conduct of a fair trial.

Comparative law clearly illustrates this point: the countries that have introduced it a long time ago, Senegal and Mali, have not applied the laws for decades. The laws are now back on the agenda, but one can fear that proceedings would be initiated more for political reasons than for improving transparency and governance, because the initiative to trigger prosecution seems to depend too much on the appreciation of the public prosecutor, and therefore the Executive.

Criminalization of illicit enrichment may be introduced in the legislation while prosecution assumptions are not specified with utmost caution. The persons or entities that can trigger legal proceedings should be defined restrictively. The elements on which the proceedings can be based must be provided precisely enough in order to justify a reversal of the burden of proof which ends up, whatever the precautions taken, raising criticism from advocates of fair trial.

*Translated from French to English.*

# 13. The obligation of public information: A means to fight corruption

## *Okwe Ndong Vincent*

With globalization and the emergence of the knowledge economy, the free flow of information has become a necessary condition for personal development, economic performance, and social cohesion. During the last two decades, a growing number of countries have adopted laws that seek to provide the public with the largest possible access to the data held by the administration, and to develop information of general interest. Likewise, intergovernmental organizations, development banks, and a given number of other financial institutions have set up a policy of information disclosure. In order to improve the collection and the retention of documents, facilitate the dissemination of information, and reduce administration management costs and the costs resulting from the citizens' use, the public authorities resorted to information technology which benefited from various economic advantages as regards research and development, profit, and the promotion of competitively. In response to this movement, a normative framework was deployed favoring the recognition of the right of access to information as an acknowledged prerogative for each person, enabling them to claim and obtain any information they request as long as it is not explicitly limited by a law, notably in order to protect the necessary interests of democratic societies.

The right of access to public information derives directly from Article 19 of the 1948 Universal Declaration of Human Rights and from the 1966 International Covenant on Civil and Political Rights. It represents the essence of the freedom of expression and opinion, and remains congruent with the other fundamental rights, which are the right of equality and the right of participation by citizens in the management of public affairs. In fact, the effective participation of citizens in the management of public affairs is contingent on their access to the information owned by the public institutions. The very essence of information lies in the cognizance that is made outwardly free through general accessibility. Information, as a public good

that can be appropriated by any individual, the use of which will not taint its content, does not exist thus through its object, but through its goal and the relevance of its content.

From the rulers' side, the right to information obliges anyone who holds a public or a private mandate to be accountable to the public permanently, by allowing them to have access to tools enabling to control the use that is being done with that mandate. The disclosure of information enables citizens to take cognizance of the activities of their rulers, and fixes the anchor point of a discussion structured on governmental action. Furthermore, with the absence of free access to information, it will be difficult to achieve the goal of a "transparent administration", which is a prerequisite to the consolidation of a true democracy.

Originally limited only to the administrative law, in order to give a response to the research of information by the public service users, the right of access to information has now become interested in different other fields related both to public and private law. Since then, this right has moved from the exclusiveness of a right considered as being linked to the administrative governance, to a fundamental right of the human person, which indicates thus a considerable evolution. Today, this right is at the heart of the strategies developed by intergovernmental organizations and the actions lead by international civil society, notably the fight against corruption, impunity, the promotion of good governance, and the protection of the environment and the public health.

The necessary need of the citizens for transparency will be thus for the authorities directly linked to the obligation of considering and designing "knowledge routes for the whole society", especially in the new environment of the information society. The administration, by making information available and accessible, first makes the citizens contribute validly to the denunciation of the bad practices of their rulers as regards the management of public affairs and public goods in order to put public finances back



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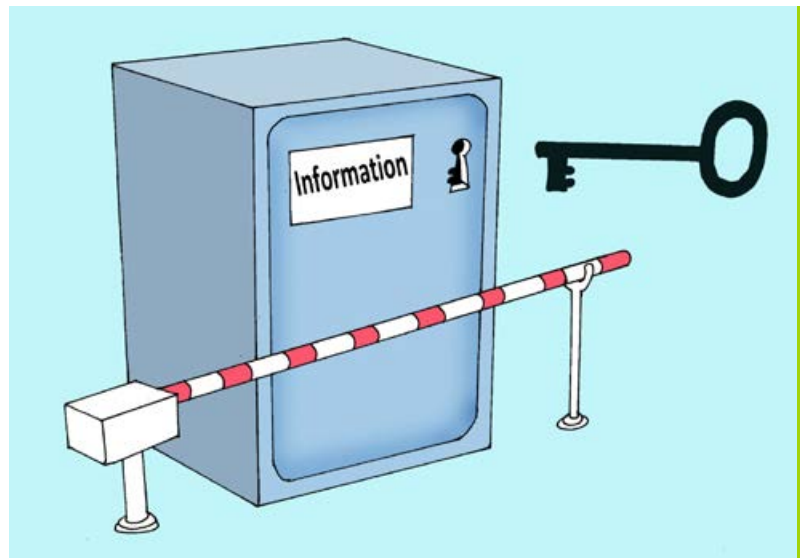
in order (I); and second to the advent of a more democratic society (II), since access to information will allow them to take part in the management of public affairs by being informed about the ideas and projects to be implemented by the authorities.

## A Right in the service of public governance

The obligation for the public authorities to make information available, besides its aspect that promotes administrative transparency, is justified also in the need for knowledge. In a democratic system, any public office shall be accountable to citizens. Accountability is a key element in democratic governance. It is implicitly recognized in the right for political participation which is based notably on the idea that the government must answer for its actions before the people. The exercise of public office shall be marked with the seal of responsibility, ethics, morality, and transparency. For this reason, it is compulsory that the public authority develops principles and policies aiming at facilitating the free flow of public information.

The new Moroccan constitution proclaims the right of access to information. Article 27 states that: "All citizens have the right to access to the information owned by the public administration, elected institutions, and the organizations having a public service mission. The right for information can only be restricted by law to protect national defense, the state's interior and exterior security, as well as the private life of individuals, to prevent the infringement of the rights stated in the present constitution, and to protect the sources and the areas expressly stated by law".

The constitutional requirements for the quality and transparency of the public services are laid down in title XII "*Good governance, general principles*" (art. 154 to 167). Thus, by laying down what the doctrine calls the "laws" of the "public service", article 154 states that: "The public services are organized based on the equal access of all citizens, the equitable coverage of the national territory, and on the continuity of the rendered services". The article adds that the public services shall comply with the "standards of quality, transparency, accountability, and responsibility, and shall be regulated by the democratic principles and values enshrined in the constitution". Concerning transparency and ethics, article 158 also states the following: "Any person, either elected or designated in public office shall make [...] a written statement of the goods and assets held directly or indirectly by



them [...] addressed to the court of auditors". The objective of this obligation is obviously to prevent officers from any illicit enrichment during the exercise of their functions, and to enable transparency in the management of public affairs. It is thus obvious that the need of the citizens to be informed remains here imperious and it is necessary that notably those who generate the information are "legally obliged to communicate it". For, in this case, all these legal constraints to communicate information are justified in order to respect values that are viewed as fundamental, such as the integrity of public officials.

In parallel with the adoption of the new constitution, the government approved two bills n° 31-13 on the right of access to public information, respectively on August 6th 2013, and July 14th 2014. While the 2013 bill, despite its shortcomings was generally viewed as acceptable, that of 2014 remains regressive. In fact, instead of organizing the access to information as it is proclaimed by paragraph 1 of article 27 of the Constitution, and as it is recommended through international practices, the 2014 text penalized it. Yet, the free movement of public information allows citizens to perform an informal control on the administration's mode of operation, as well as on the effectiveness, equity, and the integrity of its action. In this context, transparency is not only the best method to fight corruption, abuses, the misuse of power, and the embezzlement of public funds; it is also the last stand against the dissipation of public funds. Promoting administrative control proves to be fundamental especially if we keep in mind the constant magnitude of the state's intervention in the social sphere. In truth, transparency has become in contemporary societies a recurrent topic which has seemingly found a privileged



status in all social activities. The implied fundamental idea is that the public authorities have to act in an open manner. This openness should be reflected on their activities and on the decisions they take. Better yet, this representation is based notably on the right of every person to “seek” and “receive” information and ideas, as guaranteed by international law. Transparency is also anchored in the idea upon which democracy is established, namely that “the will of the people is the foundation of the government’s power”, and without transparency, that goal cannot be achieved. Consequently, “free information”, that is the right for every person to have access to the information held by the government, is an essential element of this right.

Thus, by focusing on the principles of transparency and access to public information, the United Nations Convention Against Corruption (UNCAC), represents the impetus behind any development process in any country, be it individual, social, or societal. A set of parameters contribute together to the strengthening of this process which cannot yield positive results in a society affected by corruption. The Convention obliges the countries which have ratified it to take measures to improve “public access to information” (art. 10), by “a) enhancing the transparency of and promoting the contribution of the public to decision-making processes; b) ensuring that the public has effective access to information” (art. 13).

Allowing citizens to know how major socioeconomic guidelines are taken is one of the first elements of the elimination of corruption. Access to public information finds thereby a clear foundation in international law. The Convention does not only invite the states to consecrate the right of access to information as a response to the people’s requests, it calls them to do it spontaneously. Through the right of access to information, the public administration will be required to communicate information related to its missions, its organization, its strategy, and its action plans, as well as on performance and activity indexes.

The originality of the Convention lies in the important preventive measures for the detection and penalization of corruption, as well as in the cooperation between the countries in this field. The Convention aims at promoting responsibility and the good management of public affairs and goods. In fact, with the liberalization of trade, countries can efficiently capitalize on the intensive capital and exchange flows to adhere to the dynamics of global economic integration.

One of the most important values that justify the free movement of information is that the Convention advocates transparency and democracy: a greater openness of the administration towards the citizens. In general, transparency has to do with the opening of internal processes and decisions of an organization to a third party, whether or not involved in that organization. It is based on a non-negotiable right which is the right to know, stated in article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. This fundamental right constitutes also the foundation of the modern processes of accountability, and legitimation of public finances. In this context, the transparency of the government’s activities becomes an indispensable condition for good governance and for the effective participation of citizens in the political processes. Access to public information is therefore a way to work for democracy and good governance. It is also through the principle of good governance in the management of public affairs that the right of access to information contributes to realizing the democratic ideal.

## A Right in the service of participatory democracy

One of the main missions of the state of democracy and the rule of law is to guarantee to all citizens and to the whole society, the enjoyment of political, economic, social, and cultural rights. Democracy aims mainly at preserving and promoting the individual’s dignity and fundamental rights, ensure social justice, and encourage the economic and social development of the community. It is equivalent to a government that is efficient, honest, transparent, freely chosen, and accountable for its management.

By involving citizens in the management of public affairs, the government participates at the same time in the consolidation of democracy. To be effective, this involvement has yet to be global, which means that all the population’s categories have to be able to follow the government’s activities. Democracy is thus seen simultaneously as an ideal to pursue and as a form of government to be applied according to the modalities that take into consideration the diversity of experiences and cultural singularities, without ever derogating from internationally recognized principles, standards, and rules. Participatory democracy is the sum of all the mechanisms and procedures that enable to increase the participation of citizens in decision-making. It

came to overcome the limitations of representative democracy in terms of the participation of citizens in decision-making, implementation, and control.

As holders of their sovereignty, citizens have to be able to follow the activities of their representatives in an objective way. They should have the means and be able to judge the way in which the public authorities are conducting their programs and actions. Popular sovereignty is only meaningful when the public is well informed of the affairs of its government. The right to know constitutes an instrument for the equilibrium of powers, as it strengthens the independence of opinion towards the public authorities, while giving the representatives of the people a stronger footing for action. The right to know is therefore seen as a key element of the functioning of a system of "self-government", characterized by the control of the administration by the users. It is now accepted and recognized that the freedom of information constitutes and organizes the very notion of democracy. Some even assert that in a democracy, publicity is fundamental because it is the guarantee of freedom. Because, by facilitating access to information, publicity represents the implementation of the very first meaning of freedom, which is the possibility to act knowingly.

Moreover, the most important virtue of freedom is to allow any person to acquire a knowledge that will lead them to form their convictions, to determine real choices, and to bring their contribution through their adherence to the adopted choices. It is therefore through the public authorities' policies and the way they will be implemented that citizens, fully and objectively informed about the republica, can be able to take part effectively and in an enlightened way to the implementation of these policies. Also, the public authorities have to offer information in order to serve the "public interest". The «Public interest «consists of "considering information as a tool of control and participation of citizens in public affairs". Public interest should authorize the derogation from legal restrictions for a larger access to public information. In fact, unjustified restrictions to the citizens' access to information and public data limit their right to know.

There are therefore, a myriad of resolutions, declarations, and official reports emanating from the UN and its specialized bodies which recommend the formulation of guiding principles for the development and promotion of "public domain" information. Among the most relevant resources therein, the 2003



Recommendation, and the guiding principles for the development and the promotion of the governmental "public domain", published in 2004. The 2003 Recommendation devotes a whole chapter to the development of the "public domain" content (line n° 15). In addition to this Recommendation, one can mention the Declaration of Principles and the Action Plan adopted on the same year during the World Summit on the Information Society (WSIS).

Free information, as an instrument for the transparency of public and administrative institutions, offers through this evolution, the establishment of a participatory democracy, which is an essential supplement necessary to the current regimes of participatory democracy. Indeed, the public debate in the social body, which is a feature of pluralist systems, is only made possible on the basis of access to the information held by the public authorities. A secret regime would prevent, in contrast, the parliament, the courts, the press, or even the citizens themselves from counterbalancing the enormous powers of the executive branch. Today, the transparency of information provides a guarantee for democratic systems because it encourages good governance by curbing corruption, and for the effective participation of citizens to the production process of public policies.

Providing the public with information contributes to the efficiency of the administrative work. In fact, transparency is used in decision-making which interests the community, as it allows to take decision-making more properly by considering the interests at stake. As a witness of the proper and balanced functioning of institutions, transparency guarantees a better communication, whether it is horizontal or vertical, internal or external. In this regard, it contributes fully to the efficiency of the administrative action. Like participation, transparency aims at erasing the old vision of commanding administration and at consolidating the consensus as a new operating mode around its different services. Before being recognized and consecrated by other countries, administrative transparency was first implemented in US administrations and in those of the Nordic countries, given the principle of accountability of the Anglo-

Saxon system, and later the French system. These administrations, while meeting the challenges and serving the best interests of the administration, either at the level of the operation of its services or the scope of its decisions, have laid down the foundations of a policy of distribution of information.

The quest for the efficiency of the administrative action can also guide transparency as regards the scope of administrative decisions, because the antagonism between the secret and the real interests of the administration reveals itself even at the level of the content decisions. One can therefore question the value of the decisions taken without having the official in charge accessing information, because of the rule of secrecy, and all the facts and documents held by different government services. Generally, the segmentation imposed by security mechanisms decreases to a minimum for each decision of the public authorities. This failure of participation by all qualified people diminishes sometimes the value of the decision and does not always allow to evaluate all its exact consequences.

The situation is particularly worrying in foreign policy, where many decisions are taken in complete secrecy, and where the committed mistakes seem irreversible. In fact, it is commonly accepted that a wider consultation when the decision is to be taken can prevent such erring. In the United States for example, President Kennedy admitted that the mistakes made during the Bay of Pigs invasion in Cuba in 1961 could undoubtedly have been avoided, have information circulated more freely. Administrative transparency determines thus the effectiveness of the control of the public opinion, whose necessity is felt more in modern democracies than in hierarchical, parliamentary, or jurisdictional controls, which have proven to be difficult to implement, and whose range is limited.

Likewise, abuse in the practice of secrecy removes the effectiveness of the protection of some kinds of information that are particularly sensitive. Just as «too much tax kills tax», «too much communication kills communication», or «too much unnecessary secrecy damages the protection of the legitimate secret», abusive practices of secrecy take away a great amount of the force of the minimal system of the protection of information.

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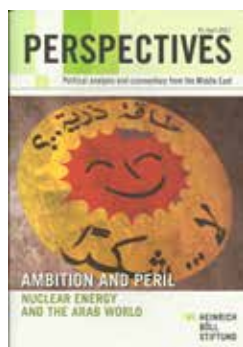
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