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Palestinian Center for

POLICY and

SURVEY RESEARCH

# The Third Draft Constitution for a Palestinian State: Translation and Commentary

By  
**Nathan J. Brown**

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October 2003



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*Constitutional Issues*

# The Third Draft Constitution for a Palestinian State: Translation and Commentary

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## Domestic Politics

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The draft constitution for a Palestinian state has been developed through an extended process that drew on Palestinian and international expertise and shows strong signs of reacting to earlier Palestinian (and broader Arab) experiences with constitutional documents. It should thus be no surprise that the draft has grown longer and more specific over time. Constitutions throughout the world have shown increasing length and specificity in the past decades, so the Palestinians are participating in a broader trend. The Palestinian draft does not include as lengthy provisions on general ideological matters as has become the norm; the current draft does not even have a preamble. It is not devoid of generalities, but it is probably more remarkable for the specific language of some of its provisions.

Some will find many of the articles too detailed and confining. It is likely that the drafters have chosen to use specific language in order to close loopholes that have emerged in past Palestinian (and broader Arab) experience. Palestine does not have a constitutional tradition to guide those interpreting and applying constitutional texts, and it seems quite likely that its constitutional institutions, if they emerge at all, will come under great pressure from the beginning. For this reason, it may make sense for the draft to go into more detail than most constitutions do: any loophole left in the text will probably be exploited.

Palestinian Center for  
POLICY and SURVEY  
RESEARCH

Irsal Street  
P.O. Box 76  
Ramallah, Palestine  
Tel: (02)2964933  
Fax: (02)2964934  
Email: [pcpsr@pcpsr.org](mailto:pcpsr@pcpsr.org)

## About the Author

Nathan J. Brown is Professor of Political Science and International Affairs at The George Washington University in Washington, DC, where he also serves as an adjunct scholar with the independent Middle East Institute. He is a specialist on comparative politics of the Middle East and has focused on issues of constitutionalism, rule of law and democracy. He has conducted research on Egyptian, Palestinian and Gulf politics.

Professor Brown is the author of four books: *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine*, a study of Palestinian politics since 1994 published in 2003 by the University of California Press; *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*, published by the State University of New York Press in 2001; *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, published by Cambridge University Press in 1997; and *Peasant Politics in Modern Egypt*, published by Yale University Press in 1990.

Professor Brown received his B.A. in 1980 from the University of Chicago and his M.A. and Ph.D. from Princeton University in 1983 and 1987. His doctoral dissertation was awarded the Malcolm Kerr Prize by the Middle East Studies Association.

## **Contents**

Background and General Comments

Chapter One: General Foundation of the State

Chapter Two: Public Rights, Freedoms, and Duties

Chapter Three: Public Authorities

Section One: The Legislative Branch

Section Two: The Executive Branch

Section Three: The Judicial Branch

Chapter Four: Concluding Provisions

## Background and General Comments

The effort to draft a Palestinian constitution has seen sudden bursts of activity alternate with sustained lulls. In 1988 the Palestinian National Congress (a body designed to represent Palestinians throughout the world) declared a Palestinian state and authorized a committee to begin work on drafting a constitution. That project began at a glacial pace but took on some urgency with the 1994 creation under the Oslo Accords of the Palestinian Authority, governing Palestinians in the West Bank and Gaza. The Accords provided for an elected assembly which began operation after 1996 elections. That body—the Palestinian Legislative Council—assumed control over the drafting process. Its product, the “Basic Law”—an interim constitutional document for the PA—was finished in 1997, but it was not approved by Yasir ‘Arafat until 2002 and still has not been fully implemented.

In 1999, the PLO’s Central Committee authorized a wholly new and separate effort, this time not for an interim constitution but instead to accompany a declaration of statehood. Yasir ‘Arafat named cabinet minister Nabil Sha‘th and a group of legal figures to begin work. In 2001, the committee produced a first draft, though it received little public attention in the midst of the intifada.

In May 2002, reform of Palestinian institutions suddenly returned to the domestic and international agenda. At first, constitutional issues arose only in internal debates, but in June 2002, US President George W. Bush publicly called for a “new constitution,” an empowered parliament, and “a new and different Palestinian leadership.” Nabil Sha‘th quickly responded by submitting a revised version of the 2001 draft constitution to the American leadership, but this modified document was stillborn: it did not respond to American concerns and had been modified without the knowledge of most Palestinians, seriously undercutting its legitimacy.

A more serious effort to revise the 2001 draft began. The committee was reconvened, and its membership was widened to include political leaders and activists. In the second half of 2002 and the first half of 2003, multiple drafts have been circulated among interested parties (both domestically and internationally) and experts. Some drafts have been published and one was submitted as a report to the Central Committee of the PLO.

In January and February, the constitution drafting process received a large amount of attention, emerging as central to Palestinian reform efforts. In particular, those who argued for a less presidential style of government saw the draft constitution as a

possible way to attain their wishes. While the presidential nature of the draft has definitely decreased over time, attention shifted in February and March 2003 to a set of amendments to the Basic Law, the interim constitution for the Palestinian Authority. A new position of prime minister was created, taking on much of the authority formerly in the hands of the president. The process of amending the Basic Law took much of the pressure off (and diverted attention away) the draft constitution for statehood. Nevertheless, the drafting committee kept working. And indeed, a draft constitution is part of the “Road Map” advanced by the United States, the United Nations, Russia, and the European Union in 2003.

**The translation:** The draft presented here, dated 4 May 2003, represents a comprehensive and all but final draft (a final draft is expected within the next few months). I am presenting my own translation of the draft. This translation has several features:

- I have tried to translate as literally as possible, keeping in mind that this is a legal document. I have made no effort to make the document read smoothly in English.
- I am not a professional translator. While I have some experience dealing with Arabic-language legal and constitutional documents, I am quite certain that it is possible to improve upon my translation.
- Translations of some previous drafts have been published, generally on the internet. I have consulted with some of those translations but developed my own.

In the translation that follows, I insert my comments in **bold** after many of the articles.

**General comments on the draft:** The draft constitution for a Palestinian state has been developed through an extended process that drew on Palestinian and international expertise and shows strong signs of reacting to earlier Palestinian (and broader Arab) experiences with constitutional documents. It should thus be no surprise that the draft has grown longer and more specific over time. Constitutions throughout the world have shown increasing length and specificity in the past decades, so the Palestinians are participating in a broader trend. The Palestinian draft does not include as lengthy provisions on general ideological matters as has become the norm; the current draft does not even have a preamble. It is not devoid of generalities, but it is probably more remarkable for the specific language of some of its provisions.

Some will find many of the articles too detailed and confining. It is likely that the drafters have chosen to use specific language in order to close loopholes that have



emerged in past Palestinian (and broader Arab) experience. Palestine does not have a constitutional tradition to guide those interpreting and applying constitutional texts, and it seems quite likely that its constitutional institutions, if they emerge at all, will come under great pressure from the beginning. For this reason, it may make sense for the draft to go into more detail than most constitutions do: any loophole left in the text will probably be exploited.

Viewed in light of the Palestinian and Arab experiences, the present draft seems to have several remarkable features besides the careful drafting and the specificity of its clauses:

- It provides for a far stronger parliamentary system than is the norm in the Arab world. It should be noted that although the immediate call for such a system stemmed from concerns (both domestic and international) about the Palestinian leadership, it reflects a much deeper set of concerns as well. Authoritative Palestinian documents have always shown a preference for a parliamentary system. In addition, one of the greatest failures of Arab governance—the inability to constrain the authority of the head of state in legal and constitutional channels—is now widely acknowledged.
- While it does provide for a strong parliament and prime minister, the constitution does leave some room for interpretation. Constitutions often work in unintended ways, especially in the area of executive-legislative relations. One of the reasons for such unpredictability is that the operation of constitutional institutions is very heavily conditioned by areas that are less amenable to constitutional engineering—in particular, the party system.
- In my comments below, I try to show why I think that the draft would work to contain presidential power but not eliminate it, based partly on the existing state of the Palestinian party system (in which the current president heads the largest party, party discipline is weak, and political parties are not inclined primarily toward the electoral arena).
- The draft is probably more liberal than any of its Arab counterparts, not only in its general spirit (emphasizing rights and accountability) but also in many of its specific provisions (designed to ensure through the use of specific language that its liberal provisions are not undermined). The constitution is remarkably strong on gender equality. Its provisions on religion have attracted attention, but I read them as combining general obeisance to religion while showing a much stronger secularist focus in practice.
- Much effort has gone in to ensuring that political authority is exercised through clear legal channels. In this regard, the state of Palestine seems consciously designed as the opposite of the Palestinian Authority, in which legal mechanisms have been poorly developed and sometimes murky.

**Final status issues:** The draft constitution deals explicitly with three of the four areas specified under the Oslo Accords as “final status” issues: refugees, borders, and Jerusalem. It deals implicitly with fourth: settlements. In all areas, it stakes out the public Palestinian negotiation position but leaves an escape hatch to prevent rendering the matter entirely non-negotiable:

- Refugees are accorded a right of return. But the Palestinian state has two obligations in this regard: to allow them all to return to the state of Palestine and to pursue return or compensation through peaceful means for those coming from Israel within the 1948 borders.
- Borders are defined in terms of the June 1967 lines. Modification is possible through constitutional amendment and, arguably, through treaty. Either step would probably require a referendum.
- Jerusalem is to be the capital of Palestine. But Jerusalem is not defined. Based on the provision for borders, it would be restricted to East Jerusalem.
- Settlements are not mentioned but all the territory of the Palestinian state are to fall under Palestinian law. Thus while there is no call to remove settlements, it would be difficult (and indeed impossible without modifying borders) not to bring them under Palestinian law.

In one sense, there was no need to address these issues. Most constitutions do not address such matters, and part of the motivation for including them seems to have been an insistence that a constitution is not merely a document for organizing a state but also for proclaiming a society’s fundamental values and principles. Having included language on such issues, it may be politically difficult to remove the clauses—it would probably be seen as a retreat.

Israel will likely object to the inclusion of such issues in the draft constitution. Indeed, some public comments have already indicated the existence of such objections. Yet it could be argued that the historical experience of the Arab world indicates that there is a long-term logic in including such provisions in terms of legitimating the outcome of any negotiations.

Most Arab states achieved independence gradually after a period of ambiguous, even contested sovereignty. In most cases (such as Iraq, Syria, and Egypt), the imperial power worked to construct a relationship with ruling elites in the state in question that fell outside the oversight of constitutional mechanisms. Britain negotiated its oil concession in Iraq before allowing a constitution to go into effect that provided for a parliamentary role in approving treaties and agreements. France attempted to foster constitutional development in Syria and Lebanon in a way that placed the mandate beyond the reach of any constitutional procedures. Britain unilaterally declared Egypt independent while reserving four areas (foreigners, defense, the Suez Canal,

and the Sudan), thus indicating that it would not deal with Egypt as a sovereign state on such issues.

In the short term, such strategies were sometimes successful. In the long run, they did little good and even contributed to undermining the relationship. Political elites in all countries came to be seen as caught between loyalty to their own countries and to the imperial power. Parliaments and political parties felt excluded from the major national issues and whatever arrangements existed lost any nationalist or procedural legitimacy.

In the Palestinian case, the strong language of the constitution may press Israel beyond what it is currently willing to concede. But the Palestinian position presented in the constitution is not beyond the international consensus on the outlines of a settlement that has emerged over the past few years. The constitution thus establishes a tough but not impossible bargaining position—and also one that would have some nationalist legitimacy. And it is more likely to deliver an agreement that will be endowed with procedural legitimacy as well—an agreement endorsed not merely by a narrow group of leaders but by a host of emerging structures that can speak authoritatively for Palestinians.

This view may be excessively optimistic; more likely it may be asking the Israelis to take a longer-term perspective than is common in the region.

**Adoption:** As it stands, this draft constitution remains simply the work of a committee charged by the Central Council of the PLO. It has always remained unclear precisely how to bring it into operation, or even how to give it some form of official endorsement as a provisional constitution. Most who have considered the matter favor some form of constituent assembly to consider the draft, but such a procedure would seem to be difficult to arrange at present. Article 185 of this draft presents a formula for adoption that does not involve such a constituent assembly, but it does not make clear if (and how) the draft might be amended before adoption.

## Constitution of the State of Palestine

*Revised third draft*

4 May 2003

### Chapter One: General Foundations of the State

*From Article 1 to Article 18*

**Article (1)** Palestine is an independent, sovereign state with a republican system. Its territory is an indivisible unit within its borders on the eve of June 4, 1967 and its territorial waters, without prejudice to the rights guaranteed by the international resolutions related to Palestine. All residents of this territory shall be subject to Palestinian law exclusively.

**Most constitutions do not mention borders at all, much less feel the need to assert that only national law prevails. The implications of this clause are clear: the state of Palestine lays claim to all of the West Bank (including East Jerusalem) and Gaza but no other territory. Implicitly, Israelis who reside in that territory would be subject to Palestinian law.**

**While the Palestinian National Council accepted a two-state solution in 1988 and the Palestinian leadership has constantly reiterated its desire to establish a Palestinian state on the West Bank and Gaza, this is (to my knowledge) the first authoritative document (as opposed to policy statement) detailing the specific territorial boundaries of that state.**

**Any deviation from this position would seem to require a constitutional amendment (requiring public referendum—see Article 189). If the matter were handled in a bilateral treaty instead, Article 124 still requires that treaties affecting the integrity of the national territory be presented for public referendum.**

**The phrase “territorial waters” was added late in the drafting process, presumably to lay claim to the waters off the coast of Gaza. Under Oslo, access to the port of Gaza and to exploration of resources off the coast have been subject to negotiation with Israel.**

**Article (2)** Palestine is part of the Arab homeland. The state of Palestine abides by the Charter of the League of Arab States. The Palestinian people are part of the Arab

and Islamic nations. Arab unity is a goal. The Palestinian people work on behalf of its realization.

**Article (3)** Palestine is a peace loving state that condemns terror, occupation and aggression. It calls for the resolution of international and regional problems by peaceful means. It abides by the Charter of the United Nations.

**Article (4)** Jerusalem is the capital of the state of Palestine and seat of its public authorities.

**A claim to Jerusalem has been a constant element in various drafts of Palestinian constitutional documents. Jerusalem itself is not defined.**

**Article (5)** Arabic is the official language and Islam is the official religion in Palestine. Christianity and all other monotheistic religions are accorded sanctity and respect. The constitution guarantees equality in rights and duties to all citizens irrespective of their religious creed.

**It is fairly common for constitutions in the Arab world to designate Islam as the official religion—indeed, this has been a fairly consistent element in Arab constitutional texts since the early twentieth century. The clause is so general that the practical details must be sought in other clauses. Perhaps the only real effect of making Islam “the official religion” would be to render baseless any arguments for disestablishing religion. In other words, one could not complain on constitutional grounds about the practice of appointing a state mufti (who delivers interpretations of Islamic law) or including religious education in the school curriculum. Such challenges would have been unlikely to get very far even without this clause. It should be noted that this draft does not follow the path of many others in the Arab world that require that the head of state be a Muslim.**

**Just as the language on Islam is general, so is the language on religious freedom (though again, other clauses give some greater specificity). Interestingly, the first mention of other religions is restricted to “monotheistic” religions; the second gives no such qualification. Since virtually all inhabitants of the area are monotheists, the impact may not be great.**

**Article (6)** The Palestinian flag, motto, seals, emblems, and national anthem shall be defined by law.

**Article (7)** The principles of the Islamic shari`a are a main source for legislation. The followers of the monotheistic religions and shall have their personal status and religious affairs organized according to their shari`as and religious denominations

within the framework of [positive] law, while preserving the unity and independence of the Palestinian people.

This article has attracted tremendous attention, but again the impact is far more symbolic than practical.

- First, the article refers not directly to the shari'a but to the "principles of Islamic shari'a." This in itself is ambiguous, since it is not clear what the "principles" of the Islamic shari'a are. The Egyptian Supreme Constitutional Court has wrestled with a stronger clause (more on this below) and has decided that only shari'a-based rules "certain as to their authenticity and meaning [qat' al-ithbat wa-l-dalala]" are relevant. Since so much of the Islamic legal tradition consists of debate, analysis, and contrasting interpretations and applications, only a very small body of such rules can be easily identified.
- Second, the clause gives no guidance on who is to interpret the principles of the Islamic shari'a. Since it is "a major source for legislation," presumably the legislative branch itself is to draw on shari'a principles when writing laws. Again, with the shari'a presenting not a body of codified law but a quite long and varied tradition, it would be difficult to prove that a law does not draw on shari'a principles in some way. In short, this clause should be read as an injunction to the legislature to take Islamic law seriously rather than an attempt to implement a shari'a-based legal system. It would be virtually impossible to challenge any law on the basis of this provision.
- Third, the drafters of the constitution have deliberately eschewed a stronger formulation—making the principles of the Islamic shari'a the rather than a source of legislation. The stronger formulation is used in Egypt and there has been pressure for it in other Arab states (such as Kuwait). The practical effects even of this stronger formulation have been quite limited.

In short, the tremendous debate this clause has already engendered both among Palestinians and outsiders masks the limited impact of the provision.

Actually, the second part of this clause will probably have more practical implications. It essentially provides for the operation of religiously-based law for matters of personal status. In a sense, that makes religious freedom mentioned in Article 5 quite real but places it at least in part on a communal (rather than individual) basis.

However, the clause gives few clues on the content of this religiously-based law. The wording does imply that such law will be legislated; that is, that the law applied in personal status matters will be written by—or at least bound by law written by—the legislature. Indeed, the phrase “within the framework of the law [qanun]” comes close to subordinating religious law to secular law.

Perhaps significantly, this draft makes no provision for separate religious courts. Some previous drafts allowed them. The constitution would not prohibit them (indeed, such courts exist at present and would presumably continue uninterrupted). But there would be no bar to a state of Palestine following the path of a few Arab states (such as Egypt and Kuwait) by abolishing separate religious courts and—without changing the religious content of the law applied—folding their work into the regular judiciary.

**Article (8)** The Palestinian political system shall be a parliamentary representative democracy. It shall be based on political pluralism and the guarantee of the rights and freedoms of all citizens. These include the right to form political parties and engage in political activity without discrimination on the basis of political opinions, sex, or religion. Parties shall abide by the principles of national sovereignty, democracy and peaceful transfer of authority in accordance with the Constitution.

The reference not only to democracy but also to pluralism is unusual in Arabic constitutional documents and ideologically significant, as is the reference to “parliamentary representative democracy.” The language remains very general, though it is given some specificity in terms of the freedom to form political parties.

Article 182 leaves matters related to banning parties to the Constitutional Court, but gives few clues as to why parties might be banned. This article gives some very general basis for determining the acceptable boundaries for party goals.

**Article (9)** Rule of law and justice shall be the basis of governance. All authorities, agencies, departments, institutions and individuals shall abide by the law.

This is, of course, a basic element of constitutional government. The Palestinian National Authority (PNA), however, sometimes operated outside of any legal framework.

**Article (10)** All activities of the Palestinian public authorities shall, in normal and exceptional circumstances, be subject to administrative, political, legal and judicial review and oversight. There shall be no provision of law which grants immunity to any administrative action or decision from judicial supervision. The state shall be

bound to compensate for damages connected to errors and dangers resulting from actions and measures carried out by state officials in the pursuit of their duties.

**Some Arab states have actually removed some actions from judicial oversight. This provision obviously prevents such a measure and, by requiring compensation, may give it some effectiveness. This has been the case in Egypt, which has had a similar provision to this one since 1971. Of course, it is unlikely to prevent all authoritarian practices (it certainly has not done so in Egypt, where security authorities often find way to sidestep the courts), only diminish them.**

**Article (11)** The independence and immunity of the judiciary are fundamental guarantees of rights and liberties. No public or private individual shall be immune from submitting to the law and executing judicial rulings. The law shall punish infringement on the dignity of the judiciary.

**The final sentence may be overly vague. It is, however, most likely a reaction to the experience of the PNA, in which attacks on judges' persons (and not just their dignity) have occurred. The provision leaves specification to ordinary legislation.**

**Article (12)** Palestinian nationality shall be regulated by law, without prejudice to the rights of anyone who legally acquired it prior to May 10, 1948 or the right of any Palestinian who resided in Palestine prior to this date and fled, was forced to immigrate, or prevented from returning thereto. This right passes on from fathers or mothers to their offspring. It does not cease or lapse unless voluntarily relinquished in the manner prescribed by law. A Palestinian cannot be deprived of his nationality. The acquisition and relinquishment of Palestinian nationality and the rights and duties of those with multiple citizenship shall be regulated by law.

**In many critical and politically sensitive areas (such as borders and citizenship) this draft does not merely leave the matter to regular legislative and political processes, as other such documents might do. Instead, it frequently specifies what legislation must do. The result is a long and fairly detailed document. This is probably a reaction to the experience of the PNA and the Arab world as a whole (in which any loophole left in the text has been exploited).**

**In this specific instance, the issues involved are particularly difficult. Palestinians have not had to define citizenship before. The mandate-era government did have some legal provisions for citizenship, but political circumstances and national identity have changed greatly since then. The Palestinian election law of 1995 also had to make some provisions for**



eligibility to run for office, but it did not take up the issue of Palestinians living outside the West Bank and Gaza.

The drafters clearly want to:

- Offer Palestinian citizenship to all Palestinian wherever they live; and
- Not endanger the status of Palestinians who enjoy citizenship elsewhere.

It is difficult to craft legal language that will meet both objectives. For instance, will offering Palestinian citizenship to Palestinian Israelis be seen as irredentist by Israel? Might the Jordanian government—which has granted citizenship to many Palestinians—take a similarly unfriendly view? And there are other problems: automatic transfer of citizenship based on territory might grant Palestinian citizenship to Israeli settlers; basing citizenship on 1948 legal status would confer it even on Israelis who live within the 1948 boundaries.

The solution here is written in fairly strong terms (and accentuates the right of return covered in Article 13) but sidesteps most of these issues by offering “the right” of citizenship rather than imposing citizenship. Presumably the hope is that a law could be written that would merely offer citizenship to all those within these ambiguous categories who wish and request it (without requiring that it be given to those who do not).

One very notable feature of this provision that differs from the practice in most Arab states (as well as from previous drafts) is that citizenship passes through either the mother or the father. In most Arab countries, it is far more difficult to pass citizenship from mother to child than from father to child.

**Article (13)** Palestinians who were expelled or emigrated from Palestine as a result of the 1948 war, and who were denied return thereto shall have the right to return to the Palestinian state and bear its nationality. The right is permanent and cannot expire. The state of Palestine shall strive to implement the legitimate right of Palestinian refugees to return to their homes and to compensation, through negotiations, political, and judicial channels, in accordance with United Nations General Assembly Resolution 194 of 1948 and the principles of international law.

**This article is likely to provoke more international controversy than any other. Israel will likely object to a right of return based on Resolution 194 as well as an unlimited right of return to the state of Palestine.**

Previous drafts handled the matter somewhat differently. The first draft, for instance, affirmed a right of Palestinians to return to their original homes and asserted not simply that the right was permanent but also that it could not be delegated. In a real sense, this would have made negotiations on the matter impossible, because the leadership could not act on behalf of the refugees. It also offered a right that the state of Palestine would have been powerless to implement; it seems rather unlikely that Israel would permit refugees to return based on a Palestinian constitutional provision.

The effort here seems somewhat different. The approach is:

- To assert an unambiguous and unlimited right of return to the state of Palestine (i.e., the West Bank and Gaza. In other words, the state of Palestine would have to accept all refugees who wished to return.
- Not to offer that right to the descendants of such refugees—although Article 12 offers them citizenship and thus may make it difficult to prevent them from returning.
- To assert a broader right to return not simply to the state of Palestine but also to the original home of the refugee.
- But to couple that right with instructions to the leadership to strive for its implementation. In short, rather than preventing negotiation, this wording requires a certain negotiating position. Implicitly, implementation of the right should be pursued peacefully (through negotiations, political, and legal channels) and may involve compensation (presumably, though not explicitly, in lieu of actual return).
- Additionally, the constitution does not provide that the right to return to one's original home is transferred to offspring.

**Article (14)** Natural resources, archaeological remains, and historical sites in the state of Palestine are the property of the Palestinian people. The state shall preserve them. The law shall regulate their optimal use.

**Article (15)** The state strives to realize a clean, balanced environment. Preservation of the Palestinian environment shall be the duty of the state and the society. Whoever damages it shall be subject to the penalty of law.

**Article (16)** The economic system in Palestine shall be based on the principles of a free economy, and the protection of free economic activity within the context of legitimate competition. The state may establish public companies to be regulated by law, without prejudice to the principles of a free economy and in accordance with the interest of the Palestinian people.

Arab constitutions written in the 1960s and 1970s tended to proclaim a vague socialism as a general principle; this draft instead seems inclined toward a liberal system. But the language is so general as to contain only a symbolic commitment. The final sentence, however, is more specific in ways that may not be immediately apparent: the PNA allowed public companies to operate outside of any legal framework. This draft would seem to bar such a practice.

**Article (17)** The state shall strive to promote social, economic and cultural growth and scientific development of the Palestinian people while giving consideration to social justice and providing special protection to the group of those who suffered during the struggle to realize the Palestinian national project and establish an independent state of Palestine.

The “special protection” offered to those who suffered during the national struggle is not unusual—veterans have special status in many political systems. But there are special problems in the Palestinian case.

This clause does not specify that such “protection” must operate in accordance with law. In the PNA, family members of those who had given their careers or lives to the nationalist struggle were routinely given preference, but on an ad hoc basis that made it difficult to distinguish from cronyism. The obvious solution is to codify in law the nature, extent, and procedure for preferential treatment. And this article, while it does not require that the protection operate through law does not prevent it.

But an attempt to write the protection into law would face two political problems, one internal and one external.

Internally, the Palestinian national struggle was not principally carried out through a regular army but through a group of organizations and activities that were loosely coordinated at best. Defining past national service and suffering in a manner accepted by all those who consider themselves veterans or victims might be particularly difficult.

Externally, the effort to codify the preference in law would run into the difficulty that most Palestinians would include violent actions—some

targeted against Israeli civilians and more recently suicide bombing—as legitimate parts of the national struggle. To accord preferential status to relatives of suicide bombers would deeply offend Palestine’s most powerful neighbor and likely be seen as endorsement—and even encouragement—of such actions.

The constitution sidesteps these issues for the time being; perhaps in a less passionate moment a solution might present itself.

The same issues arise in Article 45 below, which makes a greater effort to insure that the preferences operate in a legal manner.

**Article (18)** The state of Palestine shall abide by the Universal Declaration of Human Rights and shall seek to join other international covenants and charters that safeguard human rights.

**Specifying adherence to the Universal Declaration of Human Rights in the constitution might have the effect of making it self-enforcing.**

## Chapter Two: Public Rights, Freedoms, and Duties

### *From Article 19 to Article 62*

**Article (19)** All Palestinians are equal before the law. They enjoy civil and political rights and bear public duties without difference or discrimination, regardless of race, gender, color, religion, political opinion, or disability. The term ‘Palestinian’ or ‘citizen’ wherever it appears in the constitution refers to male and female.

**The last sentence is, I believe, unique in Arab constitutional texts. Indeed, I have never seen an Arab legal text that makes such an explicit statement on gender. Unlike English, all Arabic nouns are gendered. “Palestinian” and “citizen” are either masculine or feminine words; generally the masculine is used if gender is unknown or unspecified. Thus the last sentence might not be strictly necessary, since the preceding sentence implies that gender is not a basis for discrimination. It is still striking.**

**Article (20)** Human rights and fundamental freedoms are binding and must be respected. The state shall guarantee religious, civil, political, economic, social, and cultural rights and freedoms to all citizens and their enjoyment on the principle of equality and equal opportunity. A person may not be deprived of his rights, fundamental, or legal competence for political reasons.

**Article (21)** Every Palestinian who has reached the age of eighteen years shall have the right to vote in accordance with the provisions stipulated by law. Anyone who bears Palestinian nationality shall have the right to enter his candidacy for the presidency of the republic or for membership in the Representative Council and/or assume a ministerial or judicial position. The law shall regulate the age and other prerequisites for these posts.

Interestingly, a similar provision in the Egyptian constitution has been interpreted by the Supreme Constitutional Court to require that independents be allowed to stand for office. Pure party-list systems have been held to inhibit the rights of those who are not members of political parties. The result has opened up the parliament but also weakened the party system.

The failure of Palestinian political parties to organize themselves effectively in the electoral arena may be one of the chief problems confronted by any constitutional system. It is possible that guaranteeing an individual right to candidacy might have an unintended side effect of undermining parties.

However, it is quite possible—even likely—that the Palestinian constitution would be interpreted differently than the Egyptian. Article 121 of this draft refers to parliamentary blocs within the parliament.

**Article (22)** Women shall have their own legal personality and independent financial assets. They shall have the same rights, basic freedoms as men as well as the same duties.

**Article (23)** Women shall have the right to contribute effectively in social, political, cultural and economic life. The law shall strive to abolish restraints that prevent women from participation in the building of family and society. The constitutional and shari'a rights of women shall be safeguarded; their violation shall be punishable by law. The law shall also protect their rights to shari'a inheritance.

The strong gender equality provisions alongside mention of “shari'a” rights here may be taken by many outsiders to be contradictory.

In fact, most of the references to shari'a in the constitution are sufficiently general—and the shari'a itself sufficiently indeterminate—that the more specific language on gender equality is likely to dominate, leading perhaps to interpretations of the shari'a more friendly to gender equality.

The primary exception to this lies in the area of personal status: marriage, divorce, and (here) inheritance. Virtually all dominant interpretations of

the shari'a are predicated not on gender equality but on reciprocal (but often quite different) obligations. Thus, attention should shift from matters of general principle to specific legislation: how will the shari'a be rendered into codified form?

In the specific matter of inheritance, shari'a provisions are fairly clear, giving women a definite but unequal share. Prevailing social practice often honors this only in the breach however: women frequently complain that men exercise control of their inheritance, never allowing them even the lesser share accorded to them by the shari'a. Thus this article seems designed to ensure that however the law is codified, it is actually enforced in matters of inheritance.

**Article (24)** Children shall have all the rights guaranteed by the United Nations Convention on the Rights of the Child.

The text of the Convention can be viewed at:  
<http://www.unicef.org/crc/fulltext.htm>.

**Article (25)** The right to life is safeguarded and to be protected by law.

**Article (26)** Every individual has the right to personal safety. It is forbidden to torture a human being, harm him, treat him in an inhumane manner, or subject him to harsh, humiliating, or undignified punishment. Such deeds or contributing to them shall be a crime punishable by law without statute of limitation. Any confession proven to have been obtained under torture or serious threat of it shall not be considered proof of guilt. Anyone carrying out torture, ordering it to be carried out, or participating in it shall be subject to punishment of law.

While the first two sentences seem the strongest, it may be the last two that give the prohibition of torture teeth. This is because torture in many Arab states is often anonymous: victims are unable to identify their torturer. This can rob the legal prohibition of any meaning. But prohibition of admitting confessions gained by torture has had some effect: a similar provision in the Egyptian constitution has led some courts to acquit those accused of crimes. In addition, making those who order torture criminally liable may strengthen the prohibition, though proving such orders would most likely be quite difficult.

**Article (27)** Scientific or medical experimentation on a person without his prior legal consent is forbidden. It is not permitted to subject someone to medical examination, treatment, or surgery, except in accordance with the law. The law shall govern the

transplant of organs, cells and other, new scientific developments, consistent with legitimate, humanitarian purposes.

**Article (28)** Every person has the right to freedom and personal safety; it may not be violated, except in cases and according to procedures stipulated by law. It is not permitted to arrest a person or search, imprison, or limit his freedom in any way except by order of a competent judge or the Attorney General in accordance with the law; the measure must be necessary to safeguard the security of the society. He must be informed quickly in a language he understands of the charge against him. From the moment of the measure against him, he has the right to seek assistance from an attorney and he must be brought before the competent judicial authority immediately. The law shall define the conditions and time period for provisional detention. Any person arrested, detained, or imprisoned without legal basis shall be entitled to compensation.

**The provision for provisional detention seems to be potentially quite wide; much depends on how the relevant law is written. The other important innovation in Palestinian practice is to require that detention operate through defined legal mechanisms.**

**Article (29)** The accused is innocent until proven guilty in a fair trial in which he is granted the guarantees of self-defense either personally or by means of an attorney he chooses in a public trial. The court shall appoint an attorney to defend him without charge if he is unable to afford one.

**Article (30)** Detainees and those deprived of liberty shall be treated humanely, preserving their dignity. Care shall be taken in implementing sentences to observe the pronouncements of the United Nations related to the minimal principles for treating prisoners or those being judged. Care shall be taken in the sentencing of minors and in implementing them to do what is appropriate to reform, rehabilitate, and train them.

**Article (31)** Citizens shall have the right to choose their place of residence and to travel within the state of Palestine. No person may be denied the right to travel from Palestine except by a judicial order issued in accordance with the law. Likewise a Palestinian may not be deported or prevented from returning to his country. No Palestinian may be extradited to a foreign state.

**The Oslo Accords provide—in an extremely elliptically worded formula—for the extradition by the PNA to Israel. The Accords do provide an escape hatch—the PNA need not extradite those it has already detained.**

With one exception, the PNA has responded to extradition requests by detaining the individual in question—sometimes with a flimsy legal basis—or (since the beginning of the intifada) ignoring the request.

These detentions have been enormously unpopular, but extradition would have been virtually unthinkable (the sole exception occurred in the case of someone accused of raping an Israeli Arab boy). The provision barring extradition is thus not surprising, given this political context.

However, the provision may solve the domestic political problem at the risk of accentuating the international one—it might place a state of Palestine in an extremely difficult political position if a Palestinian were implicated in a violent attack on Israel. Interestingly, the protection against extradition is for a “Palestinian” not merely for a “citizen,” the term used elsewhere in this article—implying perhaps that it would extend to Palestinians who had not taken Palestinian citizenship.

Some Palestinians have felt frustrated by the weak legal framework in the PA, complaining that it gives them little basis to resist international pressure. A strongly worded constitution or a robust parliament might allow Palestinian leaders to cite the requirements of their democratic or legal system in the face of foreign pressure—a common (and not necessarily insincere) tactic of democratic political leaders. There seems to have been an effort in some clauses like this one to strengthen the backbone of the Palestinian leadership, enabling it to cite constitutional provisions and general human rights guarantees in such cases.

**Article (32)** A political refugee who legally enjoys the right of asylum may not be extradited. The law shall regulate the extradition of those ordinary foreigners accused, in accordance with bilateral agreements or international conventions.

**Article (33)** Litigation is a right guaranteed to all by the state. Each individual shall have the right to resort to his natural judge to defend his rights and freedoms, and to receive compensation for a violation thereof. The law shall regulate the procedures for litigation in a manner that ensures a speedy decision of cases without harming the rights of litigants. In the event of a judicial error, the state shall be obligated to compensate the damaged party. The law shall govern the conditions and procedures for compensation.

The phrase “natural judge” is rarely used in English, though it is more common in continental jurisprudence. Perhaps the fullest set of meanings is listed in Article 8 of the Greek constitution: “No person shall be deprived of the judge assigned to him by law against his will.” Further,



**“Judicial committees or extraordinary courts, under any name whatsoever, shall not be constituted.”**

The 1971 Egyptian constitution introduced the phrase to the Arab world. A full Arabic-language treatment of the subject can be found at:

<http://www.undp-pogar.org/activities/justice/obeid.pdf>.

The “natural judge” principle has several specific applications in the Arab context: that judges and court proceedings must observe certain procedural safeguards; that cases must be assigned in accordance with clear legal principles (in order to avoid assignment for political reasons or because of favoritism); that exceptional courts are forbidden; and that civilians may not be tried in military courts.

The second meaning—involving the assigning of cases—is perhaps the most common in Europe. The last meaning—barring trials of civilians in military courts—has taken on particular significance in Egypt, though the Supreme Constitutional Court has long delayed ruling on a case in which such a challenge has been made

**Article (34)** There shall be no crime or punishment except by law. No sentence shall be implemented except by judicial order. Punishment shall be personal and an individual may not be punished more than once for the same offence. Collective punishment is prohibited. Care shall be taken to observe the principle of appropriateness between crime and punishment. There can be no punishment except for acts committed after a law has come into effect. The law shall regulate, in non-criminal cases, the retroactive effectiveness of laws.

**These are basic liberal principles related to the rule of law. The prohibition of collective punishment, while standard in this respect, takes on added force in a Palestinian context because of the frequent complaint that the Israeli occupation uses collective responsibility as a matter of policy.**

**Article (35)** The private life of every person has legal sanctity, including family particularities, residence, confidentiality of correspondence and other means of private communication. It may not be infringed upon except by judicial order and within the limits of the law. Any consequence of the violation of this article is invalid. Whoever is harmed as a result has the right to request compensation.

**Article (36)** Freedom of creed is guaranteed and every person has the right to practice the rites of worship in accordance with the provisions of the constitution and the law. The state shall guarantee access to holy places that are subject to its

sovereignty within the framework of law. The state shall guarantee to followers of all monotheistic religions the sanctity of their places of religious worship in accordance with the historic commitment of the Palestinian people and the international commitments of the state of Palestine.

**The implications of the precise phrasing here is unclear, but it seems to allow for some legal regulation of access to religious places, perhaps to anticipate (and fend off) any claim of extraterritorial status (in effect if not in name) by non-Palestinians seeking access to holy places under Palestinian control. The final phrase seems designed to allow for provisions regarding access to religious sites in any comprehensive peace settlement with Israel.**

**Article (37)** Freedom of opinion and its expression in speech, writing, and other means shall be guaranteed within the limits of the law and insofar as to guarantee respect for the rights and freedoms of others.

**Article (38)** The founding of newspapers and the ownership of all media is a right for all citizens guaranteed by the constitution. The sources of their funding shall be subject to legal oversight.

**At first glance, this wording seems opaque and weak. It may not be, however: print and broadcast media are frequently state controlled in many Arab states (the latter more often than the former), though this is beginning to change. The intention here may be to protect privately-owned media.**

**Article (39)** Freedom of the media, including press, printing, audio, and visual media, and the freedom of those working in the media, is guaranteed and protected by the constitution and the relevant laws. The media shall freely exercise their mission and express different opinions within the framework of society's basic values, preserving the rights, freedoms and public duties in a way that does not conflict with the rule of law. The media may not be subject to administrative censorship, nor to suspension or confiscation, except by court order in application of the law.

**There seems to be an effort here to balance between liberty and social values (such as those barring pornography). It is not clear how this would work in practice and probably would ultimately depend on the relevant law rather than simply on the constitution.**

**The specific wording in the final sentence may owe something to the experience of the PNA, where security forces have sometimes closed down media without any clear legal justification.**

**Article (40)** Journalists and citizens shall have the right to obtain news and information with transparency and responsibility in accordance with the conditions stipulated by law.

**This article effectively transfers the most difficult issues to legislation. It might be noted that the opening phrase (“journalists and citizens”) implies that the right extends to foreign journalists.**

**Article (41)** Every citizen has the right to defend his rights to intellectual property deriving from any scientific, artistic, or literary work he has produced in a manner that does not contradict the basic values of the society and the rule of law.

**Article (42)** Education is a right for the individual and the society. It is compulsory for every citizen until the end of the elementary level. The state shall guarantee it in public schools, institutions, and establishments until the end of the secondary level. The law shall regulate the manner of the state’s supervision of the performance of education and curricula.

**Article (43)** Private education shall be free and independent, and the law shall regulate the oversight of the state over its organization and curricula.

**Article (44)** The state shall honor the independence of the universities, institutions, and research centers that have a scientific purpose. The law shall regulate oversight over them in such a manner so as to safeguard the freedom of scientific research and innovation in all fields. The state shall, within the bounds of its capabilities, work to encourage, assist and protect them.

**In general, while most constitutions written in the past half century make provisions (sometimes quite extensive) for social and economic rights, these are generally treated as aspirational and unenforceable except through the regular policy process. Given the fiscal constraints in a Palestinian state, it would be impossible to take any other position.**

**This implicit attitude is made explicit by the phrase “within the bounds of its capabilities” which occurs here and elsewhere.**

**In a few cases, however, courts have taken such aspirational provisions a little more seriously, demanding that authorities provide evidence that they have taken their obligation to attempt to provide for such rights quite sincerely. The phrasing here might possibly encourage such a judicial attitude, though it would hardly require it.**

**Article (45)** The law shall regulate the services of social security, disability and old age pensions, care for families of martyrs, prisoners, orphans, and care for those injured in the national struggle, and those requiring special care. The state shall guarantee them, within the bounds of its capabilities, the services of education, health and social security and shall give them priority in employment opportunities in accordance with the limitations laid down by law.

**Article (46)** The state shall organize health insurance as an individual right and a public interest. It shall guarantee, within the boundaries of its capabilities, basic health care for those financially unable.

**Article (47)** The state shall strive to guarantee appropriate housing for every citizen by way of a housing policy that relies on the cooperation of the state, the private sector, and the banking system. In circumstances of war or natural disaster, the state shall work within the bounds of its capabilities to provide shelter to the homeless.

**Article (48)** The state shall guarantee care for families, motherhood, and childhood. It shall care for adolescents and the youth. The law shall regulate the rights of the child, mother and family in accordance with the provisions of international agreements and the “Charter of the Rights of the Arab Child.” In particular, the state shall seek to provide protection for children from harm, harsh treatment, exploitation, and from any work that would endanger their safety, health and education.

**A translation of the Charter may be viewed at:**

<http://www.geocities.com/joelmermet/arabcharter.html>

**Article (49)** Public property shall be honored and its protection is a duty of each citizen. It shall serve the public interest in accordance with the law. The law shall regulate the authority for religious endowments and management of its properties and funds.

**This would have the effect of placing religious endowments [waqfs] under state supervision. This is the case in most Arab countries. In the West Bank, however, the administration of these endowments still shows some vestiges of Jordanian control; this provision would place them firmly under Palestinian control.**

**Article (50)** Private property is protected. It may not be confiscated or seized except for the public benefit in accordance with the provisions of the law. In all cases, it is necessary that there be just compensation. The general confiscation of private property is prohibited. The law shall regulate real estate ownership by foreigners.

**Sale of real estate to non-Palestinians (and especially land purchases by the Zionist movement) is an especially sensitive subject in Palestinian history and the issue has not gone away under the PNA. This clause asserts a Palestinian right to regulate such land sales, though it assigns the matter to regular legislation.**

**Article (51)** Work is a right of every citizen, and the state shall strive, with support from the private sector, to provide work opportunities to those able to undertake it through its development plan. The law shall regulate work relations so as to guarantee justice for all parties and provide for the protection and security of workers. The law shall regulate mandatory work in exceptional circumstances and during natural disasters. Workers may form unions and professional associations in the context of work. The right to protest and strike shall be exercised with the framework of law.

**This language gives stronger rights for unions and strikes than earlier drafts. The right to form unions seems unqualified (there is no mention that it must occur within the context of the law—there is likely to be a legal framework for union activity but this language would seem to make it difficult to restrict union activity in the guise of regulating it). The right to strike, however, occurs only within the framework of the law, making possible restrictions (and this clause gives no limitation on the state’s legal authority to regulate strikes).**

**The current PNA Labor Law can be viewed in English at:**

<http://www.pnic.gov.ps/english/law/law10.html>.

**Article (52)** Citizens have the right to assume public office, which is a charge for those who undertake it to serve the society. It shall be assumed on the principles of equality, merit, and equal opportunity in accordance with the provisions of law.

**Article (53)** Every citizen has the right to express an opinion in referenda, elections, and in nominating himself or others meeting requirements for nominations, in accordance with the stipulations of the constitution and the provisions of law.

**Article (54)** Every citizen has the right to contribute to political activities, individually, or collective. Specifically, he has the following rights and freedoms:

- Participation in forming political parties, or joining them, or withdrawing from them in accordance with law.

- Participating in forming syndicates, associations, unions, leagues, assemblies, clubs, or institutions, or joining them, or withdrawing from them in accordance with law.

The law shall regulate the procedures for them to acquire legal personality.

**Article (55)** Every individual has the right to hold private meetings in a matter not conflicting with law, and to do so without the presence of the police. Every individual shall have the right to assemble and hold public meetings, and to demonstrate in a peaceful manner without bearing arms. It is not permitted to place restrictions on their exercise except that which is imposed by law and forms necessary measures in a democratic society safeguarding the rights and freedoms stipulated in the constitution. The use of violence during demonstrations is forbidden and its use, or the incitement of its use, shall be held to account under the law.

**This article contains fairly strong guarantees, though much depends on the content of the law. The PNA does have a very liberal law of public assemblies, which can be viewed at <http://www.pnic.gov.ps/english/law/law4.html>. Under the provisions of the constitution, this law would continue in effect until amended.**

**Two specific features of this article deserve mention. First, barring police from private meetings (though not from public ones) would presumably prevent surveillance for the purposes of intelligence. Second, the article provides no protection to armed demonstrators. Political marches—and even wedding parties—in which members bear arms (and sometimes shoot in the air) are quite common in Palestinian society.**

**Article (56)** Every citizen has the right to address public authorities and to present and sign written petitions and complaints.

**Article (57)** It is not permitted to suspend any basic rights or freedoms. The law shall define those rights and freedoms that may be limited temporarily in exceptional circumstances in matters related to public security and the purposes of defense of national security. The law shall penalize the arbitrary use of power and authority.

**The precise meaning of this article is obscure because it seems to attempt to make rights absolute but also allow their restriction.**

**One interpretation is that it presupposes a distinction between “basic” rights and freedoms (which may not be suspended at all) and those that may be limited in the case of clear national need. While the constitution gives no guidance on which rights fall in the basic category, it does**

indicate how such a distinction should be made: through ordinary legislation. This is a potentially wide loophole, but it need not be quite so wide if the legislation is carefully written.

An alternative interpretation is that the clause distinguishes between “suspending” and “limiting” rights, forbidding the first but allowing the second, again in accordance with law and only for dire national need.

**Article (58)** Any violation of the basic general rights and freedoms guaranteed by the constitution or law is a crime, and any criminal or civil case arising shall have no statute of limitation. The state shall guarantee just compensation for those who have been harmed.

**Article (59)** An independent public body for rights of the citizens shall be established by law, concerned with monitoring the conditions and rights of citizens and their freedoms. The law shall regulate its formation, responsibilities, and competencies. It shall present its report to the Representative Council, the president of the state, and the prime minister.

Such a body has already been established by presidential decree, very shortly after the founding of the PNA. The PNA’s Basic Law later gave the body a constitutional basis. The only significant change is to have the body submit reports to the prime minister (a position that did not exist when the Basic Law was originally written, though it has been added since). While established as a Palestinian body under Palestinian law, the body in question, the Palestinian Independent Commission for Citizens’ Rights ([www.piccr.org](http://www.piccr.org)), has received significant funding from external donors; its relations with the PNA have sometimes been tense.

**Article (60)** The state is responsible for the security of persons and property. It shall work to protect the rights of every citizen internally and abroad.

**Article (61)** Defending the nation is sacred duty and serving it is an honor for every citizen. It shall be regulated by law. It is not permitted for individuals and groups to acquire, trade, bear, or possess arms in a manner that is in violation of the provisions of the governing law.

The PNA has issued the relevant law governing firearms; it would continue in effect (a translation is available at <http://www.pnic.gov.ps/english/law/law19.html>). The law caused some controversy when it was passed, with Israel complaining that it was too permissive and violated the terms of the Oslo Accords.

**Article (62)** The payment of taxes and public fees is a duty regulated by law.

## Chapter Three: Public Authorities

*From Article 63 to 64*

**Article (63)** National sovereignty belongs to the people, who are the source of the authorities. They exercise their competencies directly, through referenda and general elections, and through their elected representatives by way of the three public authorities—legislative, executive, and judicial—and by way of their constitutional institutions. No individual or group may claim for itself the right to exercise any of these competencies.

**In English, reference is usually made to the three “branches” of government; in Arabic the term used is “authorities (sultat).” This sometimes makes the translation confusing, since the Arabic word sometimes refers to authority in general; at other times it refers to a branch of government. In favoring a literal translation, I have used the term “authority” every time “sulata” is used in Arabic, even when it refers to one of the three branches of government as in this article.**

**Article (64)** The relationship among the three public authorities shall be based on independence in performing competencies on the basis of the principle of separation, cooperation, and balancing among them. No authority may exercise competencies assigned to another authority according to the provisions of the constitution.

**In general, Arabic constitutional doctrine (like continental European) tends to stress “separation of powers” while American stresses “checks and balances.” American constitutional systems tend to provide for a greater degree of overlap and mutual oversight, while Arab (and European) systems tend to promise greater separation. The current Palestinian draft leans toward the Arab/European pattern, but the mention of “balancing” is unusual. Earlier drafts referred to a “relative” separation of powers.**

**Chapter 3/Section One:  
Legislative Branch / Representative Council**



*From Article 65 to Article 108*

**Article (65)** The Representative Council shall exercise the legislative authority. It shall establish the general policies of the state and the general budget, which shall be prepared by the Council of Ministers. It shall exercise oversight over the actions of the executive branch in the manner specified by the Constitution.

**The term “Council of Ministers” is a literal translation of the Arabic term for “cabinet.” As is often done in parliamentary system, this constitution also uses the term “government” as synonymous with “Council of Ministers.”**

**Article (66)** The Representative Council shall be composed of 150 deputies, representing the Palestinian people. They shall be elected according to the provisions of the constitution and election law. Nomination for membership in the Chamber of Deputies shall be in accordance with the provisions stated in this constitution and in the election law. Whoever runs for the Representative Council must be Palestinian and it is not permitted after his election to hold the citizenship of another state.

**There is a Palestinian election law in force under the PNA. It provides for deputies to be elected as individuals in multi-member districts. Unlike most legislation (which would continue in effect after the adoption of the constitution), the election law could not operate unamended since it provides for Legislative Council of 88 members.**

**A thoroughly revised election law has been drawn up by a Palestinian NGO (Muwatin) and proposed in the Legislative Council (PLC) by `Azmi Shu`aybi, a leading reformer. That law provides for a party list system; such a mechanism might strengthen the party system and make the constitution operate in a manner very different from the system prevailing in the PNA.**

**A draft of that law—currently under consideration at the PLC—may be viewed at: [http://www.usaid.gov/wbg/misc/Elections\\_Draft\\_Law\\_-\\_English\\_Translation.pdf](http://www.usaid.gov/wbg/misc/Elections_Draft_Law_-_English_Translation.pdf)**

**The wording on citizenship would seem to allow candidates who are citizens of other states provided they renounce that citizenship once elected.**

**Article (67)** Members of the Representative Council are elected for a period of five years. A member may be re-elected more than once. It is not permitted to extend the term of the Representative Council except in case of necessity, and by virtue of a

law passed by the Representative Council by a two-thirds majority of its total membership.

The provision to extend the term in case of an emergency is likely a response to the current position of the PLC. Elected for the interim period (which was supposed to have been concluded in 1999), the PLC had no clear method of either extending its mandate or calling for new elections. It has therefore continued with a series of presidential decrees extending its life. The provision would make the Council of Deputies itself the body that determined the necessity of extension.

**Article (68)** The seat of the Representative Council shall be in Jerusalem, the capital of the state of Palestine. Its sessions may be held in different locations based on the request of the speaker or a majority of its members.

Here as elsewhere, reference to the “majority of the members” would seem to require an absolute majority, not merely a simple majority of those present. The matter of its meeting place will naturally be quite controversial internationally, though it should be noted that Jerusalem, while mentioned in the Constitution, is not defined. Article 1, establishing the borders of the state, would seem to include only East Jerusalem. This still leaves unclear the status of villages near Jerusalem that fall outside the Jordanian and Israeli municipal boundaries (such as Abu Dis), as well as the status of those areas of East Jerusalem not part of the municipality in Jordanian times but annexed by Israel in the years after 1967 (such as Shu’afat).

**Article (69)** Before the Representative Council begins undertaking its constitutional duties, and in the first session it holds, the members swear the following oath: “I swear by Almighty God to be faithful to the homeland, to preserve the rights of the people and the nation and its interests, to honor the constitution and the law, and to undertake my duties rightfully, as God is my witness.”

**Article (70)** The Representative Council shall elect in its first meeting of every annual session a speaker, two deputies for the speaker, and a secretary-general, composing the Presidium of the Representative Council. It is not permitted for a member of the Presidium of the Council to assume a ministry or any other government position. A member of the Representative Council may assume a ministry provided that the total of deputies serving as ministers in the government is no more than half of the total number of ministers.

The requirement that no more than half of the ministers be drawn from the Representative Council—repeated in Article 141—may seem odd, and

many parliaments would consider it an unacceptable limitation. In some parliamentary systems, drawing ministers from outside the parliament is forbidden; in many others, it is kept to a minimum.

In the Palestinian case, however (and in the Arab world more broadly), the practice of appointing parliamentarians as ministers is often seen as weakening the autonomy of the parliament, especially given the weak party system in all Arab countries (which makes obtaining parliamentary majorities a matter of attracting support from individuals rather than assembling party coalitions).

Specifically, appointing parliamentarians to cabinet positions makes it easier for the government to obtain a parliamentary majority (since all ministers are expected to vote in favor of the government position). And many parliamentary supporters fear deputies will be enticed by hinted rewards of ministerial position. Both these problems seem to have occurred in the PLC, especially in its first two years.

**Article (71)** The president of the state shall open the regular round of the Representative Council. The beginning of the first regular session of the Representative Council shall not be valid except with the presence of its speaker or whoever legally acts as his deputy and a majority of at least two-thirds of the members of the Representative Council. The meeting shall continue to be legal for the rest of the regular round with the presence of the speaker of the Council or whoever legally acts as his deputy and an absolute majority of the members of the Council.

**Article (72)** The Representative Council meets at the invitation of its speaker every year in regular session in two periods, each of them four months. The first begins in the first week of the month of March, and the second in the first week of September. The president of the state may, with the agreement of the prime minister or by a request of at least one-third of all the members of the Representative Council, call the Representative Council to an extraordinary meeting in case of necessity when the Representative Council is not in its regularly scheduled sessions.

**The president's authority here is exercised largely in a symbolic way: he may act only if called upon by the prime minister or a large bloc of deputies.**

**Article (73)** The Representative Council shall refer challenges to the validity of the membership of any of its member to the Constitutional Court for decision according to the governing law. Each member who does not fulfill the legal conditions for eligibility for election or who loses them faces revocation of his parliamentary

membership. This is enforced by decision of the Representative Council with the approval of two-thirds of all of its members.

**There is some potential ambiguity here in the two sentences. The first requires that challenges be referred to the Constitutional Court. The second leaves them to the Representative Council itself. It is therefore unclear whether the Constitutional Court's decision is self-enforcing or if it must refer the matter to parliament if it finds an election invalid.**

**In most systems, certification of election results is not a parliamentary duty, but parliaments are considered the ultimate arbiters of their own membership (in accordance with the principle of the separation of powers). Thus, a deputy whose election is called into question after certification of the results can only be unseated by an act of the parliament. It may be that this is what the drafters of the Palestinian constitution have in mind.**

**The matter is not trivial. In Egypt, the Court of Cassation (the highest appellate court for most cases) rules in election disputes but must refer its rulings to the parliament for implementation. The parliament has regularly ignored such rulings, especially in cases in which membership of a member of the ruling party is found invalid. Large numbers of deputies have had their elections invalidated by the court without losing membership in the parliament.**

**The only way of avoiding such a problem is to take enforcement out of the hands of the parliament, but this would be seen in many countries as a violation of separation of powers.**

**Article (74)** If the seat of one or more members of the Representative Council becomes vacant due to death, resignation, or loss of qualifications or abilities at least six months before the end of his term in the Council, an election for a successor will be held in the concerned district within thirty days of the seat becoming vacant. The circumstances of loss of qualifications or abilities shall be defined by law.

**An odd byproduct of this clause would be to make it clear that election to the Council must be on a district basis (and not nation-wide proportional representation, as in Israel).**

**Article (75)** Sessions of the Representative Council shall be public. The speaker may, by decision of a majority of the members present, decide that the session shall be secret.

**Article (76)** The Representative Council shall establish by law its Standing Orders, in order to organize the procedures for carrying out its legislative and oversight tasks and the procedures for accountability of its members within the bounds of its jurisdiction in a manner that does not conflict with the provisions of the Constitution.

**The significant innovation in this article is the phrase “by law.” Under the PNA, the PLC did write its internal regulations—generally referred to in English as the “Standing Orders”—and attempted to refer them to the president to get them approved as law. But the president and cabinet treated them as an internal matter governing the PLC. That prevented the PLC from holding other political actors (especially the president) accountable to their provisions. Under this article, the standing orders would be treated as law.**

**The reference to “accountability” of the members of the Council is obscure. It may refer to internal discipline, but the word used (musa’ala) could refer to questioning them.**

**Article (77)** The president of the state, the prime minister, the speaker of the Representative Council, or five of its members, shall have the right to propose draft laws. Any proposal that fails to obtain the approval of the required majority may not be presented for discussion in the same session, except by decision that is approved by a two-thirds majority.

**The president’s ability to propose laws seems to be one of his few remaining non-symbolic prerogatives that he may exercise on his own.**

**Article (78)** Decisions of the Representative Council, including approval of draft laws and the proposed budget, shall be taken by a majority vote of the attendance except in cases where a special majority is a required for approval.

**Article (79)** The government shall have the authority to conclude international agreements and treaties that the state contracts or adheres to. Agreements that impose on the state treasury expenses not included in the budget or place on the citizenry or the state obligations contrary to the law in effect require the agreement of a majority of all members of the Representative Council. The Representative Council shall discuss treaties that affect the independence of the state or the integrity of its territory, in preparation for the government’s presentation for a popular public referendum.

**This would seem to give the executive a fairly broad authority to conclude international agreements. There is no role for presidential involvement**

**mentioned in this article, though Article 123 does require notifying the president of the progress of negotiations and obtaining his approval (though this latter function is probably intended to be largely ceremonial).**

**Article (80)** Laws that are ratified by the Representative Council and approved by the President of the State shall become effective after thirty days from the date of their publication in the Official Gazette, unless the law specifies another time.

**Article (81)** Laws shall be published in the official gazette within thirty days:

- from the date the law is referred after its approval from the Representative Council to the president for its endorsement.
- or from the date the law is referred to the president from the Representative Council after it is passed again by a majority of two thirds of all its members in case of objection from the president to it.

In a case in which the period has lapsed without publication or return of the law, the law is considered effective and it must be published and should be considered issued with the force of the constitution, and the Constitutional Court shall be entrusted with requesting the Representative Council to issue a resolution to publish the law in the Official Gazette.

**The level of detail in this article is quite rare for a constitutional document and might surprise outside observers, as might the provision in the final sentence for instances in which a law is not published or the president fails to act. The explanation for these provisions lies in the experience of the PNA. The PNA's interim constitution—the Basic Law—sat unapproved (but also unrejected) for five years on the president's desk. Under the provisions of this constitution, it would have gone into effect after thirty days of presidential inaction. Interestingly, a similar provision was suggested in the Basic Law, but the drafters rejected it at the time as too restrictive for the president.**

**Under the PNA, the president has even held up the publication of laws that he has signed, sometimes under pressure from powerful groups seeking to delay implementation.**

**Article (82)** The Representative Council may form special ad hoc committees, or commission one of its standing committees to investigate the facts in any public matter related to activity of any state institution falling under its oversight. The committee may collect evidence from whomsoever it feels necessary to hear testimony from, examine documents, and obtain statements from all related bodies.

The committee must submit its report to the Representative Council to take the appropriate decision.

**Article (83)** The Representative Council alone shall have the right to maintain order and security inside its building or facilities during its sessions or the meetings of its committees. It shall have its special guard under the command of its speaker. Security personnel or any other armed force may not enter or be present in the Representative Council or its facilities except in accordance with a request from the speaker of the Representative Council.

**The possibility of forming a parliamentary guard is a basic prerogative of parliaments but one that is rarely exercised in the Arab world. The idea was raised of creating a special force for the PLC, but it was never implemented.**

**Article (84)** Every member of the Representative Council has the right to direct questions or request clarifications from the prime minister, one of his deputies, one of the ministers, or whoever falls under their authority for them on any subject entering within their competencies. He has the right to resort to obtain the response according to the procedures specified by the Standing Orders of the Representative Council.

**Again, this is a basic parliamentary prerogative, though it was one that has not always been honored in the PNA. Some of this was probably due to inevitable inefficiencies with a new political system, but some officials (though not ministers) consistently failed to respond to parliamentary questions. This was often because they felt they answered to the president alone. The problem was most acute with the security services.**

**Article (85)** Every member of the Representative Council has the right to direct interpellations to the prime minister, one of his deputies, one of the ministers, or whoever falls under their authority in any matter that enters within their competencies. Discussion of the interpellation is not permitted before one week after it is presented unless the person under interpellation agrees to respond or discuss in a shorter period. The period may be shortened by decision of the Representative Council in case of urgency.

**Arab parliamentary practice distinguishes between two levels of parliamentary questioning of officials. One is the parliamentary question or inquiry, as described in Article 84. Interpellation, covered in this and the following article, is a more formal step that must be followed before requesting a vote of no confidence.**

**Article (86)** 1. After the interpellation, ten members of the Representative Council may request the following:

- a. Censure of the prime minister, the minister or who is under his authority, or the government
- b. Withdrawal of confidence from the prime minister, the minister or who is under his authority, or the government, according to circumstances.

2. Voting shall not take place until at least three days have passed from the date of submission of the request, and the decision to withdraw confidence shall be taken by a majority of the total members of the Representative Council.

**Three features of this article deserve mention. First, ministers are individually and collectively responsible to the Council. Second—and most unusually—officials under the minister also seem to be responsible; the wording seems to allow the Council to withdraw confidence from those who fall under the authority of ministers. Third, withdrawing confidence requires an absolute majority of members, a slightly higher hurdle than a simple majority of those voting.**

**Article (87)** If a majority of all members of the Representative Council agree to withdraw confidence from the prime minister or from more than one-third of the ministers, the government is considered to have resigned. It continues performing its work until such time as the new government is formed. If a majority of all members of the Representative Council agrees to withdraw confidence from a minister, he is considered to have resigned.

**Article (88)** If the president of the state or the prime minister, in case of necessity, suggest the dissolution of the Representative Council to the Council of Ministers, then its dissolution may be approved by a majority of two-thirds of its members, and the president shall issue the decision of dissolution. The government shall call voters to conduct an election for a new Representative Council in a period not less than sixty days, in accordance with the procedures specified by the law of elections. If the election is not held during the defined period, the Council returns to exercise its duties until a new Council is elected. It is not permitted for the dissolved Council to withdraw confidence from the government. It is not permitted to dissolve the Representative Council during the first year after it is formed, or in the period of a State of Emergency provide for in the Constitution.

**The president's ability to dissolve the Council is limited to cases in which a special majority of the Council agrees.**



**Article (89)** The Government shall call for the election of the Representative Council within sixty days before the end of its legal term in accordance to procedures governed by law. If the government fails to call for elections within the said period, the speaker of the Representative Council may request that the Constitutional Court order the call for elections. If elections cannot be held at the established time because of war, imminent danger of war, or siege that prevents constitutional bodies from functioning regularly, the Representative Council will continue to perform its duties until elections can be carried out within sixty days of the termination of the obstruction.

**The elaborate provisions in this and the preceding article are a clear reaction to the experience of other Arab political systems (in which parliaments have been shut down indefinitely) as well as the experience of the PNA, especially since 2000, when the PLC's term was said by some to have expired.**

**Article (90)** Charging the president of the state of high treason, breach of the constitution, or commission of a felony is to be based upon the proposal presented by one-third of the members of the Representative Council. The decision to charge shall not be issued except if a majority of two-thirds of all the members of the Representative Council. Immediately after the charge, the president shall cease performing his duties, and his trial shall take place before the Constitutional Court.

**Criminal responsibility of the president (as opposed to political responsibility, which is to the people alone) is to be handled through a combination of a political (parliamentary) and judicial process. This seems to be an attempt to preserve separation of powers by involving both other branches.**

**This article has the president ceasing his duties immediately after he is charged by the Representative Council; Article 119 provides for new presidential elections to be scheduled at that time. Thus, accusation by the Council results in dismissal, not merely suspension from office. The trial before the Constitutional Court seems designed only to assess criminal guilt and penalties. This could raise an awkward situation in which a president is removed by the Council but then acquitted by the Court. Since his successor will likely have been elected, there would presumably be no possibility of his returning to office.**

## Competence of the Representative Council with Financial Laws

*From Article 91 to 100*

**Article (91)** The law shall regulate the provisions related to the government's preparation of the general budget, its approval, the expenditure of designated funds, the supplementary and development budgets, the budgets of public bodies and institutions, and the projects in which the public sector contributes at least fifty percent of the capital.

**Under the PNA, the general budget has been prepared and approved in accordance with legal procedures, though the executive has often been dilatory in its legal obligations. The innovation in this article is to require that other aspects of government finances—such as the development budget and the activities of the public sector—are to be regulated by law. Since 1999 (and especially in the past year), the PNA has a better record of disclosure in such areas, but they remain topics of domestic and international contention.**

**Article (92)** The government shall present the draft law of the general budget to the Representative Council at least four months before the beginning of the fiscal year, and the Representative Council shall hold one or more special sessions to discuss it. The discussion and voting shall be held on the clauses and chapters of the budget, then on the budget as a whole, to approve it and refer it to the president of the state for its promulgation.

The Representative Council shall approve the general budget in a period not less than five months from the date of its submission in accordance with the previous paragraph.

Should the Representative Council fail to approve the general budget within the stated period, the president of the state may, based on a decision from the Council of Ministers, promulgate the budget in the form it was presented to the Representative Council.

**This article is unusually detailed, reflecting the recognition that Arab parliaments in general and the PLC specifically have not been able to play an effective oversight role over the budget. It has several notable provisions.**

**First, the requirement that the Council vote on individual items in the budget requires the Council to exercise a level of oversight that departs**

from the practice in the PLC (in which the body has generally insisted on transparency and compliance with the law but satisfied itself with general suggestions about priorities without insisting on detailed modifications).

Second, the provision for parliamentary inaction is also unusual; under the PNA's budget law, the executive is authorized to operate on a month-to-month budget if the general budget has not been approved as in Article 96 below).

Third, presidential prerogatives are either ceremonial or exercised upon the request of the cabinet. Finally, it makes clear that the entire budget itself has the status of a law.

**Article (93)** The Representative Council may not, during discussion of the draft law of the general budget, increase the allocations established in the draft whether in the form of an amendment made to it or by way of borrowing.

**The precise implications of this article are unclear. It appears that the purpose is to prevent the parliament from increasing the overall budget or forcing any borrowing beyond that recommended by the cabinet. The limitation on parliamentary actions seems to be designed to prevent fiscal irresponsibility.**

**Article (94)** The law may stipulate allocation of fund for more than one year in case of necessity or for long-term plans as long as authorization for all of them is included in subsequent budgets or a special budget for more than one fiscal year is established for them.

**Article (95)** Conducting transfers among chapters of the budget shall not be permitted except with the consent of the Representative Council.

**Article (96)** As an exception to the principle of annual budgeting, and in case of delay in passing it of over one month, and in case the president of the state does not use his right to issue the budget in accordance with Article 90, the government is permitted with the consent of the Representative Council, to designate specified amounts on the basis of monthly authorizations at a ratio of (1/12) one to twelve from the previous budget until the new budget law is promulgated.

**This has been the procedure under the PNA's budget law (in which the cabinet has never submitted the budget on time and only twice done so before the fiscal year has actually begun). Article 92 contains provisions if the Council fails to act five months after it has received the budget. But if the cabinet submits the budget late (or even if it does so on time, four**

months before the beginning of the fiscal year), it is still quite possible for the year to begin without an approved budget.

The reference to Article 90 appears to be an error; presumably it is Article 92 that should be referenced.

**Article (97)** The government must present the final accounting of the budget to the Representative Council within a period not more than six months from the date of the end of the fiscal year.

**A similar provision exists in the PNA budget law; it has never been honored on time and the final accounts presented have been criticized by the PLC's budget committee reports as inadequate.**

**Article (98)** Designation of public funds or their expenditure shall only be by law. Law shall determine the basis for granting salaries, compensations, assistance, and rewards that are approved from the public treasury as well as the agencies responsible for applying them. Disbursement of any exceptional amount shall not be permitted except within the limitations provided for by law.

**Article (99)** Imposition, amendment or cancellation of taxes shall be by law. Taxes and fees shall be accredited to the public treasury and accounted for in accordance with the provisions of the law. Their payment shall not be forgiven except in cases provide for by law. In imposing and Taxation can only be waived in cases determined by law. Attention shall be given in imposing and accounting for them to equality and social justice.

**Article (100)** The law shall define the bases for contracting loans and the procedures related to granting concessions and encouraging external investments or obligations connected with the exploitation of natural resources and public facilities.

**These three provisions all seem aimed to counteract practices that have prevailed in the PNA: some portion of public funds have remained off the official books; salaries have been fixed on an ad hoc basis and paid in ways that make accounting difficult; senior officials (most particularly the president himself) have authorized expenditures without a clear legal basis; enforcement of taxes has been haphazard (sometimes excessively lenient, at other times quite roughly; and sometimes involving agencies such as the security services that bear no obvious relationship to revenue collections); rates have been pegged in bilateral agreements to Israeli taxes and not based on Palestinian law; ministries have contracted loans outside of any legal framework or clear oversight; investments have been made similarly outside of any structure of accountability; and concessions**

and monopolistic licenses granted not merely without a legal basis but also completely outside of public view.

Some of these practices can be attributed to the rudimentary nature of PNA structures at their founding and indeed (under heavy domestic and international pressure); they have begun to ease since 1999 and especially since 2002.

However, it should be pointed out that many of the provisions of these articles, while they clearly react to undesirable PNA practices, have already found their way into Palestinian law (especially the budget law). It has taken some time to have these provisions implemented, however. Perhaps the extraordinary level of detail in this section of the draft constitution should be seen as an effort to strengthen the legal basis for more accountable and transparent fiscal practices. There is little other explanation for the decision to include ten articles on the budget and fiscal matters.

### **Rights, Immunities and Duties of Representatives**

*From Article 101 to Article 108*

**Article (101)** The financial prerogatives of a member of the Representative Council in terms of remuneration and privileges shall be defined by law. Amendments that the Legislative Council makes to them shall only be effective for the members of the Representative Council that is elected after the Representative Council that approved them.

**Article (102)** It is not permitted to infringe upon the immunity of the members of the Legislative Council during their term in office, question them civilly or criminally because of the opinions they express, the facts they mention, or their specific votes in the sessions of the Representative Council or its committees. It is not permitted to question them for what they express outside of the Representative Council in implementation of their representative duties.

**Article (103)** It is not permitted to ask a member of the Representative Council to give testimony on a matter connected with their actions or statements or on information he obtained in his capacity during his membership except with the consent and prior approval of the Representative Council.

**Article (104)** It is not permitted for a member of the Representative Council to be subject to any criminal procedures or brought before the judiciary unless the

Representative Council agrees, by a majority of its members, to lift his immunity or after he clearly waives his immunity before the Representative Council and the Council accepts the waiver. In the case of apprehension in flagrante delicto of a member committing a felony as defined in the criminal code, it is possible to immediately start criminal proceedings against him or arrest him, provided that the Council Presidium is immediately notified. The Representative Council is then to ensure to the soundness of the proceedings taken against the member. If the Representative Council is not in session, approval must be obtained from the speaker of the Representative Council, and all the Council must be notified, in the first session it holds, of the procedures that have been instituted against the member.

**Article (105)** A member of the Representative Council is responsible to the Council, which may, based on a request from fifty of its members, discuss removing his membership in the Council if he perpetrated a deed that offends the honor of his representative duty. If the Representative Council agrees to the request by a majority of all of its members, the matter is referred to the Constitutional Court, which decides on the request to expel the member. The Standing Orders of the Representative Council shall determine the conditions and terms according to which a member is presented with expulsion and the necessary procedures to refer the request of termination to the Constitutional Court. None of this detracts from the personal responsibility stipulated by law for what a member of the Representative Council perpetrates in terms of violations of the law.

**The Arabic word “mukhalifat” is used in the last sentence; it means both “violations” and “misdemeanors.” It is therefore likely that the article deals only with felonies and that parliamentary immunity does not extend to misdemeanors, although the Arabic remains ambiguous on this score.**

**Article (106)** Immunity shall not cease with the termination of membership in the Representative Council for the statements and actions that it covered during the time that the member of the Council enjoyed the status of membership.

**Article (107)** It is forbidden for a member of the Representative Council, during his term of membership, to be appointed to any public or private employment or to purchase anything from the state property or to rent or sell anything from its property, or to barter for them, or to execute a contract with the state as a concessionaire, importer, or contractor. The law shall preserve the employment and positions of state employees who win membership in the Representative Council. The Representative Council shall decide upon the requests of its members to resign. The Standing Orders of the Representative Council shall regulate the conditions under which the Council shall accept the resignation of one of its members.

This covers several areas that have emerged as problematic for the PNA. First, some members have conducted business with state bodies. Second, `Arafat has appointed some PLC members who lost ministries to other public positions. Third, one PLC member resigned (Haydar `Abd al-Shafi) and there were no clear procedures on how to deal with the resignation.

The article does not—nor could it—completely resolve all these issues. For instance, the bar to conducting business does not extend to family members, but that has been one of the ways in which the PNA has tolerated corrupt practices. Further, the bar to public employment has existed in the Basic Law (in effect since 2002) but has not yet been implemented.

While this article therefore addresses some problematic areas, it is no substitute for a more extensive legal framework (and perhaps a code of conduct) governing such matters.

**Article (108)** A member of the Representative Council is to submit, during the first month of the beginning of his term in office, a personal financial statement for himself, his spouse, and his minor children, detailing what he owns of movable and non-movable property, debt liabilities inside and outside Palestine, and civil liabilities. The statements shall be filed with the Constitutional Court.

The financial disclosure requirements are an innovation, but the article does not make clear how these statements are to be used. As with the previous article, this may be an important step but will depend on (as yet unwritten) legislation in order to serve as the basis of real disclosure and transparency.

### **The Advisory Council**

*From Article 109 to Article 111*

**Article (109)** An Advisory Council shall be created by virtue of this constitution composed of one hundred and fifty members; it shall have an independent personality. Care shall be taken in its formation to portion of the distribution of population of Palestinians inside Palestine and outside of it. The law shall regulate the terms and methods of election of its members or their appointment according to the countries where they live. The president of the state shall be permitted to appoint members in the Advisory Council who do not bear Palestinian citizenship if

they have been distinguished for providing outstanding services to the Palestinian cause, provided that they do not exceed ten members.

**Article (110)** The Advisory Council shall be concerned:

- with the study of general strategic issues and providing suggestions regarding them.
- with providing suggestions in all matters connected with national rights and the integrity of Palestinian soil and the rights of Palestinians abroad.
- With discussion of constitutional amendments and expressing an opinion in those that have been proposed.
- With topics the president of the state refers to the Council connected to public policy in Arab and international affairs for the state of Palestine.
- With draft laws which the president of the state refers to it connected to Palestinians abroad.
- With what members of the Advisory Council decide to put forward for discussion on its agenda.

**Article (111)** The Advisory Council shall send its recommendations to the president of the state, the prime minister, and the speaker of the Representative Council. The recommendations of the Advisory Council shall be published in the Official Gazette upon the request of the president of the state.

**The body termed the “Advisory Council” has evolved in various drafts of the constitution, though its basic purpose—to provide a voice for all Palestinians, even outside of Palestine—has remained constant.**

**In earlier drafts, the body was referred to as the “National Council,” and implicitly seemed to be identical to (or eventually the successor to) the “Palestinian National Council,” the constituting body of the PLO. It served as the upper house of the Palestinian parliament, though its role was not well defined.**

**It still shows some traces of that origin in the current draft, but much has changed:**

- **First, the Council exists only “by virtue of the constitution” and therefore is not linked to the PLO.**
- **Second, it is strictly advisory in nature and its mandate is clearly focused on those matters that clearly concern the Palestinian people as a whole.**



- Third, there is some recognition of the difficulty of its formation. It seems that its members from the state of Palestine will be elected; the members from outside Palestine will likely be appointed (though they may be elected in places permitting such election). The provision allowing for non-citizens is probably designed to include those who are ethnically Palestinian but who cannot accept Palestinian citizenship without jeopardizing their position in their home country.

There has been some international concern expressed that the existence of such a body will encourage a less conciliatory policy on the part of the Palestinian state, especially because it is likely to have a large number of those considered refugees. This may be the case, though the body's advisory nature will limit its influence. It also should be noted that the Council could have the opposite effect: it may provide the Palestinian diaspora with an authoritative voice endorsing a permanent settlement.

One cost of detaching the body from the PLO will be to leave the relationship between the PLO and the new state of Palestine more ambiguous. The overlap and hazy distinction between the PNA and the PLO has been a frequent complaint of Palestinian reformers; the constitution offers no clear provisions for the role or fate of the PLO.

### **Chapter Three/Section Two: The Executive Branch**

*From Article 112 to Article 158*

#### **First: The President of the State**

*From Article 112 to Article 130*

**Article (112)** The president of the state is the president of the republic. He shall defend the constitution and the unity of the people, guarantee the continuity of the endurance of the state, national independence, and the orderly functioning of public authorities. His shall exercise his competencies and his responsibilities shall be defined in accordance with the provisions of the constitution. Except for the competencies constitutionally attributed to the president of the state, the executive and administrative competencies of the government shall be within the competence of the Council of Ministers.

**The penultimate sentence of this article seems designed to ensure that the president operate fully within the constitution; under the PNA the presidency was created before the Basic Law and was not effectively constrained by it until 2003.**

**The final sentence suggests a major departure not only from the pattern of the PNA but also of Arab governance more broadly, in that it places most executive authority in the cabinet rather than the head of state.**

**Article (113)** It shall be stipulated that a nominee for the position of president of the state must bear Palestinian citizenship exclusively, not be less than forty years of age on the date of his nomination, and enjoy civil and political rights.

**Article (114)** The president shall be elected directly by the people for a period of office of five years. It is not permitted to re-elect anyone who has occupied or occupies the position of president of state except for once.

**The direct election of the president is one of the few remaining provisions that allow him some authority. Generally, directly elected presidents, able to cite a stronger measure of democratic legitimacy than those elected by parliaments, exercise their constitutional prerogatives with greater independence.**

**The constitution does not specify whether previous service as president (prior to the adoption of the constitution) counts toward the term limitation, but presumably it does not. (Yasir `Arafat has been president of the state of Palestine as proclaimed in 1988, but he has rarely used the title since the creation of the PNA.)**

**Article (115)** The president-elect shall assume his duties immediately upon conclusion of his predecessor's term. If it is the case that the position of president of state is vacant as a result of the commencement of procedures to dismiss the president or as a result of death, resignation, loss of legal qualifications or abilities in accordance with Articles 90 and 118 of this constitution, the new president will begin his duties immediately upon the completion of election procedures. Before exercising the duties of his office, the president shall take the following constitutional oath in front of the Representative Council with the presence of the president of the Supreme Council for the Judiciary: "I swear by Almighty God to be faithful to the homeland and its holy places and to the people and their national heritage; to honor the constitution and the law; and to safeguard fully the interests of the Palestinian people; as God is my witness.

**This oath is different from that taken by other legislative and executive officials (see Articles 68 and 136; though in Article 163, the judicial oath is to be determined by law). The differences are likely only of symbolic importance.**

**Article (116)** The president shall submit during the first month of his assuming the responsibilities of office a financial statement for himself, his spouse, and his minor children, detailing what they own of movable and non-movable property, debt liabilities inside and outside Palestine, and civil liabilities. The statements shall be filed with the Constitutional Court.

**See the comment on Article 108.**

**Article (117)** The remuneration of the president of the state shall be determined by law.

**Article (118)** The office of the president shall be considered vacant:

- Upon death;
- Or upon resignation;
- Or by loss of legal qualification or inability to perform the constitutional duties by decision issued by the Constitutional Court pursuant to a request by two-thirds of all members of the Representative Council.

**The intention seems to allow for removal of the president in exceptional circumstances but not to make him politically responsible to other state structures.**

**Article (119)** If the office of the president becomes vacant or the Representative Council decides to charge him in accordance with Article 90 of the Constitution, the Speaker of the Representative Council shall assume presidency of the state temporarily for a period not exceeding sixty days, during which presidential elections are carried out in accordance with the Law of Elections. Should the Speaker of the Council wish to submit his candidacy for presidency, or should a legal hindrance prevent him from assuming presidency, the president of the Constitutional Court shall assume presidency temporarily until the completion of procedures to elect the president. The president of the Court, in this case, may not present himself for the presidency.

**These provisions are very similar to those in Egypt. But they go farther: the Egyptian constitution does provide for a vice president, though not for his automatic succession to the presidency (and thus the designation of a**

successor in Egypt is strictly informal). The Palestinian constitution leaves the matter entirely up to the electoral process.

Reading article 90, 113, and 119 together suggests that the president must leave office once accused by the Representative Council, regardless of the eventual ruling of the Constitutional Court and cannot run for subsequent election unless the Constitutional Court acquits him.

**Article (120)** The president of the state is to direct the Council of Ministers in setting public policy.

**This vague article seems to introduce the president into the policy process while other more specific articles suggest a far more limited role.**

**Article (121)** The president of the state shall charge a prime minister upon the recommendation from the party obtaining the largest number of seats in the Representative Council, after conducting consultations with the leaders of the other parties represented in the Representative Council. If he is unable to compose a government during a period of forty-five days, the president shall name a new prime minister from and so on until the government is formed.

**This is a critical article for determining the nature and authority of the president and the prime minister. It is unclear how it would work in practice, because the political and party context will be just as important as the article's provisions in determining the result.**

**One of the main issues will be how much influence the president will have over the choice of prime minister. There are some important ways in which his choice is not restricted: the prime minister need not come from the parliament and indeed must only come from the largest party able to form a government.**

**However, the phrasing of the article implies that the political party has a strong, even defining, role in determining whom the president designates (the Arabic term "bi-tansib" implies that the party itself refers its nominee to the president).**

**If the current political party system prevails (in which Fatah is the largest party but is itself a loose coalition) It is quite possible—even likely--that the critical choice of who will serve as prime minister may effectively be transferred, at least in part, from the realm of parliamentary politics to the realm of party politics. And, at least under the PNA, the president is also the head of Fatah. Thus, his influence over the choice of prime minister will be greater than this clause might initially imply. A stronger party**

system would diminish this presidential role, but that is unlikely to emerge very soon.

Once he selects the prime minister, however, the president has little say over the composition of the cabinet and does not seem to be in a position to bring it down if he is displeased with its composition or performance. Again, given the current party system (in which Fatah has a majority but a rather undisciplined one in the PLC), the result is likely to increase the role of the parliament over the composition of the cabinet.

The most likely result, then, is that internal party politics would influence the choice of prime minister, but Council politics would influence the choice of the rest of the cabinet. Of course, much of this could change over time as the party system and parliamentary tradition evolve; there is probably no area where it is more difficult to predict the actual operation of constitutional text.

Earlier drafts required the president to turn to the second largest party if the first designee for prime minister failed in forming a government. The removal of this provision brings Palestine into accordance with more standard practice, though it also increases the latitude given to the president in selecting a prime minister.

**Article (122)** The president of the state shall ratify laws after their approval by the Representative Council, within thirty days of their referral to him, and he shall order their publication. The president of the state may, before the end of this period, object once to a draft law that was approved by the Representative Council or request its reconsideration, accompanied by the reasons for his objection within thirty days of having received it. If the aforesaid period ends without ratification of the law or objection to it, the law shall be considered effective and must be published in the Official Gazette, and the Constitutional Court shall request that the president of the state to issue an order to that effect immediately. If the president of the state returns the law approved by the Representative Council within the legal time and the Representative Council approves it again by a majority of two-thirds of all of its members, the law shall be considered effective and it must be published. The Constitutional Court, depending on circumstances and based on the request of the Representative Council, shall take responsibility for issuing the order to publish the law.

Some of these provisions mirror those in Article 81. The most notable change from PNA practice is that the president is simply to explain his objection; in the PNA he also submitted suggested amendments (this is not explicitly barred but neither it is encouraged in this article). In the proposed constitution, he may either approve a law or reject it (or request

reconsideration). Thus, his veto power, though strong, might become a clumsier weapon.

And in keeping with other articles, the Representative Council need not rely on the president for promulgation of the law.

**Article (123)** The prime minister, or the minister he delegates, is responsible for negotiations for concluding international treaties and informs the president of the state on the course of the negotiations, provided that the conclusion of international treaties is bound by the agreement of the Council of Ministers and approved by the president in accordance with the provisions of Article 79 of this Constitution.

The level of detail in Articles 79 and 123 are probably best understood as a reaction to the ambiguities surrounding negotiations and agreements prevailing at present. Under the Oslo Accords, most negotiations are to be carried out by the PLO rather than the PNA. The PLO, is, of course, headed by Yasir `Arafat, who also serves as president of the PNA. Most PLO negotiators have had senior PNA positions as well. In 2003, the PNA transformed its Ministry of Planning and International Cooperation into a Ministry of Foreign Affairs, joining but not replacing a host of PLO structures to conduct diplomacy and foreign affairs. The appointment of Abu Mazin as prime minister hardly clarified matters, because he held an important PLO negotiations portfolio.

This has led not only to confusion but lack of accountability and the marginalization of the PLC from any oversight role.

The clauses also remove the president from much of the process, though this article requires that he be informed and has him approve treaties. Since this approval function is carried out “in accordance with the provisions of Article 79”—provisions which do not mention the president—it is likely that this approval simply consists of formal (and largely symbolic) ratification of treaties that have been concluded according the constitutional provisions.

**Article (124)** The president of the state performs, in addition to the authorities stipulated in the constitution, the following authorities:

- He heads the Council of Ministers when a state of emergency is in effect and in similar exceptional circumstances.
- He issues decrees and requests their publication. He has the right to request that the Council of Ministers reexamine any decrees it has issued also within fifteen days from the date of its delivery to the presidency of the republic. If the Council of Ministers decides by a majority of two-thirds of its members

on the issued decree if the period passes without the decree being issued or returned, the decree is considered effective and it must be published.

- He alone issues the decree naming the prime minister and the decree accepting the resignation of the government or considering it resigned.

As for other decisions and decrees, it is necessary that the prime minister and the minister or ministers concerned co-sign them. The prime minister alone co-signs with the president on decrees issuing laws, decrees reexamining laws, and decrees summoning the Representative Council to meet in special sessions.

- He delivers when necessary the speech to the Representative Council without discussion.
- He forwards draft laws approved by the Council of Ministers to the Representative Council.
- He grants special pardons for criminal punishments or lessens them. General amnesties shall only be by law.
- He grants medals of state by decree.

**This article is remarkable for how it restricts many functions of the president. The precise formulation seems oddly detailed, but the pattern might be best described as converting many of the important functions the PNA president into far more symbolic ones for the president of Palestine. For instance, under the PNA, the president heads the cabinet and therefore often acts for it in communicating with the PLC. He is not a member of the cabinet under this draft constitution (and he heads it only during states of emergency), but he still retains the formal function of relaying draft laws from the cabinet to the Representative Council. Similarly, most administrative regulations are issued by presidential decree under the PNA. That continues in a formal sense but the president loses much ability to act independently (he does retain a vestigial but real veto power over such regulations, however). The requirement that the prime minister and a relevant minister co-sign his action accentuate this conversion of presidential functions to ceremonial duties, since such ministers are politically responsible to the Representative Council (and thus the president can only act in these instances with the agreement of officials who fall under parliamentary oversight).**

**Article (125)** The president of the state shall appoint the ambassadors of the state and representatives of the state of Palestine to states and international and regional organizations and relieve them of their duties, on the recommendation of the relevant minister. He shall accept the credentials of representatives of foreign states and international and regional organizations.

**Significantly, the president's role here seems to be to formalize the decisions of a minister, a further step in the direction of a parliamentary system.**

**Article (126)** The president of the state is the supreme head of the Palestinian national security forces which is headed by a cognizant minister.

**I have tried to preserve the ambiguity of the Arabic, in which the president is the ra'is (which means president, chairman, or head) of these forces, while a minister "yar'as" (which means heads or presides) over them. The intention seems to make the president the ceremonial head without removing ministerial (and indirectly parliamentary) oversight.**

**It is not clear precisely what the "national security forces" are, but the broad phrasing may be used to cover various internal and external forces, especially if the state of Palestine is limited by international agreement in fielding a regular army.**

**The language in this article is repeated in Article 153 where I have made some additional comments.**

**Article (127)** The president of the state may establish specialized advisory councils from qualified, specialized and expert persons to participate in expressing opinions and to benefit from national capabilities.

**While under the PNA, the president has asserted an authority to create administrative bodies, this article provides only for advisory ones.**

### **State of Emergency**

**Article (128)** The president of the state may, by agreement with the prime minister and with the consultation of the speaker of the Representative Council, in case the security of the country is exposed to threat of war or natural disaster or siege in a way that threatens the safety of the society and continuing operation of its constitutional institutions, announce a state of emergency. A state of emergency shall not be declared except when its measures are necessary to restore public order or the



organized functioning of the authorities of the state or confront disasters or the state of siege. The effective period of a state of emergency may not extend for over thirty days; it may be renewed only once by the agreement of two-thirds of all members of the Representative Council, except in case of war. In all cases, the declaration of the state of emergency must define the goal, region, and time period it covers.

**Article (129)** The Council of Ministers may, after the declaration of a state of emergency and if events necessitate speed in taking steps to confront suddenly-arising matters that do not admit of delay until the Representative Council meets, issue decisions to be approved by the president within a period that may not exceed fifteen days. They shall have the force of law. These decisions shall be presented to the Representative Council in its first meeting after the declaration of the state of emergency or in the session to extend the state of emergency, whichever comes first, to pass them or their legal force ceases retroactively. If the Representative Council does not approve them their legal effectiveness ceases and the Council shall decide the method to settle their effects without harm to the material rights of others.

**Article (130)** It is not permitted during a state of emergency to impose limitations on basic rights and freedoms except to the extent necessary to preserve public order in the country. All decisions and actions the Council of Ministers takes during the state of emergency are subject to judicial review. The competent court shall begin examination of submitted grievances within a period not exceeding three days.

**These three tousel articles present a tumble of clauses designed to confront one of the most difficult issues in Arab constitutional practice: states of emergency. On the one hand, the state of Palestine is likely to confront a very difficult security environment that may require exceptional measures in order to protect the society's interests. On the other hand, all of Palestine's rulers in this century have used security justifications to eviscerate any legal safeguards and constitutional guarantees. Other Arab states have experienced similar problems.**

The result in this draft may seem at first glance to be almost schizophrenic: it seems to be to attempt to anticipate unanticipated situations; and simultaneously to enable exceptional actions while insuring that they follow certain rules. The animating spirit of the articles may perhaps best be understood in historical context.

States of emergency have certainly been greatly abused in Arab governance. Some have been declared in order to shut off debates over policy; others have been used to bring into force legislation favored by the rulers but unlikely to be passed by the parliament. Some states of emergency have been limited not only in scope but also in time: Egypt,

for instance, has lived in a nearly-continuous state of emergency (with only short interregnums) for over six decades.

Thus, these articles attempt to forestall attempts to abuse states of emergencies in such ways. Whether the constitutional draft will be successful in this regard can be ascertained only in practice, but it should be noted that the draft contains the most extensive provisions in the Arab world for governing the operation of states of emergency.

Several features merit specific mention:

- Article 128 places the responsibility for the declaration in the hands of the president—which is not unusual—but requires that it be done with the agreement of the prime minister and that the speaker of parliament be consulted. If Palestinian politics does indeed follow the inclination of the draft toward a parliamentary system, it is likely that the real initiative would rest with the prime minister.
- There is no direct parliamentary oversight over the original declaration of the state of emergency. The speaker must be consulted (a weak provision) but requiring the agreement of the prime minister—himself accountable to parliament marks a less direct but probably far more effective instrument of parliamentary oversight.
- The parliament must agree—with a supermajority—to renew the state of emergency. This is not unusual. What is unprecedented is the restriction on a state of emergency to two periods of thirty days. (This does not apply to wartime states of emergency.) Such a limitation seems extremely confining.
- There are several other limitations placed on a state of emergency: measures taken must be relevant to the emergency, a clear reason must be adduced for the declaration, and the declaration may limit the geographical scope of the emergency.
- While parliamentary oversight over the declaration is incomplete, decree-laws issued under the state of emergency operate under fuller parliamentary oversight. The wording is complicated, but seems to demand that such decree-laws be submitted and that they lose their effectiveness retroactively if they are not. When they are submitted, they may either be approved or rejected by parliament. If they are rejected, it is up to the parliament to decide how actions taken under the decree-laws are to be treated.

- Article 129 appears to suffer from two ambiguities in drafting. First, the reference to the president (who must approve the laws) does not specify the “president of state” as other articles in the constitution do. It could refer to the prime minister (whose formal title might be translated as “president of the council of ministers”) or even the speaker of parliament (the Arabic word ra’is refers to president, chairman, and speaker). The nature of the duty suggests that the president of the state is the official who must act. Second, there is an apparent redundancy in requirement that decree-laws be submitted to the Representative Council: they must “be presented to the Representative Council in its first meeting after the declaration of the state of emergency or in the session to extend the state of emergency, whichever comes first.” The final phrase would seem to be redundant, though there may be a distinction between “meeting” and “session,” the first being regularly scheduled.
- Article 130 mentions “basic rights and freedoms,” raising the same issues as Article 57.
- The insistence that actions taken under a state of emergency are subject to judicial review is not unprecedented, but it runs counter to the practice introduced into Arab constitutional practice by the British of keeping emergency measures out of the courts. What is unprecedented is the provision for the courts to take up claims against emergency measures immediately.

## Second: The Prime Minister

### *Article 131 to Article 140*

**Article (131)** Whoever is appointed prime minister or minister must bear Palestinian citizenship exclusively and have reached at least thirty-five years of age.

**Article (132)** The prime minister shall be responsible for formation of the government and he shall mention in the formation which he presents to the president the portfolio which is assigned to each minister. The prime minister shall present the members of his government and his program to the Representative Council to obtain confidence.

The requirement that the prime minister indicate the portfolio for each minister would seem to require that any change in ministerial

responsibilities among existing ministers be presented to the president and approved by the Representative Council as well. This is further elaborated in Article 135 below. The principle was established with some difficulty in a 2002 PNA cabinet reshuffle.

**Article (133)** If the prime minister fails to obtain the confidence of the Representative Council within three weeks of his being charged the president will charge a new prime minister in accordance with Article 121 of the constitution. Until the new government succeeds in obtaining the confidence of the Representative Council, the outgoing prime minister leaving office shall be considered head of a caretaker government in the narrow sense.

**This clause reflects a fear that ministers may take action before they are granted parliamentary confidence; a controversy arose on this issue in the 2002 cabinet reshuffle in the PNA. The precise meaning of “narrow sense” is not clear, though the intention is probably to discourage the outgoing prime minister from undertaking any significant or irreversible initiative. The status of other outgoing ministers is not specified, but Article 87 and Article 135 would seem to indicate that they continue until their successors have been approved by the Representative Council.**

**Article (134)** The prime minister supervises the work of the ministers. Each minister shall be responsible to the Council of Ministers according to the procedures established by the provisions of this constitution. The prime minister and the ministers are responsible individually and collectively to the Representative Council for the actions of the government.

**Article (135)** When making a ministerial change, adding a minister, or filling a vacancy for any reason whatsoever, it is necessary that the new minister(s) be presented to the Representative Council in the first session the Council holds after the ministerial change in order to vote confidence in him/them. If the number of those included in the change exceeds one-third of the members of the government, it is necessary to put forward the confidence in the ministry as a whole. In all cases, it is not permitted for the prime minister or any minister to exercise the duties of his position except after he has obtained confidence from the Representative Council.

**Article (136)** After obtaining the confidence, the prime minister and the ministers shall take the following oath before the president of the state and the Representative Council in a joint session: “I swear by Almighty God to be faithful to the homeland, to preserve the rights of the people and the nation and its interests, to honor the constitution and the law, and to undertake my duties rightfully, as God is my witness.”

**The reference to a “joint session” is unclear; it may be a vestige of provisions in earlier drafts for the “National Council” (now evolved into the “Advisory Council” in this draft) to meet with the Representative Council for some purposes.**

**Article (137)** The prime minister exercises the following competencies:

- He represents the government and speaks in its name. He is considered responsible for the implementation of public policy as set by the Council of Ministers.
- He presents the general policy of the government to the Representative Council.
- He summons the Council of Ministers to meeting, establishes the agenda, informs the president of it, and presides over its sessions.
- He oversees the work of public agencies and institutions, coordinates among ministers, and gives general instructions to ensure proper functioning of work.
- He signs executive and regulatory decrees.
- He oversees the executive of laws and regulations and coordinates government policies and programs.
- He approves appointments for senior positions, based on the recommendation from the cognizant minister in accordance with legally-determined principles for appointments in ministries and state agencies.
- He submits suggestions for draft laws.
- He orders the publication of laws passed by the Representative Council after the president of state has approved them they are considered to have become legally effective.
- Any other competencies designated to him by law.

**This article has far-reaching implications in converting Palestinian governance from a presidential to a parliamentary basis. First, and perhaps most significantly, the draft departs from standard practice in many Arab political system by having the prime minister alone chairs cabinet meetings. It is far more common for the head of state to preside if**

he decides to attend. Indeed, previous drafts contained such a provision; its exclusion from the current draft creates a real prime minister.

Second, the prime minister, and not the president, issues decrees and regulations and makes senior appointments.

Third, he is responsible for publication of laws, a sensitive issue under the PNA.

Also of interest is the focus on ensuring that laws regulate many of these matters (such as appointments), diminishing the discretionary nature of executive authority.

The third to last bulleted point—allowing the prime minister to propose draft laws—does not make clear whether he must propose them to the cabinet for endorsement or whether he can submit them directly to the Representative Council.

**Article (138)** Neither the prime minister nor any minister may combine the ministry with any other work, pursue a free profession, buy or rent any state property, rent or sell to it any of his property, or barter with it. It is forbidden for the prime minister or any minister to use information which he obtained directly or indirectly by virtue of his work to realize material gain for him or for any other person in violation of the law.

**This article contains fairly strong conflict-of-interest provisions that take on special resonance because of practices prevailing in the PNA. The final phrase also suggests that implementing legislation will be required.**

**Article (139)** The prime minister and ministers shall receive monthly compensation and pension established by law.

**Article (140)** The prime minister and the ministers shall each individually submit, within thirty days of receiving confidence, a financial statement for him, his spouse, and his minor children, detailing what they own of movable and non-movable property, debt liabilities inside and outside Palestine, and civil liabilities. The statements shall be filed with the Constitutional Court.

**See the comment on Article 108.**

### **Third: The Council of Ministers (The Government)**

*From Article 141 to Article 146*

**Article (141)** The Council of Ministers shall be composed of the prime minister and a number of ministers, at most half of them members of the Representative Council.

**Article (142)** Executive authority shall be entrusted with the Council of Ministers.

**This article marks a highly unusual—if purely doctrinal—departure from prevailing Arab constitutional structures in which the head of state is considered both a part of the executive branch and an authority above all branches of government.**

**Article (143)** The Council of Ministers shall meet regularly on the call of the prime minister who shall preside at its meetings. The legal quorum for its convening is two thirds of all of its members. It takes its votes by a majority of those present as long as there is no contradictory text in the constitution or in the ordinance of the Council. The Council of Ministers exercises its competences in accordance with the constitution, the law, and the ordinances regulating the work of the government.

**Such detailed provisions—extending even to quorum--seem unusual in a constitution; they are generally left to less general legal enactments.**

**Article (144)** The Council of Ministers shall have the following competencies:

- Setting public policy, in the light of the ministerial program approved by the Representative Council.
- Implementing public policy as established, laws and regulations, ensuring compliance therewith, and proposing new draft laws.
- Preparing the draft general budget to be presented to the Representative Council for approval.
- Organizing, supervising, and overseeing the work of the agencies, institutions, and offices of the state at their various levels.
- Monitoring the performance of the ministries, public agencies and institutions, and offices and overseeing their work.
- Discussing the proposals, plans, and policies of each ministry in the field in which it exercises its competencies.
- Approving the system of administrative formations.

- Issuance of organizational regulations, regulations necessary for measures to implement laws, regulations of controlling and organizing public interests and facilities.
- Appointing civilian and military personnel, pursuant to the recommendation of the cognizant minister, and in accordance with the stipulations of law.
- Any other competencies granted pursuant to the provisions of the constitution and the law.

**Article (145)** The law regulating the work of the executive authority shall establish standing committees in the Council of Ministers. From among their chairs one or more deputy shall be selected for the prime minister.

**Article (146)** The Council of Ministers shall issue the regulations necessary for the exercise of its powers.

**This seems to indicate that most of the internal operations of the cabinet are not to be governed by law passed by the Representative Council but instead determined by the cabinet itself.**

## **The Ministers**

*From Articles 147 to Article 152*

**Article (147)** The minister is the supreme administrative head of his ministry. Each minister shall have the following competences within the sphere of the ministry with which he is entrusted, under the supervision of the prime minister:

- Proposing public policy for his ministry and overseeing its implementation after its adoption.
- Overseeing the course of work at the ministry and issuance of the necessary directives for the performance of his duties.
- Submitting to the council of ministers proposed draft laws related to his ministry.
- Implementing the general budget within the scope of his ministry and according to the allocations approved for it.



- Choosing senior employees and recommending them for appointment by the Council of Ministers. The appointment of employees of lower ranks will be among the competencies of the minister within the framework of the law and within the limits of the budget.
- Delegating some of his administrative competences to the deputy minister or other senior administrative officials in his ministry in accordance with the law.
- Supervising the implementation of laws and regulations related to his ministry.
- Any competence legally assigned to him.

**Article (148)** Each minister shall work within the boundaries of his competence to execute the laws, regulations, and governmental plans and programs in the manner indicated in this constitution and the laws regulating the work of the executive branch.

**Article (149)** Indicting the prime minister or a minister for high treason, violating the constitution, or committing a crime shall be based on a request submitted by one-third of the members of the Representative Council. The decision to indict shall not be issued unless two-third of all the members of the Representative Council agree. The accused shall be referred for investigation immediately after the issuing of the decision to indict.

**This provision seems designed to ensure that ministers are criminally responsible for their actions, but the procedure is more cumbersome than for holding ministers politically responsible.**

**Nineteenth-century constitutions in monarchical systems often worked to ensure that ministers could not claim immunity from prosecution on the grounds that they were acting as agents of the sovereign and therefore responsible only to him. Even in cases in which ministers were not clearly political responsible to parliaments, constitution-writers often wanted to ensure that they would act within the law. Thus, they often established special courts to try ministers (or provided for their trial by parliament). The American practice of impeaching and trying high officials by the legislative branch is an example of such a provision for ensuring that criminal responsibility of some kind operated. The Kuwaiti constitution, which provides for a special court to try ministers, is another example.**

**This constitution gives the parliament a role in indicting but then turns the matter over to the Constitutional Court in accordance with the following article.**

**Article (150)** Whoever is referred for investigation ceases performing his duties, simply by virtue of the decision of referral, until a final judicial judgment is issued acquitting him from the Constitutional Court. The Attorney General or his representative assumes responsibility for the procedures of investigation and indictment. Termination of service or resignation shall not prevent undertaking legal action or its continuation.

**Article (151)** The government shall be considered to have resigned and shall be re-formed:

- At the beginning of a new term of the Representative Council following every general election.
- Or after confidence is withdrawn from the prime minister or from the government, or from more than one-third of the ministers in accordance with Article 87 of this constitution.
- Or in case of the death of the prime minister.
- Or upon the resignation of the prime minister or the resignation of at least one-third of the members of the Council of Ministers.
- Or upon the prime ministers loss of his qualifications or capacity to perform the duties of his office, in accordance with a request from a majority of all of the members of the Representative Council and the issuance of a decision to that effect from the Constitutional Court.

**It would seem that this last provision may be unnecessary, since it would be easier to withdraw confidence in accordance with Article 87 than to declare the prime minister no longer qualified or capable in accordance with this Article (in the latter case, the matter must be referred to the Constitutional Court). Perhaps it is included because Article 87 clearly anticipates a loss of confidence on political grounds (and follows interpellation and parliamentary debate).**

**Article (152)** The resigned government shall continue in directing government affairs until a new government is formed in accordance with the provisions of the constitution.

This article merely repeats the language of Article 87 with the addition of the reference of following the provisions of the constitution.

### Security forces

*From Article 153 to Article 154*

**Article (153)** The national security forces belong to the Palestinian people. They shall assume the task of protection and security of the Palestinians and defense of the homeland. The cognizant minister shall head them and the president of the state shall be the supreme head. It shall be forbidden to form armed groups outside of the network of national security forces. The law shall regulate the terms and condition for the announcement of general conscription.

The language on command mirrors that in Article 126. The language may be seen to imply a purely ceremonial role for the president, but other interpretations—giving him a stronger role—are possible. It would seem that even if his authority is more than ceremonial, it must be exercised through the cognizant minister.

Another matter of interest is that the security forces defend “Palestinians” and not merely the homeland; they belong to “the Palestinian people” and not merely the state. An expansive reading of this article might be taken to imply that the security forces could play a legitimate role in defending Palestinians in other countries. It seems unlikely that such a role could be exercised in practice, however.

**Article (154)** The police is a civilian organization. It is part of the Ministry of Interior, and the law shall regulate its role in the service of the people, defense of the society, and vigilance in preserving security, public order, and public morals. It shall perform its duty within the limits that are established by law and with complete respect for the rights and freedoms stipulated in this constitution.

This article designates a ministry by name; most constitutions avoid such a level of specificity. This insistence that the police fall under the Ministry of Interior, along with the requirements that it be a civilian organization, operate within the law and respect rights and freedoms must be seen as a reaction to the experience of the PNA, in which police conduct, status, and organization were all loosely controlled.

## Public Administration

### *From Article 155 to Article 156*

**Article (155)** Appointment of public employees and all persons working for the state and the conditions of their employment shall be according to law.

**Article (156)** The law shall regulate everything connected with the affairs of the civil service, including appointment, transfer, seconding, promotion, and retirement. The General Personnel Bureau, in coordination with cognizant government departments, shall work to improve and develop public administration. Its opinion shall be solicited on draft laws and regulations related to public administration and those employed in it.

These two articles seem designed to ensure that public employment follow clear legal procedures. The level of specificity—including reference to a specific government agency, the General Personnel Bureau—is high, though implementation rests on the text of the law. While the general intent seems to be to avoid the abuses of the PNA, it should be noted that the PNA has passed (if only unevenly implemented) a civil service law; an English translation can be viewed at [http://www.usaid.gov/wbg/misc/Civil\\_Service\\_Law.pdf](http://www.usaid.gov/wbg/misc/Civil_Service_Law.pdf).

## The General Audit Organization

### *Article 157*

**Article (157)** An independent organization with legal personality shall be established by law to be named the “General Audit Organization.” The law shall regulate its competencies, the manner of its formation, and the principles of its work. The president of the “General Audit Organization” shall be appointed by a decision from the president of the state pursuant to nomination from the Council of Ministers and approval by the Representative Council.

The requirement that such a body be formed is not unusual—some Arab countries have an “audit court,” a body that is designed to perform a similar function.

The innovation, however, is to give the body some greater status and independence by having its head approved by the Representative Council.

While the PNA does have an audit bureau (generally referred to in English as the General Control Institute), it has generally reported directly to the president rather than to the PLC. (In 1997, its annual report did go to the PLC, shocking the body and leading to a parliamentary inquiry into official corruption. The president reacted by refusing to submit subsequent reports, despite the provisions of the budget law requiring him to do so).

The Basic Law does provide for similar parliamentary approval of the head of an official auditing body, though that provision has yet to be exercised.

### Local administration

#### *Article 158*

**Article (158)** The law shall regulated the relationship between the government and the local unites on the basis of administrative decentralization. The units of local governance shall enjoy legal personality. Their councils shall be elected. The law shall provide for the method of their establishment, formation, the election of their councils, competencies, and jurisdictions.

The promise of decentralization will likely be met only if there is strong legislation and some measure of fiscal autonomy. Much of the relevant legislation regarding local government and elections has been written under the PNA (indeed, the first law passed by the PLC involved local government). An English translation of the law on local government can be viewed at <http://www.pnic.gov.ps/english/law/law22.html>

In general, the PNA legislation contains some ambiguities, but does have some elements that suggest decentralization. Many provisions—especially those for elections and for fiscal autonomy—have not yet been implemented.

### Section Three: The Judicial Branch

*from Article 159 to Article 184*

**Article (159)** The judicial branch shall be independent. It shall have original jurisdiction to perform the judicial function and to decide in all disputes and crimes. The law shall define the institutions of the judicial branch and regulate their structure. It shall define the types of courts, their levels, jurisdictions and procedures. Exceptional courts may not be formed.

The blanket ban on exceptional courts is unusual (though it is not unprecedented) in Arab constitutional texts. In general, in the Arab world, courts established for special reasons or on a temporary basis are regarded as exceptional. Standing military courts and state security courts are not regarded as exceptional, though special sections are established for specific crimes might be. Under the PNA, the legal basis for state security courts has shifted over time, but the most infamous body—eventually termed the Supreme State Security Court—would probably be viewed as exceptional and thus unconstitutional because of its ad hoc nature. There was some effort under the PNA to establish a separate standing State Security Court that would resemble the rest of the judiciary more closely; its status at present is unclear.

**Article (160)** A Supreme Council for the Judiciary shall be entrusted with the affairs of the judicial institutions. The law shall define its formation and competencies, ensuring its independence and guaranteeing its equality in the framework of cooperation with the other public authorities. Its opinion shall be solicited in draft laws regulating the affairs of the judiciary. It shall establish its internal regulation.

**Article (161)** The president of the Supreme Council for the Judiciary shall be appointed by a decision made by the president of the state in accordance with the law, and he shall be approved by the Representative Council. The law shall regulate the methods of the appointment of the members of the Supreme Council for the Judiciary and the necessary requisites that each of them shall have.

**Article (162)** The Supreme Council for the Judiciary shall establish, in accordance with the law, the regulations governing appointments, assignments, transfers, promotions and disciplinary measures related to judges.

Articles 160, 161, and 162 attempt to provide for a judicial council that is strong and autonomous. Most Arab states do have such judicial councils, though the degree of their independence varies. Egypt is often seen as having the strongest judicial council, though even there issues of judicial independence are often raised; most other Arab states do not meet Egyptian standards.

In general, two sorts of institutional mechanisms are used to deprive judicial councils of autonomy. First, their composition includes strong

representation from the executive. Second, their jurisdiction is limited (especially over budgetary affairs).

These articles make a serious attempt to address the shortcomings in other Arab judicial councils in three ways. First, some of the jurisdiction of the judicial council is specified. Second, it is given the authority to regulate its own internal affairs within the framework of the law. Third, the president of the Council is to be approved by the Legislative Council. This last provision is highly unusual: in most Arab states the judicial council is headed by the head of state or by a senior judge.

While these provisions reflect a serious effort to guarantee judicial independence, ultimately their implementation will rest on the relevant legislation. In this regard, the PNA has an impressive record of promulgating strong laws but to date its record of implementation is sketchy at best. English translations of the two most important pieces of legislation can be viewed at <http://www.pnic.gov.ps/english/law/law14.html> and [http://www.usaid.gov/wbg/misc/Formation\\_of\\_\\_Regular\\_Courts\\_doc.pdf](http://www.usaid.gov/wbg/misc/Formation_of__Regular_Courts_doc.pdf).

**Article (163)** A judge shall swear the legal oath before the Supreme Council for the Judiciary in the manner prescribed by the law of the judicial branch.

**Article (164)** A judge shall submit upon his appointment a personal financial statement for himself, his spouse and his minor children, detailing what they own of movable and non-movable property, debt liabilities inside and outside Palestine, and civil liabilities. The statements shall be filed with the Constitutional Court.

**Article (165)** Court sessions shall be public, unless the court decides they shall be secret for reasons

- related to public order or morals
- or by agreement of the court upon the request of the litigants.

In all circumstances, sentences shall be pronounced in a public hearing.

**Article (166)** Judicial judgments shall be issued, pronounced and executed in the name of the people in accordance with the law.

**Article (167)** Litigation procedures shall be regulated by law so as to guarantee justice and expeditious decisions in cases.

**Article (168)** Judges are independent. There shall be no authority over them in their judicial duties except the law and their conscience, and they shall not be removed.

The law shall regulate the terms of the end of their duties and disciplinary questioning of judges before the Supreme Council for the Judiciary in cases defined by law without infringement on their independence in performing their duties. It is not permitted for anyone to intervene in the course of justice or to delay the implementation of judicial judgments. Intervention in the course of justice or delaying implementation of judicial judgments shall be considered a crime punishable by law, and such cases arising shall have no statute of limitation.

**Under the PNA, officials (including, on one occasion, the entire cabinet) have refused to implement court decisions, especially related to the release of those extralegally detained. The language of this article would seem not simply to ban such behavior but to criminalize it.**

**Article (169)** The terms of appointment, transfer, seconding, promotion, and regulation of affairs of the judges shall be defined by a law. It shall not be permitted to combine the judicial profession with any other profession, membership in the Representative Council, or membership in political parties. A judge shall not be permitted, while being entrusted with the judicial profession, to bear any citizenship other than Palestinian citizenship.

**This article may ban a practice that some have claimed is a subtle infringement on judicial independence. In some Arab countries (such as Egypt, which enjoys a reputation for a greater degree of judicial independence than is the norm in the Arab world), judges are seconded to non-judicial work by the Ministry of Justice. Because such employment is sometimes preferred to judicial work, ministries are often charged with doling out such opportunities to favorites. This article bars judges from engaging in nonjudicial work.**

**Article (170)** A court of cassation shall be constructed with jurisdiction over appeals in criminal and civil matters. The method of its formation, jurisdiction and operational procedures shall be defined by law.

**West Bank and Gaza courts have had only a single level of appeal. In the West Bank prior to 1967, it was possible to appeal to the Court of Cassation in Amman, but this route was cut off as a result of the Israeli occupation.**

**Judicial reformers have sought to create a court of cassation since the PNA was constructed for two reasons. First, it would constitute an important marker of the completeness of the Palestinian judicial system. Second, it would be a tool in unifying the application of Palestinian law in the West Bank and Gaza (legal communities in the two areas have sometimes acted as rivals since 1994).**



The PNA has moved recently to construct a court of cassation in accordance with the judicial laws it has passed, but the conditions of the second intifada have not allowed the courts to function fully.

**Article (171)** A high court of justice shall be established with jurisdiction to decide administrative disputes and disciplinary cases as they are defined by its establishing law, which shall regulate the bases of its operating, the terms of the appointment of its judges and employees, and the procedures which are to be followed before it. The construction of lower administrative courts is to be permitted by law.

The phrasing of the first sentence is complicated; I have tried to render it both comprehensively and accurately without straying from the phrasing of the Arabic. The term “high court” might be better translated as “supreme court,” but the former usage in English has become more common.

The provision for a high court draws on mandatory-era structures, in which such a body hears cases against government action. A “High Court” has functioned under the PNA, and counterparts exist in Israel and Jordan. Generally, the High Court is the court of original jurisdiction for administrative cases. It also often doubles as the supreme court of appeals for non-administrative cases. Thus, if this article is implemented in a way consistent with the history of such bodies, the High Court and the Court of Cassation (referred to in the previous article) might be virtually co-terminous bodies.

This is not the pattern followed in most Arab states: instead, the more common method is to construct a separate hierarchy of administrative courts on the French Conseil d’Etat system.

By allowing the establishment of lower administrative courts, however, this article would leave open the possibility of a system that resembles other Arab states more than Jordan and Israel. In such a system, the High Court would not be the court of original jurisdiction but instead the supreme court of appeals for administrative cases.

It is probably not of tremendous importance which structure is used, so long as there is a judicial body that is independent, has clear jurisdiction over such cases, and is authorized to take appropriate action. This article should therefore be read in conjunction with Article 10 which addresses the jurisdictional issues.

**Article (172)** A military court shall be established by law with jurisdiction to decide in military cases. It may not try civilians or decide in any case outside the military sphere.

Forbidding the military court to try civilians is a very strong step. Banning exceptional courts (Article 159) does not bar the trial of civilians in military courts, since the latter are standing bodies, generally established by law.

### Office of the Attorney General

*From Article 173 to Article 177*

**Article (173)** The Office of the Attorney General is one of the organs of the judicial branch. It is part of the Ministry of Justice and governed by the law of the judicial branch.

This article indicates that Palestine will follow the prevailing practice in the majority of Arab states in establishing a “niyaba” system. The “niyaba `amma,” translated here as the “Office of the Attorney General,” is responsible for the investigation and prosecution of crimes. It is neither a wholly judicial nor a wholly executive function. While its personnel are generally drawn from the judiciary—and they consider themselves an integral part of the judiciary—it generally is far more closely attached to the Ministry of Justice than other judicial organs.

**Article (174)** An attorney general shall be appointed at the head of the Office of the Attorney General, by nomination by the minister of justice and decision of the Council of Ministers. The law shall determine the competencies of the attorney general, his assistants, and their duties.

The appointment of the attorney general has already been the subject of much contention under the PNA.

The PNA has had four individuals fill the post. The first, Khalid al-Qidra, was generally regarded as placing loyalty to the president on a higher level than legal niceties. The second was sufficiently independent that he was promoted to the position of “presidential advisor.” The third, who also was respected in legal circles, was promoted to minister of justice, allowing Khalid al-Qidra to return to the post through an irregular appointment; he was replaced by an attorney general appointed through regular legal mechanisms.

Mindful of the sensitivity of the position—and of the possibility for executive domination—the PLC took strong measures to ensure that it had a voice in the designation of the attorney general. It attempted to write a PLC vote both into the Basic Law and the Law on the

**Independence of the Judiciary.** It removed it from the second law under the threat of presidential veto. The provision was removed from the Basic Law without PLC action (through a highly dubious legal procedure that went uncontested). In the version of the Basic Law finally published, the president was to appoint the attorney general upon the nomination of the Judicial Council.

This article places the appointment of the attorney general solely in the hands of the executive branch. It is thus one of the few places where the draft constitution retreats from the Basic Law on matters of executive authority. The officials responsible for appointment—the minister of justice and the cabinet—are politically responsible to parliament for their actions in general, but do not need to seek parliamentary approval for this appointment. In addition, the Judicial Council has no role in the selection.

**Article (175)** The Office of the Attorney General shall undertake public cases in the name of the people in accordance with the provisions of the law.

**Article (176)** The judicial police shall fall under the judicial authority and be subject to its direct supervision.

**Article (177)** The Ministry of Justice shall be entrusted with the organization of offices related to the administration of judicial facilities, without infringing on the professional supervision of the Supreme Council for the Judiciary over the judiciary, including the Office of the Attorney General.

This article suggests a division of labor: physical facilities are the responsibility of the Ministry (and thus the executive); personnel fall under the Supreme Council for the Judiciary (and thus the judiciary). Responsibility for the regular budget for the courts is not specified in the constitution but apparently left to legislation.

## **The Constitutional Court**

*From Article 178 to 184*

**Article (178)** A Constitutional Court shall be established by virtue of the constitution to exercise its jurisdiction independently in order to defend the legality of the work of state institutions. It shall be composed of nine judges appointed by the head of state by nomination from the Council of Ministers and approved by the Representative Council. The Court shall set its internal regulation which will organize the procedures

of its work. The judges shall be appointed for one term of nine years that shall not be renewed or extended.

The name of this court in earlier drafts was the “Supreme Constitutional Court,” it may have lost the title of “supreme” in order to reduce confusion with the two other supreme courts—the Court of Cassation and the High Court.

Judicial review is surprisingly widespread in the Arab world, but only in a few cases has it emerged as significant in practice. Many constitutional courts and constitutional councils have had trouble establishing their independence from other branches of government (especially the executive). The Egyptian Supreme Constitutional Court has emerged as a notable exception, largely due to a significant degree of autonomy that the body has been given by law.

This draft would seem to allow for an autonomous court on a different basis: rather than making it autonomous of other branches, the court is formed with involvement of the executive and the legislative branches. In Egypt, judges serve until retirement; in the Palestinian case they are given extended terms that cannot be renewed (with renewable terms often seen as a device to encourage judges to curry favors with their appointers). The Court is allowed autonomy in its internal operations and procedures.

The resulting model resembles some European constitutional courts. However, the draft Palestinian constitution does not advocate two measures common in Europe to ensure that the constitutional court reflects a broad, multiparty consensus rather than a parliamentary majority: staggered terms and the requirement that parliament approve nominees by a supermajority. The first could be accomplished by law but the second may not be constitutional. The result may be an independent Constitutional Court but also one that largely reflects the views of the majority party.

**Article (179)** The judges of the Constitutional Court shall elect a president from among their number for a term of three years. The president and of the Court and the judges in the Constitutional Court shall swear the legal oath before discharging their duties before a meeting of the president of the state, the speaker of the Representative Council and the president of the Supreme Council for the Judiciary.

**Article (180)** A judge on the Constitutional Court shall not be permitted to assume any other public employment or conduct any commercial, political or partisan activities. If he belonged to a political party, he must resign before swearing the legal oath.

**This article attempts to strengthen the independence of the court but it does so in a way that might draw some of Palestine's best legal minds to under-employed positions. It is quite likely that the Constitutional Court will receive very sensitive cases from the beginning, but it is not likely that a large number of cases will be generated. Thus, holding a seat on the Court will be prestigious but not overly taxing.**

**Article (181)** Membership of a judge in the Constitutional Court shall terminate in one of the following cases:

- At the end of the judge's term stipulated in the Constitution.
- By voluntary resignation.
- By loss of one of the conditions of assuming duties.
- By judicial conviction of a felony

A successor shall be appointed within one month of the position becoming vacant.

**Article (182)** The Constitutional Court shall rule, pursuant to a request from the president of the state, the prime minister, the speaker of the Representative Council, ten members of the Representative Council, the Courts of Appeal, Cassation, or High Justice, or the Attorney General in the following questions:

- The constitutionality of laws before they are promulgated, if the request was brought before it within 30 days from the referral of the law to the president of the state to approve and promulgate it;
- Disputes related to the constitutionality of laws, regulations, ordinances, measures and decisions issued by the president or the council of ministers which have the force of law.
- Interpretation of constitutional texts in case of a dispute concerning the rights, duties, and competences of the three authorities, and in case of a dispute over jurisdiction between the president of the state and the prime minister;
- Problems connected with the constitutionality of the platforms and activities of political parties and associations, procedures to dissolve them or freeze their activities, and the extent of conformity of these measures with the constitution.
- The constitutionality of concluding international treaties, joining them, the procedures of implementing them, and deciding the nullification of the law or

some of its articles should they conflict with the constitution or an international treaty.

- Any other jurisdictions assigned to it by this Constitution.

There are three features of this article that merit special attention. First, a provision in an earlier draft to allow individuals to resort directly to the Court if their rights have been violated has been removed. The effectiveness of the Court to protect individuals thus depends on another court agreeing to refer a case to the Constitutional Court. While this is not unusual (direct access by individuals to constitutional courts is sometimes allowed but is more often limited), in some Arab countries constitutional courts have sometimes found other courts reluctant to refer cases.

Second, the Court is also assigned the task of resolving disputes between the president and the prime minister. Some confusion over their relationship is virtually certain given, though it is not inevitable that either would resort to the Court to resolve a dispute. However, placing the Court as the ultimate arbiter would probably diminish the possibility of disputes being solved by unilateral actions.

Third, the article anticipates problems with political parties and associations and assigns to the Court, rather than any organ of the executive, the authority to decide cases involving measures taken against them. Given the realities of Palestinian politics, this article may become relevant sooner rather than later.

**Article (183)** The Constitutional Court shall render void an unconstitutional law, regulation, ordinance or procedure, or end its effectiveness, in accordance with the conditions and terms that the law organizing its construction defines.

**Article (184)** The decisions of the Constitutional Court shall be final and may not be appealed in any manner. They are binding on all public authorities and natural and legal persons.

## Chapter Four: Concluding Provisions

*From Article 185 to Article 190*

**Article (185)** This constitution shall be called the “Constitution of the State of Palestine.” It is based on the will of the Palestinian people. The Palestine National Council of the Palestine Liberation Organization shall adopt this constitution before

the establishment of the independent Palestinian state with sovereignty. In the case that the Palestine National Council cannot meet, the Palestine Central Council shall adopt this constitution. After the establishment of the state, and immediately after the first general election, the elected Representative Council shall assume the authority of establishing this constitution in its current form as it is adopted by the Palestine National Council of the Palestine Liberation Organization or the Palestinian Central Council, according to circumstances, and that by agreement of two-thirds of all members of the Representative Council. And the Council shall decide, by a majority of all of its members, to present the constitution to a general popular referendum to approve it. If the majority of the participants in that referendum agree to the constitution, it is considered effective from the date of the announcement of the result of the referendum.

**One of the most difficult issues to resolve has been how to adopt the constitution. This article posits three stages. The first is the adoption of the current text (by the relevant PLO body). Implicit (but not explicit) is that such adoption places the constitution in provisional effect upon declaration of statehood in order to allow for elections. The second stage is its approval by the newly-established Representative Council. The third stage is popular referendum, after which the constitution is in effect.**

**There are three glaring omissions from this article. First, it is not clear if any amendments can be made in the draft, and if so, how and by whom. This question is especially relevant for the Representative Council. The second omission is a provision for possible rejection at any of these stages. The third (and related) omission is of any body (such as a constituent assembly) to review the draft.**

**This procedure is likely to prove controversial among Palestinians, some of whom may see it as an attempt to rush through the current draft.**

**In one sense, such criticisms would be fair: while the present committee has produced a very carefully designed draft constitution that corrects many of the flaws that emerged in the PNA, its work has largely been confined to the circles of specialists. The procedures in this article present various bodies with the opportunity to accept or reject the work but not amend it.**

**In another sense, such criticism, even though valid, should not lead to exclusive concentration on the procedures for adoption at the expense of debating the draft itself. The Basic Law gained some legitimacy not simply because of its content but because of the very public nature of the drafting process. In other words, it may make sense to read, comment on, and suggest changes in the current draft now. While there are no explicit**

provisions for modifying the draft, standing aloof from the process will likely lead to the entrenchment of current language.

Further, in drafting constitutions, the best can be the enemy of the good. It has not been possible under prevailing conditions to draft the constitution in a more systematic fashion. But abandoning the project for that reason risks rendering permanent current (rather confused) constitutional arrangements.

The reference in the third sentence to “the independent Palestinian state with sovereignty” is presumably to distinguish the anticipated statehood from the Palestinian states declared in 1948 in Gaza and 1988 in Algiers.

**Article (186)** The president of the state, the prime minister, or one-third of the members of the Representative Council may request the procedure for amending the constitution, by addition, deletion, or amendment of one or more articles. In all cases, the principle of conducting the amendment must be passed by the agreement of a majority of two-thirds of all members of the Representative Council. If the request is rejected, it is not permitted to request the amendment of the constitution before one year has passed since this rejection. The Representative Council shall discuss within sixty days after agreeing on the request of the amendment, the clause or clauses that it is desired be changed. If two-thirds of all members agree then the amendment is considered accepted. The Representative Council may also, by a majority of all its members, decide to present the amendment to general popular referendum to approve it. If a majority of the participants in the referendum agree with the amendment, it is considered effective from the date of the announcement of the result of the referendum.

**Article (187)** Insofar as they do not conflict with the provisions of this constitution, the laws, regulations, decisions, agreements, and treaties effective before the beginning of this constitution remain in effect until they are changed or amended in accordance with the law.

**Implicitly, this marks a link between the PNA and the State of Palestine. However, the article does not provide any guidance for deciding what is actually in effect. In addition to the law produced by the PNA, there is also a body of PLO law and a large number of Israeli military orders that have sometimes remained in effect under the PNA.**

**Article (188)** The legislative authority shall undertake the preparation and approval of the necessary draft laws to establish the legal and administrative structure to implement the provisions of this constitution and its requirements and to establish institutions which are stipulated, within a period at most six months from the date of the issuing of the constitution.



This six-month deadline is very ambitious, even though much of the necessary legislative work has been accomplished under the PNA. It is probably inspired with the extreme tardiness of other Arab states (and arguable under the Basic Law) to develop the laws necessary to give constitutional provisions meaning.

The reference to the legislative authority rather than specifying the Representative Council is probably vestigial language from previous drafts in which the current Advisory Council was a full house of parliament.

**Article (189)** Official institutions shall continue to exercise their competencies according to constitutional and legal rules that regulate them until the time that the legislation required by the Constitution is promulgated.

**Article (190)** The Basic Law, promulgated on May 29, 2002, and anything contrary to the provisions of this constitution are abolished.

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