

# Where Reform and Peace Collide:

## Assessing the Palestinian Basic Law and Draft Constitution

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### Brief Analysis

With this week's dispatch to the Middle East of Director of Central Intelligence George Tenet and Assistant Secretary of State for Near Eastern Affairs William Burns, the Bush administration has put its toe into the water of Palestinian reform. Success in this vital effort will require avoiding the trap of sham reform (such as a disproportionate focus on elections that might only confirm the worst excesses of Palestinian misrule) or effectively endorsing any particular Palestinian leader or would-be leader (thereby repeating the mistakes of the last decade). Instead, Washington should focus on the larger objectives at hand. At the core, there are two: 1) fostering the development of Palestinian national institutions based on democracy, transparency, accountability, fiscal propriety, and the rule of law; and 2) advancing the prospect for lasting peace and security between Israel and the Palestinian Authority ([PA] and its eventual successor, the State of Palestine).

These two objectives may be complementary, though not necessarily so; in fact, in certain circumstances, they may be contradictory. Indeed, in approaching the Palestinian reform process, U.S. officials should not only highlight the importance of structural change but also keep in mind the pitfalls of promoting (or acquiescing in) certain kinds of "reform" that may inhibit, handicap, or prevent real peacemaking from taking hold. A review of two key documents—the Basic Law governing the PA until the conclusion of the current "transitional period" and the PLO-endorsed draft constitution for the future State of Palestine—reveals several areas where U.S. officials need to take particular notice as they discuss various reform ideas with Palestinian leaders.

### Basic Law

This week—five years after it received formal approval by the Palestinian Legislative Council and after years of intermittent pressure from foreign donors and international aid agencies (though with little prodding from Washington)—Yasir Arafat signed the Basic Law. In doing so, he finally acceded to a law designed to serve as the "constitutional" framework governing the PA during the transitional stage that, according to the 1995 Oslo II accords, was envisioned to terminate with an eventual Israeli-Palestinian accord on "permanent status."

Overall, the Basic Law, as with the draft constitution discussed below, provides for a bold experiment in Arab democracy: extensive individual rights and liberties with guarantees of protection under the law; strict procedures

for the control of public funds, in terms of both revenue and expenditures; and clearly defined checks and balances among the executive, legislative, and judicial branches of government. If this law were implemented according to the word and spirit in which it was written, the Palestinian Authority would almost surely become the freest of Arab lands.

U.S. officials, however, should be concerned about several features of the Basic Law that are likely to pose impediments to the pursuit of Palestinian-Israeli peace. They include the following:

The definition of Palestinian security forces as "a regular armed force created for the protection of the homeland" (Basic Law, Article 75). This characterization, which suggests the creation of a standing army based on regular military formation and armaments, contradicts the wording of the Oslo II agreement, which is supposed to govern the period during which the Basic Law is applicable. Oslo II defines Palestinian security forces as "a strong police force" established solely "for the purpose of safeguarding [Palestinian] internal security and public order" (Oslo II, Article 12).

The prohibition which states that "no Palestinian may be deported . . . or surrendered to any foreign authority" (Basic Law, Article 28). If in place a month ago, this principle would have prevented the peaceful resolution of the Bethlehem siege. Moreover, it directly contradicts Oslo II, which provided for the possibility (never implemented) of the transfer of criminal or terrorist suspects to Israel.

Preambular language stipulating that the "status of this law and its ratification by the PLO [Palestine Liberation Organization] comes from the fact that the PLO is the sole legitimate representative of the Arab Palestinian people." Although perhaps just a sop to the Old Guard, these words have real political meaning. The United States has no interest in acceding to the creation of dual governing institutions—one PLO; one PA overseeing Palestinian political life. On the contrary, the faster that power shifts from the refugee-centric PLO to the West Bank/Gaza-focused PA, the more likely that historic compromise will be possible with Israel; indeed, lasting peace can probably never be achieved between Israel and the PLO, but between Israel and the PA it is both conceivable and doable.

#### Draft Constitution

In November 1999, at a time when there was a swirl of talk about unilateral declaration of statehood and the possibility of final-status negotiations with Israel, Arafat established the Palestinian Constitution Committee under the chairmanship of Minister of Planning and International Cooperation Nabil Sha'ath. With the support of the Konrad Adenauer Foundation of Germany, this committee of governmental and academic experts was charged with preparing the juridical framework for an independent Palestinian state and eventually produced a 220-article draft document. According to the Palestinian Center for Policy and Survey Research, the committee's mandate and efforts were endorsed by the PLO Central Council. Despite the recent approval of the Basic Law, the Sha'ath document remains the presumptive constitution of a future Palestine.

Like the Basic Law, the draft constitution offers the prospect of a quantum-leap forward in terms of protection of individual liberties, accountable government, and limitations on the powers of an abusive state. In an important improvement on the Basic Law, the draft constitution makes no mention of the PLO and states that the president may not hold any other position (Draft Constitution, Article 119), implicitly prohibiting the current setup whereby Arafat simultaneously holds the leadership of the PA, PLO, and Fatah. If implemented fully, Palestinians living under this constitution would undoubtedly find themselves in a better legal situation than Arabs in any neighboring state (perhaps even including Israel).

However, in terms of at least one key civil liberties issue—the relationship between religion and state—the constitution does take a step backward from the Basic Law. For example, not only is Islam deemed the official religion of the state (as is the case in the Basic Law), but "principles of Islamic Sharia [Islamic law] are a primary

source for legislation" (Draft Constitution, Article 7). Elsewhere, the draft paints the issue of women's rights in a distinctly Islamist hue: women, it states, "have rights and duties as guaranteed by Sharia and established in law" (Draft Constitution, Article 63). This creeping Islamization should be a special cause of concern to U.S. officials both in terms of civil liberties in a future Palestine as well as in terms of its impact on larger political and strategic issues.

### The Constitution and the Peace Process

As with the Basic Law, several aspects of the draft constitution deserve the attention of U.S. officials because of their impact on the prospects for peace. Focusing on this document now is especially important given the fluidity of the wider political environment. With senior officials apparently considering ideas for the speedy establishment of an independent Palestinian state in advance of completing a Palestinian-Israeli "permanent status agreement," which is the thrust of the reported Peres-Abu Ala plan, the prospect of this draft constitution coming into effect and having salience to Arab-Israeli peacemaking is real and significant. Although it may be too late to seek alterations in the Basic Law, it is not too late to prevent nettlesome draft language from becoming the "law of the land" in Palestine. Problematic aspects of the draft constitution include the following:

A declarative statement that "Palestine is an independent state with complete sovereignty that cannot be conceded" (Draft Constitution, Article 4). This article is bound to complicate negotiations that can only succeed on the basis of limiting some aspects of Palestinian sovereignty—from restricting the acquisition and development of certain armaments, to preserving access to Palestinian territory for Israeli forces in times of emergency.

The definition of Palestinian citizenship as "permanent for any Arab who lived in Palestine before May 1948. It is transmitted from father to child. It endures and is not cancelled by the passage of time" (Draft Constitution, Article 25). In other words, all Israeli Arabs as well as the majority of Jordanians are, by dint of this text, considered to be citizens of the State of Palestine, regardless of whether they move to Palestine or take steps to claim that citizenship. This would have far-reaching implications for all three parties: Israel, Jordan, and Palestine.

Commitment to the inviolability of the "right of return." As stated in Article 32 of the draft, "the right of the Palestinian refugee to return to his home and the original home of his ancestors is a natural right which cannot expire. Its exercise may not be delegated nor surrendered." In whole and in part, this article seems drafted specifically to prevent the adoption of any sophisticated, nuanced formula that would prevent Palestinians from exercising the "right of return" to the very towns, villages, houses, and plots of land that they may claim as their rightful inheritance. Adherence to these principles would be, in other words, a clear deal-breaker for any peace agreement.

Creation of a bicameral legislature in which the 150 members of one house (the Legislative Council) would represent "the Palestinian people living in the State of Palestine" while the 150 members of the other house (the National Council) would represent "Palestinian refugees abroad." According to the draft text (Article 70), the Legislative Council "alone shall be entrusted with the legislative and oversight role in the state" but, it says, the National Council exists to "protect the guarantee of justice in representation and share with the Legislative Council in legislating laws connected with general national rights." Whereas the Legislative Council members would be chosen through general elections, the members of the National Council "shall be chosen according to the election system of the National Council until it is amended," i.e., in practice, by appointment of the rais. If implemented, this setup will institutionalize the most atavistic instincts in Palestinian political life, the PLO-as-refugee-lobby mindset that prevents any workable compromise with Israel and ensures the survival of old-style, Arafatist management of Palestinian institutions. As such, it will constitute the poison pill for both Palestinian democracy and the prospects for real peace.

### Conclusion

In helping to define parameters of Palestinian reform, Messrs. Tenet and Burns have a long and arduous agenda before them. Given the urgency of the situation and the sense of fleeting opportunity, it is only natural for them and for other interested international parties to focus on immediate changes—the formation of a new cabinet, the consolidation of security agencies, and the fight against corruption. But a focus on these much-needed improvements should go hand-in-hand with efforts to ensure that the reform process advances the prospects for peace. Reform and peace are not antithetical, but unless the administration fights for the right kind of reform and against "reforms" that would impede peace, the outcome will be a third intifada between Israel and a leaner, more efficient Palestine.

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