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A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority

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INTRODUCTION

Under funding from the European Commission, MUSAWA has undertaken a study on the need for a Constitutional Court to be established in Palestine under the Palestinian Basic Law and the Law on the Supreme Constitutional Court 2006 (LSCC)¹. The International Bar Association, through its Human Rights Institute (IBAHRI), is an associate in this project.

In 2009 Musawa organised a series of workshops in West Bank and Gaza organised to gain an understanding of local opinion on LSCC. The organisation then convened a roundtable discussion in Cairo on 11 and 12 May 2009, bringing together experts from Palestine, the region and internationally, to discuss the findings of the first stage of the project and to consider how and to what extent the LSCC might be amended in the light of experience in other jurisdictions. The IBAHRI participated, inviting three constitutional experts from key jurisdictions (Canada, France and South Africa) to share their thoughts on the draft review.

Following this roundtable discussion, the IBAHRI compiled reports from a team of constitutional experts from around the world to analyse and comment upon both the LSCC itself and the viability of implementing the LSCC and establishing a Constitutional Court in the Palestinian territories at the present time. Those experts are:

- Eva Maria Belser, Professor of Constitutional and Administrative Law, University of Fribourg, Director of the International Research and Consulting Centre, Institute of Federalism; and
Peter Hänni, Professor of Constitutional and Administrative Law, University of Fribourg, Director of the Institute of Federalism (Switzerland)
- Hugh Corder, Professor of Public Law, University of Cape Town (South Africa)
- Françoise Dreyfus, Professor of Constitutional Law, University Paris I Panthéon-Sorbonne (France)
- Musawa, in particular Anis Kassim Mustafa (Palestine)
- Robert J. Sharpe, Justice of the Court of Appeal, Ontario (Canada)
- Guillaume Tusseau, Professor of Public Law, Head of the Doctoral School, University of Rouen (France)
- The European Commission for Democracy Through Law (Venice Commission) – based on comments by Anthony Bradley (United Kingdom), Yehia El Gamal (Egypt), Peter Paczolay (Hungary), and Cesare Pinelli (Italy)

This report is based on the comparative studies by these experts. The analysis which follow specifically relate to the Articles in the LSCC, as indicated.

1.1 Constitutional Basis²

¹ Law on the Supreme Constitutional Court No. (3) of 2006. Official Gazette, number 62, 25 Mar 2006, at 93 [*hereinafter* LSCC].

² For more detailed information on the constitutional foundations of Palestine and the legal efforts leading to the enactment of the LSCC, see Yaser Amoury, 'The Palestinian Constitutional Court: Between Need and Difficulties,' *available at* <http://www.musawa.ps/etemplate.php?id=149>.

The Palestinian National Authority ('PNA') is governed by the Basic Law of 2002, as amended in 2003.³ The Basic Law regulates basic rights and freedoms, outlines the organisation of the executive, legislative and judicial authorities, and governs their inter-relations.

Article 94 of the Basic Law (2002) called for the creation of an independent Supreme Constitutional Court (the 'Court') to adjudicate disputes related to the Constitution (Basic Law).⁴ The Law on the Judicial Authority No. (1), also enacted in 2002, confirmed the Palestinian desire for the formation of a Constitutional Court by asserting that the Palestinian judiciary shall consist of 'first: *Shari'a* and Religious Courts..., second: a High Constitutional Court..., third: Regular Courts...'⁵

The LSCC, ultimately drafted and approved in 2006, governs in detail the Court's composition, jurisdiction, procedures, and financial and administrative matters. Although the LSCC was promulgated in 2006, it has not yet been implemented and the Court has never been established. In its absence, the Court's duties have been temporarily assumed by the High Court,⁶ according to the transitional provision (Article 104) of the Amended Basic Law.⁷

In light of the unstable Palestinian situation, there remains great ambiguity regarding the nature, jurisdiction, mandate and independence of the Court as written in the LSCC. Under the current environment in Palestine, 'some Palestinian factions do not even recognise the legitimacy of the Law of the Constitutional Court, which raises many questions about the future of this Court that has not even formed yet.'⁸

³ Basic Law of the Palestinian National Authority (2002), 29 May 2002 [*hereinafter* Basic Law], amended as Amended Basic Law of the Palestinian National Authority (2003), 18 March 2003 [*hereinafter* Amended Basic Law].

⁴ Reiterated in the Amended Basic Law (2003), arts. 103 & 104. The Basic Law, Amended Basic Law, and Law on the Judicial Authority No. (1) refer to the Constitutional Court as the 'High Constitutional Court.' However, for the purposes of this report, we will refer to it as the 'Supreme Constitutional Court' in keeping with the title of the LSCC itself. Revisions to amend the inconsistency in the laws should be considered.

⁵ Law on the Judicial Authority No. (1) (2002), 14 May 2002, art. 6. Official Gazette, number 40, 18 May 2002, at 9 [*hereinafter* Law on the Judicial Authority].

⁶ The High Court consists of the Court of Cassation and the High Court of Justice. Law on the Judicial Authority (2002), art. 6.

⁷ Basic Law (2002), art. 95.

⁸ Amoury, *supra* note 2, at sec. 1.

2 ANALYSIS OF THE LAW

2.1 General Comments

The Constitutional Court will decide a wide-range of issues, including very sensitive ones. Experts thus universally agree that its composition, jurisdiction and procedures must be established in a way that effects the trust of society in the Court as a neutral arbiter.

Experts' reports highlight the importance of several guiding principles that the LSCC and the Court must strive to uphold, including:

- the LSCC must defend and respect the rule of law – the Palestinian judiciary (and the PNA itself) cannot claim legitimacy without proof of a commitment to establishing a legal system and state that is based on the respect of the Basic Law;
- the Court must be strong and independent;
- the Court must make decisions with a high degree of legitimacy and transparency;
- the Court must work to safeguard and protect commonly shared values, especially human rights; and,
- the LSCC must ensure that the Palestinian judiciary maintains a coherent jurisprudence.

2.2 Conformity of the Basic Law and the LSCC

In order to ensure clarity, legitimacy, appropriate separation of powers and the independence of judges, and to entrench the system and Court into Palestinian national norms, experts agree it is imperative that the Basic Law (specifically Articles 37, 103 and 104) and the LSCC conform.

Experts, however, do not appear to have a clear consensus regarding into which statute the provisions about the Court should be written. One expert suggests the provisions on jurisdiction, the independence of judges, and main characteristics of proceedings should be entrenched in the Basic Law itself. He recommends either including a new title specifically devoted to the Court or amending Title XI on judicial authority.

Where clauses overlap experts overwhelmingly call for identical language to be used in both statutes.

Specifically regarding the independence of judges, two experts strongly recommended that provisions in the Basic Law on judicial independency should apply equally to lower courts and to the Supreme Constitutional Court.⁹

⁹ One must additionally ensure the Basic Law and LSCC also conform to the Law on the Judicial Authority with regard to judicial independence. There is no provision in the LSCC as written declaring the independence of judges, except as briefly

2.3 Formation of the Court

Experts agree that the Court must be selected based on transparent and legitimate standards for qualification for membership, a balance of state powers, and respect for the independence of the Court and its members.

2.3.1 Composition of the Court

Article 2: The Court shall be comprised of a President and a deputy for him and seven judges. The Court shall convene before a panel of a president and six judges at least and shall issue its decisions with a majority vote.

Experts generally agree that a Court consisting of nine members, with a quorum of six, is a reasonable composition.

2.3.2 Qualifications for Judges

Article 4: Any person to be appointed as a member in the Court shall be required to meet the general conditions necessary to assume the judiciary in pursuance of the provisions of the Law of the Judicial Authority, provided that he is not less than 40 years of age and to be from among the following categories:

- 1. Present or former members of the Supreme Court who have spent in their functions at least five consecutive years.*
- 2. Present Presidents of the Courts of Appeals who have spent in their functions seven consecutive years.*
- 3. Present or former professors of law at the Palestinian universities or acknowledged universities in Palestine who have spent in the function of a professor at least five consecutive years, or an associate professor who has spent at least ten consecutive years.*
- 4. Lawyers who have practiced the legal profession for at least fifteen consecutive years.*

Some experts find the provisions in Article 4 on qualifications for judges satisfactory, while others express concern that the criteria appeared arbitrary or too limiting.

Some welcomed the enumerated standards and argue that the age limit and set number of years of necessary experience will help to produce a more competent and reliable Court. To further enhance the likely competence of the Court, however, a review of the need to include associate law professors in the list of potential candidates has been suggested.

In contrast, other experts believe the age and time limits appear indiscriminately restrictive as written. Especially for a new court in a relatively immature legal system already plagued by a scarcity of skilled legal professionals, experts fear that overly restrictive qualifications for appointment might exclude talented and capable candidates who lack experience in formal positions but who have the requisite expertise. In South Africa, for example, the 40-year age limit would have been particularly problematic, for ‘one of the most outstanding of the first group to grace South Africa’s Constitutional Court’ was a 37 year old Professor of Law when appointed, Justice Kate O’Regan. She was, admittedly, an exceptional appointment, but the question remains: why limit the

mentioned in Article 12 of the LSCC (asserting the members of the court are subject to the provisions of the Law on the Judicial Authority).

pool of potential appointees for the Palestinian Court, especially when that pool is likely to be quite small?

Some experts also worried that the qualifications for appointment of judges in Article 4 appear to be not only too narrow but also somewhat arbitrary and unclear. Why, for example, should a talented lawyer not having practiced for fifteen years be unable to be considered for the Court?

In addition, Article 4 does not specify that the candidate lawyer, judge or professor must have practiced in Palestine or may have practiced in other legal systems. Nor does it outline exactly which are the suitable 'Palestinian universities or acknowledged universities in Palestine' from which the professors may be selected. To increase legitimacy and transparency in the process of selecting members of the Court, experts suggest rethinking and clarifying these points.

Despite the specificity of the Article 4 provisions as written, which many experts found restrictive, civil law experts suggest that additional qualifications might be required to inspire support for the Court from the Palestinian Legislative Council and the greater Palestinian population. There is currently no LSCC provision or cultural convention encouraging proportional representation of parties in the Court, as exists, for example, in the membership of the Swiss Supreme Court as an unwritten constitutional custom. The strictly legal criteria for judges in Article 4 might be supplemented with additional provisions detailing political criteria – as is the case in Belgium, for example, which admits that former members of the Senate, the House of Representatives and local parliaments are eligible for appointment to the Constitutional Court¹⁰ – to increase the likelihood of acceptance of the Court and its members by politicians and the politically diverse Palestinian population.

Finally, although Article 4 states that a candidate for appointment must satisfy the general conditions necessary for elevation to the judiciary under Title Three of the Law on the Judicial Authority, including the requirement that the candidate 'must possess Palestinian nationality and enjoy full legal capacity',¹¹ many experts would encourage the possibility of including foreign judges on the Court.¹² Those in favour of allowing the election of foreigners argue that their inclusion would enlarge the choice for membership and strengthen the independence of the court. It was noted that other nations with a scarcity of judges and a lack of human resources in general, such as Liechtenstein, have adopted similar constitutional provisions for just these reasons, which could serve as a model for Palestine. Those experts who opposed appointing foreigners to the Court, however, recommend maintaining the nationality requirement to protect the Court's legitimacy. They maintained that, in light of the considerable political authority granted to a Constitutional Court, it is undesirable to contemplate non-Palestinians serving on the Court.

¹⁰ Belgium, Special Law on the Court of Arbitration (2003), art. 34 § 1er, 2. See <http://www.const-court.be/>.

¹¹ Law on the Judicial Authority, art. 16.1.

¹² Several experts also expressed a desire to clarify or highlight the nationality requirement included in the Law on the Judicial Authority in the Law on the Supreme Constitutional Court itself.

2.3.3 Authority to Appoint Members of the Court

Article 5:

- 1. The first formation of the Court shall be conducted by the appointment of the President of the Court and its judges by a decision from the President of the Palestinian National Authority, in consultation with the High Judicial Council and the Minister of Justice.*
- 2. The President and judges of the Court shall be appointed by a decision from the President of the Palestinian National Authority based upon a recommendation from the General Assembly of the Supreme Constitutional Court.*

All experts believe Article 5 requires greater scrutiny and revision. They found the provision problematic for three reasons: (i) the disparity between the first and later appointments to the Court; (ii) the inequitable balance of powers in deciding appointments, including the overwhelming power granted to the executive for first appointments and the subsequent role of the Court in appointing its own members; and, (iii) the lack of transparency in the appointment process.

2.3.3.1 First Appointment

Experts recognise that the first appointment is particularly important to ensure a continuing, balanced, independent and legitimate court. However, the disparity between the appointment procedures for the first Court versus that of successive appointments is troubling. They recommend reconsideration and/or clarification of the provision.

2.3.3.2 Balance of State Powers in Appointment

Experts agree that an appointment process driven by a single power threatens the independence and legitimacy of the Court and its judges and the balance of state powers. Ensuring involvement of all three branches – executive, legislative, and judicial – in the selection process would enhance the legitimacy of the Court and may be the best way to maintain its independence. However, the appointment provision as drafted excludes the Palestinian Legislative Council from the procedure of appointment and, in practice, places the ultimate power of appointment in the sole hands of the President of the Palestinian National Authority.

All experts consider the elimination of the legislature from the selection process to be inappropriate. Although it is not uncommon to find judicial appointments designated by the executive in countries with a common law background (e.g. Cyprus), experts overwhelmingly agree that the current state of Palestine demands a more balanced process that includes the legislature. The involvement of the Legislative Council in the appointment process will help ensure a balanced composition of the Court that, to the extent possible, reflects the various tendencies of society and will thereby enhance the popular legitimacy of the Court.

Moreover, several experts object to assigning the High Judicial Council and the Minister of Justice as the two consulting powers in the appointment process. Because the President of the PNA is the head of the executive branch and the Minister of Justice is part of the executive branch, consultation with the Minister of Justice is not an appropriate check on the process of appointment. Some experts believe that the High Judicial Council, as it exists today, should not take part in the appointment process since it is too closely linked to a court that will be supervised by the Constitutional Court.

One expert also found the use of the phrase ‘in consultation with’ confusing and problematic. In South African jurisprudence, for example, the meaning of the phrase is significant and means ‘with the agreement of.’ In other words, in the case of Palestine, the three parties would have to reach common ground on these appointments; however, by implication of the LSCC as currently written, the legislature is not involved and would not be party to the agreement between the judicial and executive branches (via the High Judicial Council and the Minister of Justice). Is this appropriate when the popular legitimacy of the Court will be of such paramount importance?

Finally, experts find Article 5.2 ‘undesirable’ because it appears to contemplate a Court that could have virtual control over all subsequent appointments. Although two experts agreed that judicial appointments should be de-politicised and that it may be helpful to consult judges when appointments are being made, both fear that giving the Court near complete control over the selection of new members creates the risk of establishing a self-perpetuating and exclusive elite on the Court that would lack public credibility and confidence. In order to establish legitimacy and accountability some mechanism which involves at least consultation with the legislature and executive ought to be devised.

2.3.3.3 Transparency

As written, the consultation between the President, High Judicial Council and Minister of Justice and its outcome need not be made public. Although experts welcome the idea of requiring consultation before appointment, they overwhelmingly find inappropriate the severe lack of transparency in the consultation as drafted in the LSCC and recommend that it be reconsidered.

2.3.4 Termination of Membership

Article 14:

1. *The service of the member shall terminate by default in case he completes seventy years of age.*
2. *The pension or remuneration of the member shall be settled in pursuance of the provisions of the Law of the Public Retirement.*

Article 16:

1. *In the event a matter is imputed to a member of the Court that may infringe confidence or eligibility or violate intentionally or gravely the obligations and requirements of his function, the President of the Court shall present the matter to the provisional committee in the Court.*
2. *In case the committee decides following the summoning of the member to hear his statements decides that there is venue to initiate the proceedings, the President of the Court shall form a committee of three members from the General Assembly to interrogate him. The member who is referred to interrogation shall be deemed to be at a compulsory leave with a full salary from the date of such decision.*
3. *Upon completion, the interrogation shall be presented to the General Assembly which is convened in the form of a disciplinary court (with the exception of its members who have taken part in the interrogation or impeachment) to issue, following the hearing of the defence of the member and the implementation by his defence, its judgment by the absolute majority on the innocence or of his being retired on pension from the date of the*

issuance of the judgment without violation of any other penalty provided for in the Law. The judgment shall be final and not subject to objection in any means.

Article 21:

1. *The service of the member of the Court shall terminate in any of the following cases:*
 - A. *His reaching seventy years of age.*
 - B. *Resignation.*
 - C. *Incapacitation.*
 - D. *Disability, for any reason whatsoever, to perform his function.*
 - E. *Death.*
 - F. *Retirement on pension.*
 - G. *Loss of nationality.*
2. *The decision regarding the termination of service shall be issued by the President of the National Authority base upon a request by the General Assembly of the Court.*

According to these provisions of the LSCC, no specific term of appointment exists for judges – only an age limit of seventy. Although some experts believed the age limit appears unsuitable or random, the seventy-year age limit actually conforms to the seventy-year age limit required by Article 34.1 of the Law on the Judicial Authority (2002). The seventy-year age limit is also specified in Article 14.1 of the LSCC. The text of Article 14 is taken exactly from Article 34 of the Law on the Judicial Authority (2002).

To many experts, some grounds for termination in Article 21 appear unnecessary or overly broad and easily subject to misuse. Under Article 10.2 of the LSCC, a majority five of the nine judges is sufficient for the General Assembly of the Court to ask the President of the PNA to terminate the service of a judge. As the rationale necessary to request termination of service may be very vague under the law, experts generally worry that the process as written is too easily open to abuse and corruption. Especially problematic in this sense is provision 21.1(D) regarding disabilities because the phrase ‘for any reason whatsoever’ does not exclude simply political reasons.

Moreover, many experts are troubled by the fact that the process for deciding on a judge’s incapacity or disability differs within the law itself. On the one hand, Article 21.2 requires a decision by the President of the National Assembly based on a request from the General Assembly of the Court. On the other hand, Article 16 requires the matter to be presented to the provisional committee of the court for cases of misconduct. They recommend a revision of the law to include only one process for dealing with all cases of discipline or removal, in a manner that respects the principle of judicial independence and satisfies the need for public credibility and confidence.

One expert additionally finds Article 21.1 problematic as written, for three reasons: (i) it is difficult to distinguish between 21.1(C) (incapacity) and (D) (disability); (ii) 21.1(E) (death) seems superfluous; and (iii) 21.1(G) (loss of nationality) assumes a nationality test that is not present in this law. Although a provision on nationality does exist in Article 16.1 of the Law on the Judicial Authority (2002) (‘A member assigned to the judiciary shall...possess Palestinian nationality and enjoy full legal capacity’), adding a reference to it in the LSCC to help avoid confusion.

Finally, one expert raised the possibility of judges serving a fixed term on the Palestinian Court – of say 12 or 15 years – as is the case in many European systems and

in South Africa. When one considers the immense power which is in fact wielded by a Constitutional Court, it is unusual to allow someone appointed at the age of 45 years, for example, to serve in such capacity for 25 years. Consideration should be given to adding some fixed term provision to the LSCC – one that is not too short (i.e. not less than about 10 years), as this could lead to instability and insecurity of tenure, but is limited enough to avoid ossification of ideas and approaches of the judges.

As a drafting point, several experts suggest removing the overlap in Articles 14 and 21 and placing all clauses regarding termination of judicial service in a single provision to avoid confusion and repetition.

2.3.4.1 Deemed Resignation

Article 23:

- 1. The member of the Court may not be absent or discontinue his work without an excuse and notification of the President of the Court.*
- 2. The member shall be deemed to be resigning in case he discontinues his work for a period of fifteen consecutive days without an excuse to be admissible by the President of the Court even if such [discontinuation] takes place following the lapse of the period of his leave or secondment.*
- 3. The resignation of the member shall be deemed to be accepted by two weeks following the date of its submission to the President of the Court. A decision of its acceptance is to be issued by the President of the Palestinian National Authority as of the date of its submission.*

Experts overwhelmingly found the deemed resignation provision inappropriate and worrying. Most of the experts contend that the provision as written is unacceptable because it includes no sufficient safeguards against illicit use of this mode of judicial termination in doubtful or marginal cases, which could threaten the legitimacy of the Court, spoil public confidence, and endanger the independence of the Court and its judges in the exercise of their duties.

It could even be regarded as patronising. The provision could be used inappropriately to exploit or dismiss an unwanted member of the Court. As written, there is no independent investigation, no disciplinary board review and no right or ability to appeal the deemed resignation. There is no check on the President's ability to accept or refuse a fellow judge's excuse for missing more than fifteen consecutive days, which could lead to dangerous abuses of power. Essentially, through this Article, the Court and the President have near control over the discipline and removal of judges. If implemented as written, such a system would risk the development of a self-perpetuating politicisation of the bench.

One expert additionally commented that Article 23 reflects an attempt to 'micromanage' the daily work of the judges, threatening the independence and legitimacy of the court. That role should rather be left to the President of the Court, as would be the case for similar courts.

As a remedy, it was suggested that a provision allowing an appeal to the Plenary of the Court be inserted. Alternatively, a provision calling for 'the impartial and independent adjudication of complaints against judges of the Court by a body that is

representative of the judiciary, the public, and the legal profession' could be added. Some experts would rather see the provision stricken entirely.

2.3.5 Provisional Committee of the Court

Article 11:

1. *By a decision issued by the General Assembly with the absolute majority, a provisional committee shall be established under the presidency of the President of the Court and membership of two or more members. It shall assume the powers of the General Assembly in the urgent matters during the judicial vacation at the Court as well as the other functions assigned to it by the General Assembly.*
2. *The decisions issued by the provisional committee during the judicial vacation must be presented to the General Assembly in its first meeting; otherwise, the legal effect which they bear shall vanish. In the event such decisions are presented to the General Assembly but it does not approve them by the absolute majority, their legal effect shall vanish.*

Article 16:

(see *supra* sec. 2.3.4)

Article 18:

The provisional committee in the Court shall be competent to examine the detention of the member of the Court and renew his detention, unless the case is being heard before the Penal Courts that have jurisdiction to hear the action. Hereby, it shall be competent thereto.

While the experts concede that these provisions establishing a Provisional Committee of the Court for emergency situations are *a priori* understandable given the peculiar situation of the Palestinian National authority, especially the fragmentation of the country and the isolation of the Gaza strip, some nevertheless find the broad-ranging powers granted to the Provisional Committee to be a concern. This is especially so when, in addition, the selection process for the 'two or more other members' is unclear; the transfer of the authority of a Court of nine judges to a panel of three judges remains questionable, and the law as drafted suggests the Provisional Committee's permanent existence.

Many experts expressed fear that this select group might become a standing committee on the Court that could in practice exclude a number of judges from decision-making in critical matters. It was recommended that the rules of procedure for the Court be amended to make clear that the emergency-constituted Provisional Committee cannot be used to discard judges from the Court's normal decision-making processes.

Most troubling to experts, however, is the power granted to the Provisional Committee to direct and examine disciplinary measures against judges.¹³ It was suggested that this role is inappropriate in the hands of members of the court – disciplinary measures against judges should not be taken by the Provisional Committee but by a wider body and, specifically, the dismissal of a judge should always involve review by the High Council of the Judiciary.

¹³ See also *supra* secs. 2.3.4 & 2.3.4.1.

2.4 Rights and Duties of Members

2.4.1 In General

Article 12:

The members of the Court (in conformity to the entity and independence of this Court) shall be subject to the provisions related to the recusal of the judges, their non-deposability, obligations, resignations, leaves and secondment which are provided for in the Law of the Judicial Authority.

Article 13:

The President and members of the Court shall earn salaries and increments and allowances defined for the President and members of the Supreme Court in accordance with the Law of the Judicial Authority.

The experts generally find these provisions satisfactory. It was noted, however, that many European countries include special provisions for members of a Constitutional Court (e.g. in respect of term office, re-appointment, etc.) that do not apply to the rest of the judiciary. This is something to consider if the law is reconsidered or redrafted.

One expert wondered whether Articles 12 and 13 are necessary. To avoid repetition and confusion across statutes, it was suggested that it may be sufficient simply to state somewhere in the LSCC that, except where otherwise provided, the same terms and conditions as provided in the Law on the Judicial Authority will apply to the Court.

2.4.2 Immunities and Oversight for Members of the Court

Article 16:

(see *supra* sec. 2.3.4)

Article 17:

- 1. In cases other than being caught in the very act of a crime [flagrante delicto], the member of the Court may not be apprehended or detained nor any penal measures be taken against him except following a permission from the President of the Court.*
- 2. In the event of being caught in the very act of an offence, the Attorney General, upon the apprehension of the member of the Court, must report the matter to the President of Court within the twenty four hours following his being apprehended. The provisional committee in the Court must decide, following the hearing of the statements of the member, either to release him with or without a bail or to continue to detain him for the period of time which it decides and it shall be entitled to extend such period.*
- 3. The member of the Court shall be detained and the penalty confining freedom shall be enforced upon him in a place that is independent of the places allocated for other prisoners.*

Article 18:

(see *supra* sec. 2.2.5)

Article 19:

The detention of the member of the Court shall result in the immediate suspension of him from the acts of his function for the period of his detention. The President of the Court may

order to suspend the member from the commencement of the acts of his function during the proceedings of the investigation of an offence, the commission of which is imputed to him. In such case, the provisions stated under Article (16) above shall be enforced.

Article 20:

The penal action shall not be lodged against the member of the Court except by a permission from the President of the Court who shall be entitled to allocate the court that shall bear the action regardless of the rules of territorial jurisdiction prescribed in the law.

Two experts from Common Law countries specifically found Articles 17-21 inappropriate and odd. Why should judges on the Constitutional Court have immunity from criminal prosecution?

One suggested that Article 17.1 is presumptuous to contemplate that members of the bench are likely to engage in such criminal conduct. In a sense, this may undermine the authority of the members of the Court in advance. A reconsideration and redrafting the provision to achieve a similar aim of protecting members of the Court from arrest and public humiliation through less direct means should be attempted.

The other expert, on the other hand, presumed that the provision is included out of fear that unfounded criminal charges could be levelled against judges to undermine the Court's independence. However, a more significant fear is that a state in which the very people assigned the task of upholding the rule of law are themselves immune from the law's reach would undermine public confidence in the Court. Also, Article 17 appears not to allow a member of the Court to recuse him or herself and seems to require the other members of the Court to make the decision in all cases.

2.5 Jurisdiction and Proceedings

2.5.1 Jurisdiction

Article 24:

The Court shall exclusively have jurisdiction over the following:

- 1. Oversight over the constitutionality of laws and regulations.*
- 2. Interpretation of the provisions of the Basic Law and laws in the event of conflict over the rights, obligations and capacities of the three authorities.*
- 3. Adjudication of the conflict of jurisdiction between the judicial authorities and administrative authorities with judicial jurisdiction.*
- 4. Adjudication of the conflict which arises in regard of the execution of two contradictory final judgments, one of which is issued by a judicial authority or an authority with a judicial jurisdiction and the other from another authority therefrom.*
- 5. Adjudication of the challenge regarding the loss of legal capacity by the President of the National Authority in accordance with the provisions of Clause (1/C) under Article (37) under the Amended Basic Law of 2003 A.D. Its decision shall be deemed to be effective starting from the date of the approval by the Legislative Council thereof by the majority of two thirds of the number of its members.*

Article 25:

1. *The Court shall, in the course of the performance of the jurisdictions provided for under Article (24), be entitled to exercise all the powers of hearing and pronouncing on the unconstitutionality of any piece of legislation or act contravening the Constitution (wholly or partially).*
2. *Upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, bylaw, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.*
3. *Upon the pronouncement on the unconstitutionality of any act, it shall be deemed to be unenforceable, and the authority which has performed it must rectify the situation in pursuance of the provisions of the Basic Law and the Law as well as redeem the right to grievant or compensate him or her for the damage or [perform] both together.*

2.5.1.1 In General

The LSCC generally grants the Court broad jurisdiction. Even so, one expert suggests adding a provision to Article 24 specifically asserting the Court's competence over political elections and additionally recommends the inclusion of *a priori* constitutional review into the Court's authority under Article 24.¹⁴

It was also recommended that the status of international law be clarified, either in this law, in the Basic Law, or in both places.

Some experts asserted that the Court should not have the power to interpret ordinary law (that power should remain with the High Court); the Court's competence should be limited to interpretation of the constitution. They recommend the removal of ordinary competence from the Court by way of amendment to the Basic Law.

¹⁴ *But see infra* sec. 2.5.2.2.

2.5.1.2 *Conformity with the Basic Law*

The experts overwhelmingly agree that the LSCC provisions on jurisdiction and proceedings (Articles 24-37) must be harmonised with Article 103 of the Basic Law¹⁵ to ensure consistency and to avoid redundancy and confusion. Some experts mention that it would be particularly helpful in Article 24, subparagraphs 1 and 2, to quote directly from the Basic Law.

2.5.1.3 *Settlement of Conflicts of Competence Between the Three State Powers*

Experts generally feel that the jurisdictional authority to settle conflicts of competence between the three state powers should be more carefully considered and more clearly written into the law.

Some experts suggest merging subparagraphs 2, 3 and 4 of Article 24 to authorise jurisdiction over conflicts between state powers more generally, while others recommended that, to avoid confusion, subparagraphs 2, 3 and 4 of Article 24 should be removed entirely or made textually equivalent to the provisions in the Basic Law.

One expert, in contrast, suggests retaining the provisions as written, especially Article 24.2, but clarifying their meaning through by-laws. In particular, the by-laws should define exactly what the statute means by 'rights' and 'three authorities' when it provides that the Court is exclusively competent for explaining provisions of the Basic Law and other laws where there is a 'conflict relevant to the rights of the three authorities'.

Two experts further believe that subparagraphs 2 and 3 of Article 25 should be removed entirely because they may be unnecessary and could threaten to interfere with the competences of the legislative and executive powers.

2.5.1.4 *Extent of Review of a Constitutional Problem*¹⁶

Article 25:

(see *supra* sec. 2.5.1)

Article 28:

The decision that is issued concerning referral to the Court or the pleading filed to it must include in accordance with the provision of the previous Article the statement of the legislative provision, against the unconstitutionality of which a challenge is being submitted as well as the constitutional provision whose contravention is claimed and the aspects of contravention.

The experts overwhelmingly find the Article 25 provisions outlining the extent of review of a constitutional problem unsuitably unclear as written.

Civil Law experts find Article 25.1 unclear and potentially too broad for the purposes of constitutional review for three reasons. First, it is unclear whether the provision asserts that the Court can review and decide the constitutionality not only of legislation but also of any 'act' potentially inconsistent with the Basic Law. This provision in practice could grant the Court fairly unlimited authority to choose to

¹⁵ Amended Basic Law, art. 103.

¹⁶ See also *infra* sec. 2.5.2.

scrutinise any behaviour of public powers, which would undermine a balance of state powers. They suggest instead that the law state that 'legislation' and/or 'acts' can be challenged and *then* declared unconstitutional by the Court; not that the Court itself has the broad power to declare acts unconstitutional on its own initiative.

Second, these experts found confusing what exactly qualify as 'acts' as opposed to 'legislation' as written in Article 25.1.¹⁷ The confusion is made worse, they claim, by inconsistencies throughout Articles 24 and 25 regarding the statutory regulations over which the Court has competence. For example, Article 25.2 refers to the Court's jurisdiction extending to review of 'any law, decree, regulation, bylaw or decision,' whereas Article 24 refers only to 'laws and regulations.' They suggest using either one phrase or the other consistently throughout the statute.

Third, these experts suggest clarifying whether the Court has competence only to hear issues about state actions or if the court may also adjudicate issues arising from state forbearance. Article 283 of the Portuguese Constitution is an example of a constitution that empowers the Constitutional Court to enact orders to control state inaction. The Palestinians must decide whether or not to confer that right on their Court via Article 25, but the issue should at least be considered.

Finally, one expert proposes clarifying Article 28. When an argument is presented to the Court to justify a constitutional challenge of a norm, is the Court's jurisdiction limited to checking the validity of the precise provisions related to the contested norm, according only to the arguments presented? Or does the Court have the power to consider the whole norm with regard to the full text of the Constitution? The expert recommends adopting the second option because it would solve once and for all the Constitutional problem, instead of making possible repeated contestations of specific norms with renewed argumentations. One example is Article 140(3) of the Austrian Constitution which provides:

The Constitutional Court may rescind a law as unconstitutional only to the extent that its rescission was expressly submitted or the Court would have to apply the law in the suit pending with it. If, however, the Court concludes that the whole law was enacted by a legislative authority unqualified in accordance with the allocation of competence or published in an unconstitutional manner, it shall rescind the whole law as unconstitutional. This does not apply if the rescission of the whole law manifestly runs contrary to the legitimate interests of the litigant who has filed an application pursuant to the last sentence in Paragraph (1) or whose suit has been the occasion for the initiation of ex officio examination proceedings into the law.

2.5.2 Proceedings

Article 27:

The Court shall assume the judicial oversight over constitutionality in the following manner:

- 1. By means of the direct, original action which the aggrieved person lodges before the Court with reference to the provisions of Article (24) above.*
- 2. In case one of the courts or panels with judicial jurisdiction manifests during the hearing of an action the unconstitutionality of a provision in a law, bylaw, decree, bylaw, regulation or decision that is necessary for the adjudication of the dispute, it*

¹⁷ See *infra* sec. 2.8.1.

shall halt the action and refer the papers without fees to the Supreme Constitutional Court in order to adjudicate the constitutional issue.

3. *In case the adversaries rebut, during the hearing of an action before a court or a panel with judicial jurisdiction, that a provision in a law, decree, bylaw, regulation or decision is unconstitutional, and the court or panel finds that the rebuttal is serious, it shall adjourn the hearing of the action and define for the person who aroused the rebuttal an appointment that does not exceed ninety days to lodge an action thereon before the Supreme Constitutional Court. In the event the action is not lodged on the appointment, the rebuttal shall be deemed to be as if it had never taken place.*
4. *In the event the Court discusses a dispute presented before it and during the proceeding in the dispute, it become manifested to the Court that an unconstitutional provision relating to the dispute exists, it shall spontaneously be entitled to confront by adjudicating its unconstitutionality, provided that such provision is in reality associated with the dispute presented before it in due form.*

2.5.2.1 Access to the Court

As written, with the opening words ‘The Court shall assume...,’ it appears to most experts that the Court is obliged to judge any and every demand put forth, which would produce an unmanageable caseload, would unduly burden the already strained resources of the Court, and would threaten the efficiency and legitimacy of the Court. Experts agree the LSCC should instead include a system of certiorari (or other vetting mechanism) or an exhaustion of remedies provision to ensure the Court is not overwhelmed with cases that lack merit.

Experts generally welcome the sentiment of Article 27.1, allowing individual direct appeals to the court, but feel the provision should be clarified. They recommend inserting an exhaustion of remedies provision for individuals or corporate entities – all other options must be attempted before appealing to the Constitutional Court. The experts additionally mention that this exhaustion of remedies provision must also conform appropriately to requests submitted under Article 27.3 (stay of proceedings in another court where a party has pleaded a constitutionality question). In Germany, for example, an individual may file constitutional complaints when a fundamental right has been violated by a public act (by any public authority or the judiciary), but the individual’s request is admissible only after all other judicial remedies have been exhausted. German law includes additional, more specific provisions to help manage the caseload, such as stipulations that a request must be filed within one month of the initial notification of the judgment deemed to have encroached the fundamental right. Such a system, the experts suggest, might help increase the efficiency of Court proceedings if incorporated in the Palestinian law.

Some experts specifically welcome the inclusion of Article 27.4, allowing for proceedings arising from a constitutional issue that emerges during a dispute before the Court itself. The clause appears comparable to a sound procedure of ‘incidental norm-control’ used at the Austrian Constitutional Court, in which the court stays its proceedings when it has doubts about the constitutionality of a law it has to apply in the present case in order to settle the issue before moving forward.

2.5.2.2 Requests for Interpretation

Article 30:

1. *The request for interpretation shall be submitted by the Minister of Justice based upon a request from the President of the National Authority or the Chairman of the Council of Ministers or the Chairman of the Legislative Council or the President of the High Judicial Council or from a person whose constitutional rights have been violated.*
2. *The legislative provision required to be interpreted must be stated in the request for interpretation along with the disagreement in enforcement which it has aroused and the extent of its importance which requires its being interpreted in order to achieve the unity of its enforcement.*

Experts hold opposing views on the provisions in Article 30 allowing requests for interpretation of legislation.

In Canada, the reference procedure has proven to be a very important and useful device to secure expeditious constitutional rulings. Often it is clear that legislation will be challenged, and allowing the government to refer the matter immediately and directly to the Supreme Court is desirable. The *Quebec Secession Reference* successfully used an interpretation request to raise issues that would be difficult to litigate in the ordinary course but that need[ed] to be answered in the national interest.

In contrast, two experts are troubled by the provision's language and wonder whether the Article intends the request to be submitted before or after the enactment of the law. It may not be appropriate to ask the Court to interpret a regulation when a proper case or controversy has yet to arise. The French system allows the legislative and executive powers to request a judicial opinion during the creation of legislation, but that process is based on an entirely different concept of constitutional review. The French system, in particular, does not provide for abstract or concrete norm control (interpretation) once the law is promulgated.

Other systems generally do not allow judicial interference in the legislative process. These experts support this latter system for Palestine, especially considering the current instability in the region, because, in general, requesting interpretation before the promulgation of a law creates a threatening imbalance of state authorities and a confusion of legislative and judicial powers.

If the request as envisaged in Article 30 is intended to interpret legislation after promulgation, some experts are troubled that the President has the power to submit a request to the Court. They suggest reconsideration or redrafting the provision with safeguards so the President cannot abuse this authority.

One expert suggests including a safeguard provision: whether the request is submitted before or after promulgation of contested legislation. In the Canadian system, the court has the discretion to refuse to answer a reference if it concludes that the issues raised by the reference cannot be dealt with properly to prevent against abuse via state powers referring inappropriate cases or cases lacking an adequate factual foundation to the Court. Including a similar provision in Palestine's LSCC could help protect against corrupt exploitation of Article 30 requests.

Other experts call for clarification of the provision, specifically regarding the requirements for who may apply for a request. The language allows requests to be filed not only by official authorities (via Article 24.2) but also directly by any ‘person whose constitutional rights have been violated.’ A by-law that outlines precise conditions required to file requests should be included. In addition, how those requirements correspond with the four main forms of proceedings listed in Article 27 should be clarified.

2.5.2.3 *Requirements for Lawyers Acting Before the Court*

Article 31:

Proceedings before the Court may not be commenced except through a representative of the entity of the issues of the State or through a lawyer whose period of experience in the legal profession is not less than ten consecutive years. The President of the Court shall appoint a lawyer for the plaintiff who is proven to be insolvent.

Two experts believe Article 31 institutes questionable control over the lawyers able to present themselves before the Court. Why must lawyers have such considerable experience for all cases? Why include limitations at all? In addition, why is a distinction made between representatives of state authorities and lawyers acting for non-state parties? The coherence between Article 31 and Article 33.1 of the LSCC should be checked. What exactly is meant by a state ‘entity’? Does this imply that fewer restrictions exist for counsel acting for the state than do for non-state representatives? This does not appear to be an appropriate provision to ensure democratic legitimacy.

The experts generally welcome the sentiment behind the final sentence of Article 31, which provides for the President of the Court to appoint an attorney for an insolvent plaintiff; however, several experts called for further clarification. This may be too rudimentary a form of legal aid. How does one interpret the word ‘insolvent’? Should the word be interpreted literally as bankrupt? Or does the law imply a broader definition meaning someone with insufficient resources to pay for legal representation? The provision as drafted might raise the floodgates if the President is required to appoint a lawyer for anyone unable to afford legal representation. The precise meaning might be clarified in a new definitions section.

2.5.2.4 *Response to Proceedings*

Article 34:

- 1. Each person who receives an announcement of a decision of referral or of an action shall be entitled to commit to the clerk of the Court within fifteen days from the date of its being announced a note including his remarks enclosed with the documents.*
- 2. The litigant may respond to that by a note and documents within the fifteen days following the expiration of the aforementioned appointment. In the event the litigant uses his right to respond, the first may comment by a note within the following fifteen days.*
- 3. The clerk of the Court may not accept following the expiration of the appointments outlined in Paragraphs (1 and 2) above papers from litigants and he must draw up a protocol in which he states: the date of the submission of such papers and the name and capacity of the person who submitted them.*

Article 34 appears to allow anyone to respond to a proceeding. This could be a problem of translation, but if not, one expert specifically questioned the wisdom of allowing anyone at all to participate in a proceeding before the court.

2.5.2.5 Pleadings

Article 36:

The Court shall rule in the actions and requests submitted before it in scrutiny without a pleading. In the event it deems that a verbal pleading is necessary, it may hear the litigants. In such case, the litigants shall not be permitted to appear before the Court without a lawyer with them. The Court shall be entitled to require necessary data or papers and to invite those concerned to interrogate them about the facts before it and assign them to submit complementary documents and notes and other procedures on the date which it sets forth.

Some experts thought clarification was needed of the requirements or guidelines for situations in which the court may deem it ‘necessary’ to hear oral testimony in a particular case. Should the court be required to inquire whether either party has requested oral hearings?

2.6 Judgments and Decisions

2.6.1 Judgments

Article 38:

The judgments of the Court shall be issued forth in the name of the Arab Palestinian people.

One expert expressed concern that the judgments would be issued in the name of the Arab Palestinian people rather than in the name of the Court.

Another noted that the LSCC does not contain a provision outlining the process for publication of Court decisions. The Court could consider publishing abstracted maxims from its rulings, available on the internet, as is the case in Italy (with the so-called ‘massime’). The maxims can act as easy guides for public authorities, other judges, and citizens as to what they are constitutionally authorised to do. The maxims further benefit the Court by acting as an additional vetting system to avoid overloading the Court’s docket.

2.6.2 Effect of the Court’s Decisions

Experts generally criticise the provisions regarding the Court’s ability to annul an unconstitutional law.

Article 25:

(see *supra* sec. 2.4.1)

...

2. *Upon the pronouncement on the unconstitutionality of any law, decree, bylaw, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, bylaw, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.*

3. *Upon the pronouncement on the unconstitutionality of any act, it shall be deemed to be unenforceable, and the authority which has performed it must rectify the situation in pursuance of the provisions of the Basic Law and the Law as well as redeem the right to grievant or compensate him or her for the damage or [perform] both together.*

Some experts expressed concern that the LSCC as written appears only to allow the Court to declare an unconstitutional provision ‘unenforceable’ and the legislature then must then amend the law to correct the situation. Another believes, in contrast, that the Court should be further empowered to quash for itself unconstitutional provisions.

Common Law experts are troubled by the provisions in Article 25.2 and 25.3 asserting that the pronouncement of unconstitutionality by the Court automatically makes the law unenforceable. Both fear the provisions could be problematic in their practical effect and suggest redrafting to clarify their intention.

One expert particularly worries that the provisions of Article 25 may cause the Court to feel pressure to refuse to find a bad law unconstitutional if faced with dire consequences as a result of the immediate nullification of a law. For example, in the *Manitoba Language Reference* the court held that the laws of Manitoba were all invalid as they had not been enacted in both English and French, as required by the Canadian Constitution. As a safeguard against this type of pressure, a system like the one used by the Canadian Supreme Court could be implemented in the LSCC. This often decrees a temporary suspension of invalidity to allow an unconstitutional law to remain in force until Parliament enacts a replacement, in order to avoid a situation of chaos that would result in this kind of situation.

Some experts welcomed the clause in Article 25.3 allowing for the possibility to compensate an aggrieved party for damage caused by the legislature.

Article 41:

1. *The judgments of the Court on constitutional actions and its decisions concerning interpretation shall be binding to all the authorities of the State and to the public.*
2. *In the event the Court decides that the provision under review is being impaired wholly or partially with the defect of unconstitutionality, it shall make it clear in a justified decision that draws the limits of the unconstitutionality. The provision which it decides to be unconstitutional shall be deemed within the limits of the decision of the Court to be unenforceable.*
3. *In the event the pronouncement on the unconstitutionality is related to a penal provision, the judgments of conviction which have been issued with reference to such provision shall be unenforceable. The President of the Court shall notify the Attorney General of the judgment immediately after its being pronounced in order to conduct the necessary legal exigency.*

Two experts find Article 41 unclear and poorly drafted, especially subparagraph 41.3. The law should not allow for all pronouncements of unconstitutionality merely ‘related’ to a penal provision to undermine a conviction (e.g. some evidence may have been obtained contrary to the constitution, yet the conviction can still stand on other evidence). Some remedial flexibility could be included in the law to allow the Court to grant a remedy that is tailored to and best meets the exigencies of the case.

However, in contrast, another expert believes Article 41 is vital and should even be further strengthened to put a positive obligation on all parts of the State to nurture and respect the role and authority of the Court.

2.7 Financial and Administrative Affairs

One expert questions the need to include Parts Four and Five of the LSCC, regarding 'Fees and Expenses' and 'Financial and Administrative Affairs,' respectively (Articles 45 to 55), 'especially as they are likely to have to be changed quite frequently, eg the reference to a fixed fee of 100 Jordanian dinars in Article 45.1.' The content of these provisions might be better expressed in subordinate legislation.

2.7.1 Budget

Article 48:

- 1. The Court shall have an independent annual budget that is prepared in accordance with the bases according to which the public budget is prepared.*
- 2. The President of the Court shall set forth the draft budget to be submitted to the competent authority after its being discussed and approved by the General Assembly of the Court with the absolute majority. The President of the Court shall be responsible for all of the issues related to the implementation of the budget in accordance with the bylaws promulgated as per this Law.*
- 3. The provisions of the Law of the Public Budget shall be applicable to the budget of the Court and the final account.*

Some experts find the budgetary provisions of the LSCC satisfactory, and agree that the proposed budget should be developed by the President of the Court and subject to ratification by the General Assembly of the Court, even though it in practice stops short of guaranteeing that the Court will receive the budget that it has requested.

2.7.2 Administrative Supervision

Article 49:

The Court shall have a Chief of Clerks and a sufficient number of working functionaries and administrative staff. The President of the Court and the Minister of Justice, each one within the limits of his legal jurisdiction, shall have the authority to supervise them in accordance with the Law of the Judicial Authority.

The experts overwhelmingly found this provision troubling. The Minister of Justice should not have the right to intervene in the supervision of the Court because executive intervention in the administrative matters of the judiciary endangers the independence and legitimacy of the Court and its decisions. The Court instead should have the power to choose and supervise its own personnel, financial and administrative matters. It is a violation of the Court's independence.

2.8 Further Matters for Consideration

2.8.1 Notes on the General Drafting of the Law

- The experts generally found the LSCC to be poorly drafted. This might be attributable to a poor English translation, but at the round table discussions in Cairo even the Arab speaking delegates appeared to share the view that it is not particularly well-written. Uncertainties created as the result of imprecise and often opaque use of the English language in many parts of the LSCC make its underlying meaning difficult to decipher and raise questions about its readiness for implementation.
- The experts acknowledge and appreciate that the LSCC has been approved by both the legislative and executive branches of the Palestinian National Authority; however, if an opportunity for redrafting arises in the future, they suggest taking advantage of the opportunity to clarify vague language – not to change the law’s import but rather to better explain what it attempts to provide.
- In this sense, the experts strongly suggested adding an article of definitions for greater clarity.
- To deal with the unique problems associated with multilingualism and multiculturalism in nations like Palestine, it was suggested that implementing the theories of South Africa’s ‘plain language’ approach to statutory construction¹⁸ should be used for the LSCC. To add clarity to laws under the ‘plain language’ approach, South Africa: (i) no longer uses the word ‘shall’ but rather uses ‘may’ or ‘must’ in order to emphasise the difference between a mandatory and permissive stipulation in a law; (ii) attempts to avoid using ‘hereinafter,’ multiple cross-references between sections, and over-long sentences with multiple clauses and sub-sections.
- A provision on the rules of interpretation for the law could be added which asserts that the language of the text which is ultimately signed by the President is regarded as the authoritative text for purposes of its meaning by the courts. It should be clear which text or translation is authoritative in the Palestinian system.

2.8.2 Notes on Specific Provisions

- Is the Preamble necessary?
- The Arabic text of Article 2 refers erroneously to the formation of the ‘Commission.’ Instead, it should refer to the formation of the ‘Court.’
- Omit the words ‘for him’ in Article 2, as it implies that the President of the Court could not be a woman.

¹⁸ South African Final Constitution of 1996.

- The use of the word ‘venue’ in line 2 of Article 16.2, and the word ‘interrogation’ in Article 16.3 are unclear.
- Article 21 is poorly drafted. If a judge resigns or dies, the law need not say that his or her services ‘terminates.’
- Experts generally suggest redrafting the law to clarify the link between Articles 24 (asserting the jurisdiction of the court) and 27 (outlining the manner for the Court to assume judicial oversight over constitutionality), specifically concerning: the class of constitutional problem (e.g., protecting fundamental rights) and the type of proceeding, including who may file a request (direct action of any interested person before the court, etc.).
- Two experts suggest that Article 26 (providing for the subsidiary application of the civil and commercial procedural law) should not be placed at the beginning of Part Two, section 2 on Proceedings. They argue instead that the section on Proceedings should start with Article 27 and the specific rules relating to constitutional matters that follow.

3 IMPLEMENTATION

3.1 Transitional Measures

Two experts urge more attention be paid to transitional provisions in the Basic Law. They believe that the numerous problems linked to the current non-existence of an adequate structure (personnel, infrastructure, political acceptance of a Constitutional Court at the present moment, etc.) could be addressed with a carefully drafted chapter on transitional issues.

3.2 Implementation

Though all experts agree the LSCC requires both substantive and stylistic amendments, experts differed on the final issue of whether now is an appropriate time to urge implementation of the LSCC and establish a Constitutional Court for Palestine.

Several experts are convinced that now is *not* the appropriate time to bring the Court into being. Implementation of the LSCC could be postponed until necessary amendments to the law have been made. The delay should not be of concern as the rapporteur for the High Supreme Court is now in temporary control of duties and functions of the Constitutional Court as provided in Article 104 of the Amended Basic Law. Taking care to activate the LSCC only after correcting necessary elements is essential to help enable the optimal functioning of the Court. Forcing a rushed implementation of the law and formation of the Court would likely exacerbate the current instability in Palestine and potentially could raise new problems that currently do not exist.

One expert particularly agrees that Palestine must first achieve stability, have a properly functioning Amended Basic Law, and have a properly appointed new Government and elected Legislative Council before a Constitutional Court should come into operation. One expert recommends that the current LSCC should be scrapped entirely, and a new law should be written. In the meantime, and as the Amended Basic Law provides, the High Court should continue to deal with any constitutional issues that may arise.

Another expert similarly fears the severe political division between the West Bank Fatah and Gaza-Hamas territories would render the exercise of authority by a single Constitutional Court problematic and consequently urges postponing implementation of the law. The West Bank, currently under Israeli occupation, lacks the political autonomy required for a viable Constitutional Court to commence operation. There is also the question whether there are sufficient structural resources – personnel, a sufficient number of qualified Palestinian judges and lawyers to be appointed to the Court, etc. – available to sustain a new Court, especially when the requirements for appointment to the Court are so limiting in the LSCC as written. Imposing the rapid implementation of the LSCC in a state of inadequate resources would immediately threaten the credibility of the new Court.

Another expert contends that the current LSCC is enforceable as written, but strongly suggests promptly amending the law through by-laws for greater clarity before finally setting up the Court. The decision to issue by-laws must come from the Palestinian Authority itself, which could prove difficult to motivate. However, since

there is no apparent need for implementation of a new Court at present, as it has already been three years without operation, ultimately executing a more refined version of the LSCC, rather than the law as it currently stands, would be a better option for Palestine moving forward.

Two experts believe that even in the most difficult circumstances it is still worthwhile to go forward with the establishment of a trustworthy judiciary so long as the LSCC is amended. While there is a necessity for a total overhauling of the law (including amending structural flaws and reworking the English translation that does not always seem to reflect the sense of the Arabic original version), the implementation of the Court is a wonderful opportunity for the Palestinian people to prove that they have the intellectual resources to build reliable institutions and to uphold the rule of law and human rights. It would be a chance to demonstrate that constructive solutions are possible and that there exists commonly shared values worth being protected. The establishment of the Court should only be achieved through a careful step-by-step approach after necessary amendments to the LSCC have been made. The issues of concern in the LSCC do not exclude the Court from being brought into operation before the law has been improved because the rules of procedure of the Court can be a means, to some extent, to remedy defects in the LSCC as currently drafted.

3.3 Other Alternatives to a Supreme Constitutional Court?

Though traditional approaches to constitutional jurisprudence include a European model, in which only a specialised ad hoc constitutional court can enforce the constitution, and an American model, in which every federal judge can, while judging a case or controversy, refuse to apply an unconstitutional norm, it was noted that there are many other possibilities that Palestine could consider as a model for its own system.

Especially in the case of Palestine, where a lack of competent would-be constitutional judges is a legitimate concern, two alternative models might be considered: (i) a single Supreme Court (rather than both a High Supreme Court and a Constitutional Court) with special constitutional protections, including especially a specific formation of the supreme court as the constitutional judge (e.g. Venezuela's 'sala constitucional' which is endowed with exclusive jurisdiction on constitutional matters); and (ii) an ad hoc constitutional Tribunal that coexists with the general jurisdiction of ordinary courts on constitutional matters (e.g. as in Portugal).

It could be worthwhile to reconsider whether Palestine should continue to work to establish a specialised Constitutional Court, as in most civil law jurisdictions, or whether to allocate responsibility for constitutional adjudication to all courts with ultimate responsibility falling on the highest court of appeal, as in most common law jurisdictions. However, all participants at the Cairo round table discussion seemed to assume that there should be a specialised Constitutional Court.

4 CONCLUSION

In light of this comparative analysis, experts generally agree that there is a need to overhaul the LSCC and correct the serious structural flaws of the state of the judiciary in Palestine before the Court can be effectively constituted.

To help the Court function properly in the current state plagued by a scarcity of personnel, qualified judges, and a lack of current political acceptance of a Constitutional Court, experts recommend amending Articles 4 and 5 of the LSCC to impose qualifications for members that are not too restrictive yet still guarantee an appropriate level of expertise to sit on such a critical Court and to ensure that the mechanism for appointing members to the Court includes input jointly from all three state authorities - including the presently excluded Legislative Council.

Experts agree the language of the LSCC requires general clarification, especially the English translation of the text.

Similarly, experts express overwhelming consensus that the provisions on the operations and authority of the Court in the LSCC must be reconsidered and redrafted to conform with the provisions on the functions and jurisdiction assigned to it under the Basic Law and the Law on the Judicial Authority. Whether those amendments are made to the Articles in the LSCC or to the text of the Basic Law or Law on the Judicial Authority remains unclear.

To better define and manage the extent of constitutional review granted to the Court, experts recommend including a system of certiorari to check the type of case and the person or authority able to bring an action before the Court to ensure its caseload does not become onerous and threaten the legitimacy and efficacy of the Court.

Finally, the LSCC must be reconsidered to enhance the independence of the Court and its judges, to increase legitimacy, and to protect against political corruption and abuse. Experts recommend amending Articles 16 – 21, 23 and 49 to create a system of proper oversight over the termination or dismissal of members, any criminal matters arising on the bench, and the administration and budget of the Court driven by a system of checks and balances between the three state powers.

5 SUMMARY OF RECOMMENDATIONS

5.1 Conformity of the Basic Law and the LSCC

- Ensure the provisions on jurisdiction, the independence of judges, and the main characteristics of proceedings in the Basic Law and the LSCC conform.

5.2 Formation of the Court

- Review and clarify the qualifications for judges (Article 4) to ensure that the criteria is too restrictive and that they result in the appointment of competent, reliable individuals to the Court through a legitimate and transparent process.
- Consider including political qualifications for the appointment of members to the Court.
- Consider allowing the election of foreign judges to the Court.
- Reassess the need to have a separate appointment procedure for the first Court versus for subsequent judicial appointments.
- Include the Palestinian Legislative Council in the selection process for both first and subsequent appointments to the Court (Article 5).
- Amend the consultation provision for the first appointment of judges in Article 5.1 and the apparent near-complete control granted to the Court for subsequent appointments via the recommendation provision in Article 5.2 to ensure greater transparency and a greater balance of powers in the appointment process.
- Amend provisions in Articles 11, 16 and 18 establishing a Provisional Committee of the Court for emergency situations to clarify the selection process and check the duration and authority of the Committee so the provisions cannot be used to discard judges from the Court's normal decision-making processes.
- Clarify the Article 21 provisions for termination of membership, especially 21.1(D) (Disability), to avoid ambiguity in meaning that could lead to politicisation, abuse, and corruption.
- Remove the overlap in Articles 14, 16 and 21 and consider placing all clauses regarding termination of judicial service in a single provision.
- Either remove Article 23 on Deemed Resignation or insert a provision allowing for an independent process of adjudication and/or appeal for complaints against judges of the Court.

5.3 Rights and Duties of Members

- Reconsider Articles 17-21; it does not seem appropriate for judges on the Court to have immunity from criminal prosecutions.

- Review generally the provisions on judicial oversight and disciplinary measures against judges throughout the LSCC to ensure consistency, independence, and legitimacy and protect against corruption.

5.4 Jurisdiction and Proceedings

- Provisions on jurisdiction and proceedings (Articles 24-37) must be harmonized with Article 103 of the Basic Law. Consider quoting directly from the Basic Law in LSCC Articles 24.1 and 24.2.
- Define more clearly the procedure and authority to settle conflicts of competence between state powers in Articles 24 and 25, either through redrafting the provisions in the LSCC or through by-laws.
- Clarify both the meaning of ‘acts’ versus ‘legislation’ and the ability of the Court to review state actions and/or forbearances in the Article 25 provisions outlining the extent of review of a constitutional problem.
- Amend the opening language of Article 27 (‘the Court shall assume’) or otherwise incorporate a system of certiorari or exhaustion of remedies provision so the Court is not overburdened by an unmanageable caseload through an apparent obligation to judge any and every demand put forth.
- Reconsider or clarify the provisions on Requests for Interpretation (Article 30) regarding whether the request should be considered before or after promulgation of the contested legislation and who may submit requests.
- Reassess the need to impose requirements for lawyers acting before the Court (Article 31).

5.5 Judgments and Decisions

- Reconsider the assertion that the judgments of the Court shall be issued in the name of the Arab Palestinian people. Why not in the name of the Court?
- Outline the process for publication of Court decisions, either in the LSCC or through by-laws.
- Amend the provisions in Articles 25 and 41 regarding the Court’s ability to annul an unconstitutional law, the immediate effect of a declaration of unconstitutionality by the court, and the apparent ability for a pronouncement of unconstitutionality of provisions ‘related’ to a penal code to undermine a conviction.

5.6 Financial and Administrative Affairs

- Amend or remove Article 49 granting administrative supervisory powers to the Minister of Justice to protect against executive intervention in the administrative affairs of the Court.

5.7 Drafting of the Law

- Generally revise the language of the LSCC, especially the English translation of the text, to clarify uncertainties caused by imprecise and often opaque use of the English language.

5.8 Implementation

- It will, in due course, be worthwhile to move forward with an attempt to establish a trustworthy judiciary in Palestine through the establishment of a specialised Constitutional Court. However, substantive and stylistic amendments must be made to the LSCC before attempting to implement the law and execute the formation of the new Court.
- Most experts urge postponing implementation of the LSCC until Palestine achieves greater political stability, has a properly functioning Amended Basic Law, and has a properly appointed government.