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## THE CONSTITUTION MAKING PROCESS

Paul R William's  
Presentation

July 21, 2006

I would like to thank Kole Berisha and Ambassador Wnendt for inviting me to participate in this workshop, and to thank Franklin De Vrieze, Blerim Vela and Jennifer Ober for their effort in organizing this workshop. I would also like to thank the participants for seeking our assistance as Kosovo prepares its constitution. It is a great honor for me to be able to exchange ideas and perceptions with those who will be drafting the constitution for Kosovo.

The hosts have asked me to begin the workshop with a few remarks concerning contemporary state practice relating to constitution making.

### Statement of Purpose

The purpose of my presentation will be to provide a review of the basic elements of the constitution-making processes that have been recently employed in post-conflict states.

In doing so I will draw upon lessons learned from several recent post-conflict constitutional models including South Africa, Albania, Bosnia-Herzegovina, Afghanistan, and Iraq.

I will approach this from a very practical perspective. [notes on participants from PILPG - Bosnia at Dayton, recent redrafts, this past summer in Iraq (Spence); for three years in Palestine (Amjad); just asked to review the new Nagorno-Karabagh constitution; new project in Georgia (Rick Lorenz), and just now returned from Sri Lanka.]

I will begin with a brief analysis of what is being called "new constitutionalism" for the twenty-first century, the notion of participatory constitution-making.

I will then survey the general mechanisms essential to any democratic constitutional process, and focus on the importance of the process of constitution making itself.

I will then review five lessons learned concerning the process of constitution making. I will conclude with a brief note on managing the role of the international community.

### Introduction

Over the past twenty years, following a wave of post-conflict constitution-making, an approach of "new constitutionalism" has emerged, that focuses as much on democratic process as it does a democratic outcome.<sup>1</sup>

One of the major critiques of traditional drafting approaches is that they are static, immovable, contractual approaches to the process of constitution-making.

While traditional approaches viewed constitutions as an "act of completion," the new constitutionalism is focused on "participatory constitution-making" or "conversational constitutionalism."<sup>2</sup>

The new approach is characterized by more transparency and by broad-based public participation.

The process is also characterized by increasing international involvement - what is being called a "shared international effort."<sup>3</sup>

As a result, the legitimacy of the constitutional process and the constitution itself is measured by the degree to which the process is participatory, open, democratic, socially

inclusive, and transparent, and where those drafting the constitution are democratically selected

and accountable.<sup>4</sup>

<sup>1</sup> Vivian Hart, Democratic Constitution-Making, U.S. Institute of Peace, Special Report No. 107, July 2003, available at <http://www.usip.org/pubs/speciaheports/sr107.html> (last viewed 3/31/05).

<sup>2</sup> Id.

<sup>3</sup> Margaret A. Burnham, Constitution-Making in South Africa, Boston Review, 1998, available at [http://www.nidcbowen.org/p2/rni/reports/constitution\\_making.htm](http://www.nidcbowen.org/p2/rni/reports/constitution_making.htm) (last viewed April 3, 2005).

<sup>4</sup> See Hart, supra note 1.

### Basic Elements of a Constitutional Process

Let's now turn to the actual process itself. The constitutional process is generally characterized by four phases:

- the preparatory phase;
- the constitutional drafting phase;
- the public consultation phase; and
- the final review and adoption phase.

#### *First Phase: Preparatory phase*

- The preparatory phase is characterized by:
- Initial negotiations concerning procedure, an outline of the process, and the establishment of realistic timetables;
- Agreement on a set of basic principals that will guide the constitutional process;
- Initial public education and consultation, national dialogue of the constitutional changes or potential revisions;
- The possible adoption of an interim or transitional constitutional document; (this already exists in Kosovo)
- And, the establishment of a constitutional commission. Second Phase: Constitutional drafting phase
- The establishment of an elected constitutional commission or assembly that will oversee the drafting of the final document;
- Extensive consultation with legal experts and advisors, the international community, a broad array of stakeholders, all political parties concerned, and the public at large;
- The preparation of an initial draft of the constitution, via transparent drafting committees, and regular input from the public, and select international advisors, as well as domestic and international legal advisors.

#### *Third Phase: Public consultations period*

- A nation-wide public and civil education, media campaigning, reception of public comments and suggestions;
- The use of traditional and innovative modes of bargaining and public dialogue, before or during the initial drafting of the new constitution; website
- Structured participation by all groups-especially women, minorities, all political and opposition parties, and civil society;

#### *Fourth Phase: Final review and adoption phase*

- A period for modifying the draft constitutional text to include public and expert comments and suggestions;
- A review by the constitutional commission, parliament or the courts, as well as the public, for necessary revisions, amendments, or greater public input;
- The broad approval and adoption of the final text via the constitutional commission, elected representatives, or a national referendum process;
- A post-adoption process of public education, national ratification, and conference of legitimacy on the final product.

### Five Rules of Constitution Making

(Adopted from a paper prepared by Jennifer Widner for the U.S. Institute of Peace)

#### **Rule 1: Limit the appearance of incumbent/occupier dominance**

Incumbent control of the drafting process can de-legitimize the constitution and sow distrust. Also, the appearance of control by an international force, such as the Coalition in Iraq, the OHR in Bosnia, or UNMIK in Kosovo can delegitimize the constitution.

#### *Measures for reducing the appearance of incumbent dominance:*

Appoint a roundtable of key players with power to select from a range of possible formats or models. Undertake a transparent evaluation of the processes being evaluated.

Buffer the process from the appearance of incumbent control by delegating partial appointment of a drafting committee to opposition parties.

Find a widely-respected neutral statesman with no local political ambitions to chair proceedings. This of course is easier said than actually accomplished.

#### **Rule 2: Provide multiple opportunities for participation Public participation may generate useful ideas. Creates a model for future democratic behavior**

Disseminates information and shapes ability of ordinary citizens to monitor adherence to substantive terms

Helps avert charges of partisanship or external control

#### *Measures for Providing Multiple Opportunities for Participation:*

Consult with ordinary citizens before submitting a second text to debate (hearings, surveys, written submissions) (2 million in South Africa - 30,000 in Iraq)

Allow social and economic groups and under-represented parts of the community to appoint representatives to sit alongside elected delegates

### **Rule 3: Choose procedural rules that foster compromise**

Many drafting processes collapse as a result of the failure to adequately structure compromises on issues of primary concern.

*Measures for selecting procedural rules that foster compromise:*

Choose low quorum requirements and supermajority or qualified majority voting rules over high quorums and simple majorities (helps avoid boycotts)

Initiate the operation of working committees within the first few days. Prohibit lengthy opening statements during the plenary session. Close early negotiating sessions to media coverage.

Balance the need for public outreach and public input with the need to prevent the work of the committee from becoming a public platform for political advantage.

### **Rule 4: Focus on the future**

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*Measures for focusing on the future:*

Start with a technical template (text) that outlines possible options and provides draft language - not with a blank piece of paper, and invite discussion on the technical text.

Avoid opening speeches that stress the past - limit the time for opening presentations.

Bar thematic committees that focus on non-constitutional issues. This is a separate process from final status

Do not try and regulate everything through the con but it should reflect broad principles

Use the constitution to define the relationships b/w different communities, and to establish workable mechanisms to accommodate an evolving relationship (yes Macedonia, no Bosnia)

A constitution is not just a law, its more important than a law, it embodies the principles which will guide the state of Kosovo, and it establishes the mechanisms for political compromise and for effective self-government.

### **Rule 5: Adopt clear rules of procedure in advance**

Uncertainty about format and timing breeds mistrust and charges of manipulation.

*Measures for reducing uncertainty in the process:*

Announce a clear timetable up front, with criteria for allowing extensions (because flexibility will undoubtedly be needed)

Develop procedural rules within closed committee meetings, but with extensive private consultation

Develop capacity for simultaneous interpretation, rapid translation, rapid publication of texts

## **Managing the International Community**

If you don't write it - they will.

Invite specific assistance - task the international community with providing concrete studies and briefings. Do not ask them to draft language.

Develop rules of procedure as to how and when the international community may be invited to provide assistance.

Careful of laboratory type of constitutional constructions:

Careful of their own agenda - must be a Kosovo constitution for all Kosovars.

### **Conclusion:**

Long and complicated process. Many facets that must be woven together. Specific role for the political parties, the public, and the international community. Must have a highly structured process. Maybe even more important than final status - in that Kosovars completely own the process..

Prof. Arsim Bajrami, PhD  
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### CONSTITUTIONAL ASPECTS OF SHARING THE POWERS AND PARLIAMENTARY CONTROL OF THE GOVERNMENT (constitutional comparative approach)

### Role of the Constitution in democratic societies

- ✦ Constitution as a contract between citizens for promotion and practice of public policies
- ✦ Constitution as a power institutionalization and limitation act
- ✦ Constitution as a construction base for political, economic and social system
- ✦ Constitution and governing system

### Kosovo Constitution in the context of final status

- ✦ New Constitution-constitutive act for establishing the new state,
- ✦ Kosovo Constitution –guaranteeing act of the rights of minority communities in Kosovo
- ✦ New Kosovo Constitution- basis for functioning of parliamentary democracy in Kosovo
- ✦ Kosovo Constitution-basis for Euro-Atlantic integrations of Kosovo

### Constitution and the negotiation process

- ✦ Constitutional principles for the rights of minorities in Kosovo, their protection, and representation in the institutions at the local and central level;
- ✦ Constitutional principles of the local power reform
- ✦ Kosovo Constitution and Assembly
- ✦ The need to avoid constitutional vacuum after the final status.
- ✦ Citizen's role and Constitution

### SHARING THE STATE POWER

- ✦ Draft constitution and legislative power
- ✦ Executive-administrative power
- ✦ Judicial power



### Power sharing principle and governing form

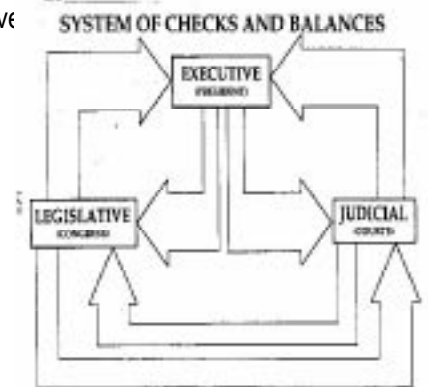
- ✦ Parliamentary system
- ✦ Presidential system
- ✦ Mixed parliamentary-presidential system

## Power sharing functions

- ✦ Independence of the powers
- ✦ Mutual limitation of the powers
- ✦ Ensure of the balanced democracy
- ✦ Checks and balances system

## Relationship between powers (checks and balance)

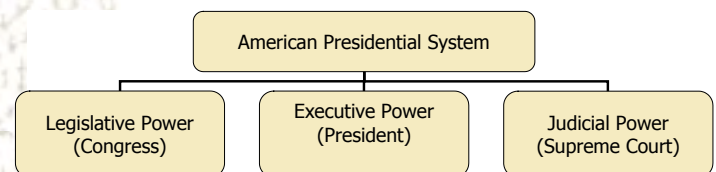
- ✦ Relationship between legislative and executive powers
- ✦ Relationship between legislative and judicial powers
- ✦ Relationship between executive and judicial powers



## Ways of power sharing

- ✦ Fluid power sharing-interference between powers
- ✦ Solid power sharing-independence and balance maintenance
- ✦ Mixed power sharing-mutual interference

## Power sharing in US



## Congress

Structure of the Congress is consisted of:

- ✦ Chamber of Representatives (435 representatives)
- ✦ Senate (100 senators)



## President

Bearer of the executive power where governing system is appointed as presidential as well



White House





Inauguration of the President

## Supreme Court

Supreme Court is the bearer of judicial power that along with classical judicial functions exercises the following functions:

- ✦ Control and protection of constitutionality and legality
- ✦ Resolves power conflicts between federation and federative states



Supreme Court

## Relationship between Congress and President

John Stuart Mill stated "real task of the Representative Assembly is to supervise and control the Government". This is a function that Congress keeps practicing still today with a pronounced independence



Cabinet of Gerald Ford

## Budget as a control mechanism

- ✦ Article 1, Chapter 9 of Constitution, determines that 'no money can be spent from the Treasury for something that has not been determined by law'. This provision provides the Congress (as the wallet power) the last word on spending the means
- ✦ The Office of Management and Budget-OMB, established by the Congress in 1921, supervises and prepares the budget for the executive branch



## Signing the laws

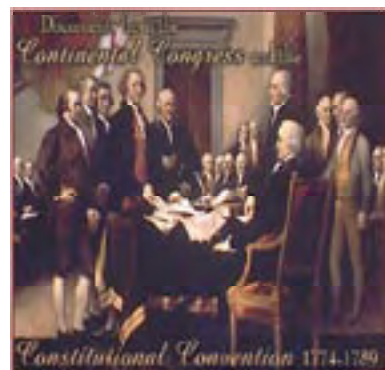
- ✦ Congress can oppose the President in many ways: cancels every resolution that supports the President, decreases or interrupts funds on war conduction (for example, Bush required from the Congress over 80 billion dollars for the War in Iraq in 2005)



Bush signing a law

## Institution of impeachment

- ✦ Draft Constitutional Convention determined that nobody will be above the law and that each president and other senior placemen can be subjects of impeachment
- ✦ Impeachment is the last mechanism and always present against the executive, as a powerful weapon against the tyranny and arbitrariness of that power or as Joseph Story used to state "to protect the states from the major state misusers"



### Impeachment procedure

- ❑ Bearer of the charge is Chamber of Representatives, while Senate is constituted as a court that judges and decides by adjudication. Adjudication can be releasing or convicting (the President can be discharged by the two-thirds of the votes). Supreme Court President heads the Senate during the trial

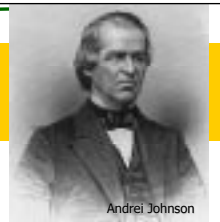


Chamber of Representatives



Senate

- ✦ Impeachment has been rarely applied, only in the President Andrei Johnson case (by releasing adjudication), against President Richard Nixon, 1973 (resigned before the Chamber of Representatives voted), and against Bill Clinton (by releasing adjudication)



Andrei Johnson



Richard Nixon



Bill Clinton

### WATERGATE AFFAIR

- ✦ Watergate affair with Nixon, proved not only the strong position of the elected president by the people's votes, but also proved how can a combination of powers exercised by the Congress and Supreme Court, as well as by the public opinion and media can discharge any president



Watergate Complex

### LEWINSKY AFFAIR

- ✦ In February 1999, a crisis ended when Senate failed to ensure two-thirds of the votes to discharge the president.
- ✦ Judgment by the Senate was influenced by the support of two against one in favor of American public opinion for not having president Clinton convicted since they highly evaluated his work



Clinton's trial

### Bill Clinton case- LEWINSKY AFFAIR

- ✦ In 1998, press and media published the President Clinton affair in the White House with the medical practitioner, Monica Lewinsky. Chamber of Representatives, supporting the assertion that the President's deed leaves the possibility for an action that has to do with "serious crimes and misapplications" as well as for false testimonies and obstruction of justice prohibited by the US Constitution, raised the charge for impeachment.



William Jefferson Clinton

### Appointment of Supreme Court judges

- ✦ Appointment of the judges by the president presents a way of important control over the Supreme Court
- ✦ In a study (1980) of 84 candidatures, 76 judges, presidents elected in that way where political philosophy was similar to theirs and this poses an indicator for the way of decision making by the judges



Actual Judges in the Supreme Court



## Power Sharing in the Great Britain

- ✎ The Crown
- ✎ The Parliament (Chamber of Communes, 659 members) and Chamber of Lords with 1185 members)
- ✎ Unbalanced bicameralism
- ✎ Homogenous Government in the cabinet form
- ✎ Prime Minister (assigned by the party that has largest representation in the Chamber of Communes)

## Constitutional Principles of power sharing in France

- Controlled presidential system
- Bicephalism and endorsement
- Government of the Coalition with double responsibility
- Balanced bicameralism-National Assembly with 491 deputies and Senate with 305 members
- Combined majority and proportional electoral system
- Constitutional Council

## Power sharing in Germany

- ✎ Federal Assembly (Bundestag)
- ✎ Federal Council (Bundesrat)
- ✎ President (Bundespräsident)
- ✎ Federative Government (Bundesregierung)
- ✎ Federal Chancellor
- ✎ Federative Constitutional Court (Bundesverfassungsgericht)
- ✎ German Central Bank (Bundesbank)

## Power sharing in Italy

- ✎ Governing principles
- ✎ Parliamentary Republic
- ✎ Balanced Bicameralism
- ✎ Multi-party System
- ✎ Government of Coalition
- ✎ Roles of the interests group and pressure group

## Power sharing in the future Kosovo Constitution

1. Governing System in Kosovo is based on the principle of power sharing and of the mutual control system of the powers in the function of setting the balance between them;
2. Executive power is exercised by the Government of Kosovo. Government is the main authority for governing the state and for the implementation of the laws and state policies. Government is subjected to parliamentary control;
3. Legislative Power is exercised by the Assembly of Kosovo that will have full legislative and constitutional drafting authority.
4. President of Kosovo is a symbol of people's unity, legitimate country representative in and out of the country and warrantor of the democratic and constitutional functioning of the Kosovo institutions.
5. Judicial power is exercised by the independent courts.

## Legislative function of the Parliament

- ◆ Constitutional Approval and Amendment
- ◆ Law approval
- ◆ Approval of general acts
- ◆ Ratification of international agreements
- ◆ Budget approval



### Elective function of Parliament

- ♦ **In the parliamentary systems**, parliament elects and supervises the government and the president-Albania, Kosovo, etc.
- ♦ **In the mixed parliamentary-presidential systems**, parliament elects the government, while the president is elected by the people-France
- ♦ **In the presidential systems**, government elects the president

### Supervising function of the Parliament

- ♦ **Regular means-**
- ♦ Budget approval and periodical relationships
- ♦ **Extraordinary means-**
- ♦ parliamentary questions,
- ♦ interpellation,
- ♦ surveying committees,
- ♦ Motion of vote of confidence and government discharge

### Recommendations for the Kosovo Constitution

#### Recommendation I.

*Relationships between the Kosovo President and Assembly need to be determined in that way so the President would be granted the authority to propose laws, suspension right of the veto, declare of laws and dissemination of the Assembly. In the other side, Assembly would press a constitutional charge against the President for violation of the Constitution and act on betrayal and would initiate the procedure in the Kosovo Constitutional Court, that with a two-thirds vote would discharge the President.*

#### Recommendation II.

*Regarding the relationships between the Assembly and Government, Kosovo Constitution should institutionalize the parliamentary control through the constitutional instruments, that may result also with the vote due to lack of confidence by the government, President of Kosovo in order to avoid the parliamentary crisis can disseminate the parliament and declare early parliamentary election.*

#### Recommendation III.

*New Kosovo Constitution would guarantee the independence of the judiciary, by protecting it from the political influences from the Assembly and Government. This would be achieved through respecting these constitutional principles; election of judges in long-term mandates; appointment of the judges by the President of the Republic, depolitisation of the judiciary, independent financing, etc.*

*A key role in providing the independence to all three powers, would belong to the Constitutional Court that would resolve the constitutional conflicts between the three powers and would be the ultimate authority in protecting the Constitution.*



## PILPG

### The Single Most Important Part of State Building – Drawing Up a Constitution

#### Lessons on Institution Building from the Palestinian Example



## PILPG

- Choosing A State Structure
- Structuring the Executive
- Designing the Legislative
- Creating a Judiciary System



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### Choosing a State Structure

- Which system best addresses the needs of the population for self-determination, economic well being, and individual human rights?
- On a continuum – Confederal ----- Federal ----- Unitary
- Unitary systems are highly centralized with little powers to local or regional authorities
- Federal systems have parallel lines of authority
- Confederations link two or more pre-existing units to form a common government for limited constitutionally established purposes.



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### Choosing a State Structure – Draft language

- Unitary - [State], with its territory and nation, is an indivisible entity.
- Federal - [State] is a federal state.
- Confederation - State of [Confederation] is a union of [names of joined states]. [Confederation] shall have its own constitution, law and government institutions. All powers not specifically allocated to the Central Government shall be reserved to the States.



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### Choosing a State Structure – Palestinian Case Study

- Which system best addresses the needs of the population for self-determination, economic well being, and individual human rights?
- From the perspective of Palestinian self-determination, the best option appeared to be the creation of a unitary Palestinian state out of 22% of historic Palestine composed of the West Bank and the Gaza Strip.
- However, both the West Bank and the Gaza Strip's economies are entirely tied into Israel's after almost 40 years of occupation. The severance of those economic ties have already caused tremendous dislocation and, a fully independent Palestine walled off from Israel would have to spend the next two decades trying to create separate economic links with a weaker Jordanian and Egyptian economy respectively from the West Bank and the Gaza Strip.
- From the perspective of individual human rights, Palestinians expelled or otherwise displaced from their homes in Israel as well as the 18% of Israel's citizens who are Palestinians, would not be able to necessarily exercise their rights in the 78% which would be defined as an exclusively Jewish state.



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### Choosing a State Structure – Palestinian Case Study

- The Palestinian Response
- A hybrid in which the state of Palestine would be a unitary state but
- With significant and continued economic interaction with Israel, requiring significant overlapping of economic models, regulations, legislation, and foreign arrangements.
- Refugee rights and the question of the equality of Palestinian citizens of Israel would be left to future negotiations.



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## Choosing a State Structure – Palestinian Case Study

- The Palestinian Response
- 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.



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## Choosing a State Structure – Palestinian Case Study

- The Palestinian Response
- 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.



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## Choosing a State Structure – Devolution of Powers

- Along the spectrum of state structures, states may choose to devolve powers in order to meet particular needs including:
- Delineating provincial boundaries;
- Devolving powers asymmetrically;
- Determining which powers will be exercised by the Central Government to provide framework legislation and legislation to harmonize provincial laws;
- Establish institutions to foster cooperation between the Central and provincial governments;
- Describe methods to resolve disputes between the two levels of government;
- Restrict constitutional amendments that alter the fundamental relationship between the Central and provincial governments.



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## Choosing a State Structure – Devolution of Powers

- Asymmetrical Devolution of Powers
- Some states may choose to devolve a disproportionate amount of power to a particular region.
- This may take the form of special autonomy arrangements, in which a region or province is granted a particular status.
- The emphasis is on the region's power to control its own affairs, rather than to participate in national institutions.
- In an asymmetrical federation, some states may be granted different powers, or may possess greater autonomy than others.
- These can extend as far as the ability to sign treaties and to engage in foreign trade.
- These can also include the right of a local assembly to legislate on all matters related to local affairs, granting the entity its own autonomous government with legislative, executive and judiciary branches, and granting the region certain powers during a transitional period before the final status of the region is determined.



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## Choosing a State Structure – Devolution of Powers

- Powers Exercised Exclusively by Central Government
- Generally, the minimal core powers allocated to the central government include:
- Armed services and national security
- Foreign affairs,
- Monetary policy, customs and duties,
- Communication,
- Interregional transportation,
- Debt management,
- Immigration and naturalization,
- Management of the national economy.



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## Choosing a State Structure – Devolution of Powers

- Powers Exercised Exclusively by Provincial Governments
- Generally, typical powers allocated to a provincial government include:
- Education,
- Health,
- Social welfare,
- Police powers,
- Local taxes,
- Regional transportation,
- Sometimes oversight of natural resources extraction, production and management.



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## Choosing a State Structure – Devolution of Powers

- Powers Shared by Central and Provincial Governments
- Health
- Welfare
- Education
- Housing
- Transport and traffic regulations
- Environment management
- Police and prisons administration



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## Choosing a State Structure – Devolution of Powers

- Process for Provincial Governments to Assume Powers over Time
- Criteria may be established in a constitution that must be met before devolution of any particular authority such as
- Requirements relating to the size of the population
- The maturity of the public administration and infrastructure
- The degree of economic development and
- A determination of financial capability.



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## Choosing a State Structure – Devolution of Powers

- Dispute Resolution between Central and Provincial Governments
- Many post-conflict constitutions specify that disputes between the Central Government and provincial governments regarding the constitutionality of the activities, laws, powers, or policies of the other may be brought to a constitutional court for resolution.



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## Devolution of Powers – Palestinian concerns

- States create constitutions that first and foremost reflect their own experiences, including fears and hopes.
- The Arab regional context is one of extraordinarily powerful executive authorities with weak to non-existent provinces, regions, or even legislatures.
- The Palestinian short history of governance with the Palestinian Authority as an administering arm of the Israeli occupation was widely considered to be flawed, corrupted, and without checks and balances.
- So the Palestinian constitution provides for a stronger parliamentary system than is the norm in the Arab world.
- Political authority is only allowed to be exercised through clear legal channels.



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## Devolution of Powers – Palestinian concerns

- Article 158: The law shall regulate 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.



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## Devolution of Powers – Palestinian concerns

- 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 fro providing outstanding services to the Palestinian cause, provided that they do not exceed ten members.





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## Devolution of Powers – Palestinian concerns

- 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.



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## Executive Branch Structures

- Constitution should
  - Define the structure of the executive branch
  - The powers and functions of the executive branch
  - The role of the cabinet or council of ministers
  - The selection of the President/Prime Minister
  - The removal of the President/Prime Minister
  - The term of office
  - Eligibility for office
  - And the oath of office



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## Executive Branch Structures – Three Models

- Presidential – Chief political executive of the federal government elected directly by the populace
  - Ensures separation of powers
  - Allows degree of accountability to voters
  - Serves as a unifying force for the state, particularly of those with significant ethnic or linguistic diversity.



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## Executive Branch Structures – Three Models

- Parliamentary System – Prime Minister serves as the chief executive of the parliamentary government and head of the cabinet. Populace elects the legislature, which in turn elects the Prime Minister.
  - Facilitate the inclusion of all groups within the legislature and the executive because cabinets are usually drawn from members of the elected legislature. This is particularly useful in deeply divided polities.
  - Flexible because coalitions can be formed to change the government on the floor of the legislature without a general election and conversely can enable elections to be called at any time increasing accountability.
  - Accountability because of greater public control and transparency over the policy-making process.
  - More sustainable for new democracies – of the states that became independent after WWII, all the continuously democratic countries have parliamentary systems.



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## Executive Branch Structures – Three Models

- Mixed Presidential/Parliamentary System – President is directly elected by voters while the Cabinet is drawn from and subject to the confidence of the legislature.
  - Advantages include potentially greater consensus requiring the two executive wings to agree before making any big decisions.
  - But great potential for deadlock between the two executive branches.



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## Mixed System – the Palestinian Approach

- Palestinians want to balance traditional reliance on strong central leadership with the more democratic requirements of a parliamentary system.
- 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.
- 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. He shall exercise his competencies and his responsibilities as 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.



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## Designing the Legislature

- The legislature is the main representative body that reflects the political will of the people at the national level.
  - Granted the power to represent the goals and interests of the people
  - To propose legislation
  - To approve legislation



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## Designing the Legislature

- Constitutional responsibilities of the legislature include
  - Electing the Prime Minister (in a Parliamentary or Hybrid System)
  - Passing laws and other administrative measures
  - Passing constitutional amendments
  - Deciding upon the sources and amounts of revenues for the operations of the institutions and international obligations of the state
  - Approving a budget for the institutions of the state
  - Ratifying treaties signed by the Prime Minister
  - Overseeing government administration
  - Overseeing government regulatory and spending powers



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## Designing the Legislature

- Unicameral
  - More efficient and less expensive
  - However, require more checks and balances to ensure that the majority do not overwhelm the minority's concerns.
- Bicameral
  - Most effective way to combine proportional representation with recognition of other internal concerns of local governments, geographic regions, ethnic groups, and underrepresented constituencies.
  - Allow the nation as a whole and individual territories or regions to be represented simultaneously in the legislative process.



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## Designing the Legislature

- Dissolution of the legislature
  - Under extreme circumstances such as states of emergency
  - Linked to votes of no confidence
  - When the legislature fails to meet its responsibilities set forth by the constitution or law
- Legislative Immunity
  - Provisions for protections and immunities for members
  - Including guarantees of the freedom of legislative speech
  - Immunity from legal liability while in office



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## The Legislature in the Palestinian Context

- Unicameral "Representative Council"
  - 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.
  - 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 the 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.



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## The Legislature in the Palestinian Context

- Limits
  - 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 by necessity, and by virtue of a law passed by the Representative Council by a two-thirds majority of its total membership
  - 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.



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## The Legislature in the Palestinian Context

- Dissolution
  - 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 provided for in the Constitution.



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## The Legislature in the Palestinian Context

- Dissolution
  - 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.



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## Creating a Judiciary

- All post-conflict constitutions establish an independent functioning judiciary to uphold the constitution and enforce the laws of the state.
- Provisions about the functioning and structure of the judiciary include:
  - Powers and functions
  - Judicial independence
  - Judicial authority
  - Structure of the judiciary
  - Administration of the judiciary



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## Creating a Judiciary

- An independent judiciary requires
  - The separation of the judiciary from other branches of government
  - Creation of a judicial council to oversee the judiciary and its judges, and to administer it effectively and independently
- Goals of an independent judiciary include
  - Protection of human rights
  - Promotion of political stability
  - Establishment of a healthy economy
  - Ensuring equal justice



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## Creating a Judiciary

- Constitutions usually specify when judicial decisions are binding upon other branches of government
- Explain the jurisdiction of each court and which individuals, institutions, or agencies have standing to bring cases to the various courts
- Provide the roles of its courts
- Specify how the courts work in conjunction with other government bodies and agencies including how the legislature is allowed to create specialized courts.



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## Creating a Judiciary

- Structure of the Judiciary
  - Some constitutions provide for the creation of specialized courts
  - Some leave the creation of courts, other than the Supreme Court and the Constitutional Court, to the legislature
    - This includes the role and responsibility of the courts
    - The existence of national, local, and provincial courts
    - The independence of the courts from other government agencies, organizations, and individuals
    - The binding effect of court decisions
    - An enumeration of some or all of the courts
    - Authority to issue decisions on civil and criminal law and to review administrative decisions.
    - The need for an impartial and independent judiciary



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## Creating a Judiciary

- Constitutional Court
  - Critical to ensure judicial independence and to provide a mechanism for upholding and enforcing the constitution.
  - Has the responsibility to decide upon
    - The constitutionality of legislative and executive acts
    - Failure to implement the constitution
    - Constitutional disputes
    - Constitutional amendments



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## Creating a Judiciary

- Supreme Court
  - Acts as the states' highest appellate court
  - States without a constitutional court also delegate constitutional review to the Supreme Court
  - Decisions are generally final and binding upon agencies, government entities, and individuals



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## Creating a Judiciary in the Palestinian Constitution

- 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.
- Article 16: 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.



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## Creating a Judiciary in the Palestinian Constitution

- 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.
- 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.



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## Creating a Judiciary in the Palestinian Constitution

- 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.