Submission by Markus Böckenförde / bockenfordem@ceu.edu

A) Public Participation / Referendum

(1) Public Participation in democratic Constitution Making Processes includes two components: giving the people a voice and giving the people a vote. While the former refers to the active involvement of the people in the process, the latter provides the people with a decisive element either at the beginning of the process (through the election of the constituent assembly like in South Africa or Tunesia and / or with a referendum at the end of the process. As the drafters of the interim constitution were appointed and not elected, the only remaining option to giving the people a vote is by referendum.

(2) One may wonder whether an interim constitution require a people's vote at all, as it is meant to be a provisional document to temporarily overcome an uncommon situation in a difficult context. However, paras 5 and 6 of the preamble are explicit about the centre-stage role of the people in the process. Not only do they praise the process as 'open to broad popular dialogue' [...] 'from its first moments' making the text 'the fruit of genuine participation', which is a commitment to a strong voice of the people, they also consider the people as 'the decision-makers', thereby implicitly requiring a referendum already in the preamble.

(3) A referendum at the end of a constitution-making process has become a common feature in recent times. Yet, conventional referenda come with various limitations as they are of a binary nature which might not always be an adequate way to legitimate the 'supreme law of the land'. Art. 162 requires only the majority [IDEA][1] of the valid votes.

A definition of what a 'valid vote' is, is missing. Who is entitled to vote? Ultimately this question would probably require a definition of nationality and citizenship [IDEA][2], whose meaning is yet to be defined by law (Art. 6). The referendum also doesn't require a quorum for its validity, meaning the participation of a certain number of registered voters in the referendum. Such a quorum is a strong tool for the opposition as it can influence the validity of the referendum by simply staying at home (the Tunisian Constitution of 2022 was approved by 95,6% yet, the turnout was at ca. 30% [no threshold was included]). In the 2010 constitutional referendum in Kenya, for example, 20% of the registered voters in at least half of the country's 47 counties had to participate.

Recommendation: Consider whether a certain type of quorum for the referendum might be a meaningful tool for a truly comprehensive support of the Interim Constitution.

[1] The ASI translation uses the term ‚plurality' which could imply that certain segments of the society need to agree.
[2] Worth noting, ASI uses the less legalistic term nationality in its translation.

Recommendation: To guarantee a 'plural' support for the constitution, one may also consider whether certain minority groups need to approve the constitution by a majority vote, thereby requiring multiple majorities (next to a general majority).

Lastly, in order to overcome a binary yes/no vote, one may consider offering several options for the most controversial issues. Though limits are set due to the complexity of such a process (some scholars suggest having a provision by provision or at least chapter by chapter vote, which I consider as unfeasible as a constitution is often a holistic document of a compromise), the constitutional referendum in Benin 1990 provides a valuable and successful experience: people were asked in the referendum not only to vote on the approval of the constitution, but also had to decide about the two most contentious issues in the negotiations: (a) whether there should be a presidential or semi-presidential system; (b) whether there should be an age limitation for running for president. The low percentage of invalid votes demonstrated that such a process was manageable and well understood by the voters.

Recommendation: One may consider whether the most controversial aspects of the Interim Constitution might be also decided by referendum, going beyond a binary yes/no voting

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B Transitional Provisions

Art. 157 seems to clarify that existing legislation does not become *ipso iure* invalid through the promulgation of the interim constitution. It thereby aims to provide clarity and legal certainty. However, as the legislation's validity depends on its constitutionality this aim is hardly achieved. I assume the Constitutional Court needs to declare an existing law unconstitutional (and does this authority also apply to the Supreme Constitutional Court until the Constitutional Court is established?) If so, is the respective legislation invalid *ex tunc* (unconstitutionality applies retrospectively upon the interim constitution coming into force) or *ex nunc* (unconstitutionality applies once the CC has decided)?

If legal certainty is the priority, one option would be to stipulate that legislation inconsistent with the interim constitution (or only parts thereof) remains in force until it is adapted to the interim constitution, but not beyond a specified date. This would enable the new legislature to adjust the laws accordingly within a certain timeframe.

Another issue that remains unclear to me is the legal status of the 'National Charter' in relation to the interim constitution. Paras. 10/11 of the Preamble reiterate the status of the PLO as determined in Art. 11 (including all its ambiguities), but also state that the PLO 'shall continue to perform its struggle-related duties in accordance with the National Charter'. Does this mean that the PLO is not bound by the interim constitution, and is the National Charter therefore superior to it?

Recommendation: One may consider to be more explicit and clearer in determining how existing documents / laws maintain their validity.

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C Judiciary

(1) Clarification: laws complementary to the Constitution & Judiciary

Art. 109 (3) stipulates that *the laws complementary to the Constitution* (elsewhere labelled as organic laws) shall apply for: the laws organizing general elections, political parties, the judicial authority, the Constitutional Court law, the law organizing the general budget, and the laws organizing independent constitutional institutions.

However, within the pertinent provisions reference to *laws complementary to the Constitution* is only made in Art. 49 (3) [Political Parties]; Art. 54 and Art. 101 [electoral law; election / size of the House]; Art. 138; 141; 142 [Constitutional Court].

Chapter six (Judicial Authority) only generally refers to 'the law' or the 'Judicial Authority Law', but never to a *law complementary to the Constitution*. This inconsistency should be fixed (as well as with regard to general budget laws and laws organizing independent constitutional institutions).

Recommendation: one may be more coherent in determining which laws should be *laws complementary to the Constitution*. What is enumerated in Art. 109(3) in general terms should be reflected in the specific chapters in a consistent manner (compare chapter on judiciary and chapter on constitutional court).

(2) One may reconsider whether the composition of the High Judicial Council (HJC) should be left to the legislature (rather than addressing it in the Constitution). As the HJC appoints three members of the Constitutional Court (CC), the CC cannot become operational without having agreed on the HJC law (which may require a 2/3 majority). In Tunisia, a similar setting caused a severe delay in the composition of the CC in the first place (and due to subsequent disagreement on another end, the CC was never established).

Recommendation: One may consider to be more explicit with regard to the composition of the HJC

(3) According to Art. 124 (2) being a member of a political party disqualifies a person to be appointed as a judge. I doubt that this is feasible as judges might not be apolitical subjects (one might say that they must not exercise any official function in a political party).

Recommendation: One may reconsider whether already a (passive) membership to a political party should disqualify a person to become a judge.

(4) The relation between the Judiciary and the Constitutional Court is unclear. As the structure of the interim constitution indicates by granting the CC an own chapter, the CC is separated from the Judiciary. Art. 120 (1) indicates that it is the task of the Judiciary to 'ensure the supremacy of the constitution'. This may indicate that there is no centralized constitutional review, as it is generally the task of a CC to be the exclusive guardian of the constitution. In this context it is also worth noting that neither chapter 6 nor chapter 7 includes a *referral proceeding* (if, during proceedings in progress before an ordinary court it is claimed that a

legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter is to be referred to the CC) before the CC.

Recommendation: One may be more specific in clarifying the interrelation between the Judiciary and the Constitutional Court.

(5) Art. 142 addresses the Jurisdiction of the CC, but is silent on which institution / individual can bring a case.

Recommendation: One may be more explicit in determining the access to the CC for each of the CC's authorities.

(6) Art. 142 (4) requires further explanation on how such a situation may occur as it implies that one and the same matter can be submitted to two different institutions at the same time. At least from my German background, such a proliferation of court proceeding is rather unusual.

(7) One may consider addressing the legal qualification for CC-judges already in the Constitution.

(8) The appointment procedure of CC judges is very similar to the one of the CC in the 2014 Tunisian Constitution. The CC in Tunisia never saw the light of the day as the House couldn't agree on its candidates. One may consider including that at least one candidate must come from the opposition.

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D Presidential Term Limits and Constitutional Amendments

(1) Contextualization: in Latin America and on the African Continent, the most contested provision is the one limiting the terms of office of the President. This partly depends on the fact that in these regions (semi-) presidential systems of government prevail. In both regions, imperial presidents for life are rather the rule than the exception.

In recent years presidential term limit rules often haven't been simply ignored and disrespected, but rather circumvented in a legalistic and formalistic correct manner. As a result, constitutional designers attempted to make presidential term limit provisions 'watertight' against abusive interpretations.

To that extent, Art. 74 (2) of the interim constitution is quite straight forward; it explicitly limits also non-consecutive terms and refers to individual persons from being prevented for running more often during their lifetime. This inclusion makes it more difficult for acrobatic judicial interpretations to reset the clock of counting term limits after constitutional amendments / replacements.

(2) The importance of respect for presidential term limits is further expressed in Art. 156 that prohibits amending the number of presidential terms under any circumstances (eternity clause). Next to the fact that including 'eternity clauses' in *interim* constitutions is telling with regard to the drafters intention of the durability of the interim document, this provision contains two flaws: (a) it doesn't address the duration of each term (5 years), allowing a president to initiate a constitutional amendment that doesn't extent the number of terms, but it length; (b) it doesn't protect Art. 156 itself from being amended. In a two-step procedure, one could first remove Art. 156 by amendment and then extend the number of terms.

(3) From an empirical perspective, protecting presidential term limits through eternity clauses -a design tool that is almost exclusively applied in civil law countries, but not in common law countries- hadn't been overly successful as constitutional *amendments* are then often substituted by *constitutional replacements* (as the constituent power is not bound by eternity clauses). What one therefore might wat to include as an additional protection of the term limit provision is a clause that doesn't prohibit the amendment of term limit clauses but indicates that any amendment to them doesn't apply to the incumbent president. Another option is to include the respect for presidential term limits in the oath of office, as has been done in Mauretania:

"I swear by Allah the Unique, not to take or support at all, directly or indirectly, an initiative that could lead to the revision of constitutional provisions related to the duration of the presidential mandate and to the regime of its renewal, specified in Articles 26 and 28 of this Constitution."

In deeply religious societies such a provision may add additional social pressure in respecting term limits. Though highly speculative, some analysts claim that the president in Mauretania refrained from running for a third term after long debates and strong pressure from his own party also due to that oath of office….

Recommendation: If there is a strong interest in increasing the protection of presidential term limits in the Interim Constitution, one may consider to include some additional parchment barriers.

Annex: David Carroll, Expert on Democracy, Democratic Institutions, and Elections at the Carter Center

David Caroll participated in the discussions surrounding the draft interim Constitution and offers these additional notes to further support the development of a constitutional framework that strengthens institutional legitimacy, accountability, and public trust over the long term.

1. Inclusivity of the Drafting Process and Public Legitimacy. The process through which a constitution is developed is central to its legitimacy. Concerns have been raised regarding the inclusivity of the drafting process including the extent to which diverse political actors, civil society, and the broader public have been meaningfully engaged. In addition, the proposed mechanisms for ratification, including reliance on a referendum model, require careful consideration, especially in the current political environment and the barriers to conducting a referendum. Public trust in both the process and its outcomes depends on transparency, inclusivity, and clarity regarding how public input is incorporated.

2. Concentration of Executive Authority. The draft constitution reflects a significant concentration of authority within the executive branch, which, as the main commentary indicates, is likely in response to the current political realities. However, it is important to consider the dangers of embedding such a concentration of power within constitutional text, which risks institutionalizing an imbalance that may persist beyond the interim period. Constitutions, including interim frameworks, serve both to reflect existing power arrangements as well as to shape future governance trajectories. As such, consideration should be given to strengthening provisions that ensure meaningful checks and balances, including clearer limitations on executive authority and stronger oversight roles for legislative and judicial bodies.

3. Institutional Preconditions and Judicial Independence. The effectiveness of any constitutional framework depends on the existence and functioning of key institutions. The current context raises concerns regarding the capacity and independence of several institutions on which the constitution relies, most notably the judiciary. A fully independent and impartial judiciary is essential for constitutional interpretation, dispute resolution, and the protection of rights. Where such institutional foundations are not yet firmly established, there is a risk that constitutional provisions may not be implemented as intended.

4. Appointment Mechanisms and Supermajority Requirements. The draft currently provides for the appointment of key institutions, including the Central Elections Commission, through presidential decree with legislative approval by a simple majority. Given the importance of such bodies for electoral integrity and public confidence, stronger safeguards should be considered to foster broad political confidence, e.g., through appointment mechanisms that require broad political consensus. In some contexts, this is achieved through supermajority approval thresholds and/or structured consultation with major political stakeholders. In this regard, consideration could be given to revising Article 149.2 as follows:

Current draft (Art. 149.2):
The President and members of the Central Elections Commission are appointed by a decree from

the President of the State of Palestine and the approval of the House of Representatives for a term of four (4) years, renewable for one term only.

Suggested amendment:
The President and members of the Central Elections Commission are appointed by a decree from the President of the State of Palestine, based on broad consultation with contesting political parties, and subject to approval by a qualified majority (e.g., two-thirds or three-quarters) of the members of the House of Representatives for a term of four (4) years, renewable for one term only.

5. Gender Equality and Representation. The draft constitution includes important references to the role and representation of women, including in Articles 8, 27, 49, and 54. These provisions provide a valuable foundation and signal a commitment to ensuring the equitable participation of women in public life. At the same time, while the current formulation in Article 8.2 refers to "fair/equitable" representation of women, the constitutional language also could allow steps to advance further toward full equality in women's participation, as conditions allow. Related, it is worth noting the important role that could be played by setting temporary gender quotas to ensure appropriate representation of women.

PRAN

The draft Interim Constitution structurally aligns the Palestinian electoral framework with binding public international law. By explicitly affirming the legal supremacy of ratified international human rights treaties—notably the International Covenant on Civil and Political Rights (ICCPR)—the draft shifts the national baseline from aspirational democratic "standards" to enforceable international "obligations". Consequently, it successfully codifies paramount electoral guarantees, including the mandate for genuine and periodic elections, universal suffrage, and the right to independent scrutiny, establishing a firm constitutional foundation to safeguard the free expression of the will of the electors. Notwithstanding this strong foundation, a select number of provisions remain non-compliant with these binding international obligations.

1. Protection of Non-Governmental Organisations (Article 52)

Article 52(1) establishes that political parties and professional syndicates may only be dissolved by a judicial ruling. Conversely, Article 52(2) stipulates that civil society institutions and non-governmental organizations (NGOs) may be dissolved or suspended "in accordance with the law," conspicuously omitting the explicit safeguard of prior judicial adjudication.

This leaves NGOs and civil society institutions vulnerable to dissolution or suspension via unilateral administrative or executive action. Under Article 22 of the International Covenant on Civil and Political Rights (ICCPR), the freedom of association is a fundamental right. United Nations Human Rights Council (HRC) jurisprudence (e.g., A/HRC/20/27) explicitly dictates that the suspension or involuntary dissolution of associations should be sanctioned exclusively by an impartial and independent court. By failing to guarantee judicial oversight for the dissolution of NGOs, the current draft does not fully comply with this international standard.

Recommendation: Consider harmonizing the protections in Article 52(2) with those in Article 52(1) to ensure that any dissolution or suspension of civil society institutions and NGOs is subject to mandatory judicial review, thereby aligning the framework with ICCPR obligations regarding freedom of association.

2. Presidential Candidacy (Article 75)

Article 75(1) restricts presidential candidacy to individuals "born to two Palestinian parents," imposes a lifetime ban on individuals convicted of an offense involving a "breach to honor or trust," and mandates that dual nationals submit a written pledge to renounce any other nationality upon election.

The Human Rights Committee (CCPR) General Comment No. 25 strictly prohibits restricting the right to stand for election based on "descent". This discriminatory dual-parentage requirement is compounded by the fact that the draft defers the establishment of Palestinian nationality to subsequent legislation (Article 6), creating severe legal ambiguity regarding who currently qualifies as a Palestinian.

The ICCPR mandates that candidacy restrictions be based exclusively on "objective and reasonable criteria" established by law. The concept of a "breach to honor or trust" lacks a precise definition, thereby delegating eligibility to the discretion of the judiciary. Furthermore, a blanket, lifetime ban on rehabilitated individuals constitutes a disproportionate and unreasonable restriction under established CCPR jurisprudence.

The unconditional mandate to renounce a second nationality risks disenfranchising individuals whose secondary states legally prohibit renunciation. Also, the draft lacks clarity on the consequences—such as a presidential recall or the triggering of a vacancy—should a winning candidate be unable to fulfill their renunciation.

Recommendation: Consider amending Article 75(1) to eliminate descent-based prerequisites and vaguely defined moral disqualifications. Explore alternative declarations of exclusive allegiance for dual nationals.

3. Presidential Vacancy, Succession, and Institutional Interdependency (Article 79)

The draft Interim Constitution stipulates that the President of the Constitutional Court shall temporarily assume the presidency in the event of a vacancy if the House of Representatives is not standing. Concurrently, Articles 87(8) and 139 empower the incumbent President to appoint the President of the Constitutional Court. This succession mechanism raises concerns regarding political and electoral legitimacy. The Human Rights Committee (CCPR), in General Comment No. 25, clarifies this obligation by stating that anyone exercising governmental power must be "accountable through the electoral process for their exercise of that power". Entrusting the adjudication of presidential incapacity and the potential succession to the presidency to the President of the Constitutional Court compromises the core standard that government authority must reflect the free expression of the will of the electors.

Recommendation: Consider amending Article 79 to establish an alternative line of temporary executive succession that structurally bypasses the Constitutional Court.

4. Powers of Central Election Commission (Article 149)

Article 149 establishes the Central Elections Commission (CEC) with financial and administrative independence to administer elections. However, the draft omits explicit regulatory powers of the CEC, whereas Article 92(1) vests the general power to issue executive regulations and bylaws exclusively within the Government. Subjecting the electoral regulatory framework to the exclusive discretion of the executive branch risks subordinating the CEC to political interference, thereby compromising ability to fulfil their constitutional duty to deliver democratic elections.

Recommendation: Consider amending Article 149 to explicitly grant the CEC the autonomous regulatory authority to issue binding bylaws.