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What Can Abu Mazin Do?

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(NOTE June 15, 2007): On June 14, 2007, Palestinian President Mahmoud Abbas dismissed the cabinet led by Hamas Prime Minister Isma'il Haniyya. On June 15, he named independent Salam Fayyad as his interim replacement.

European governments joined the United States in rushing to support Abbas. The German Foreign Ministry used the country's position as president of the European Union to state: "The EU Presidency emphatically supports President Abbas' decision, in keeping with the Palestinian Basic Law, to dismiss the government and to appoint a caretaker government for the Palestinian territories" Hamas responded that Abbas had no right to act as he did and that if he wished to dismiss Haniyya, existing ministers (including Haniyya) would continue as caretakers until new ones are approved by the Palestinian parliament.

As the analysis below explains, the German statement is false. The Basic Law is completely unambiguous in backing Hamas's position.

At the same time, Hamas's respect for the law is just as questionable. Hamas's seizure of control of Gaza did not have even the veneer of legality, since it was undertaken by the party's armed wing rather than the security forces it controlled.

The result is likely to be two lawless governments. One will operate under Hamas in Gaza, the other under Fatah in the West Bank (with a non-party figure at its head). Neither will be accountable to Palestinian society or institutions in any way—the parliament cannot meet and other governmental bodies are moribund. Rather than getting an independent state, Palestinians are finding themselves with two failed ones.

But the West Bank government will have some international support. The harsh international sanctions on Palestinian institutions may be lifted and the international community might—out of desperation rather than considered strategy—rush material and diplomatic support to Abbas and Fayyad. The result will be a strange kind of international trusteeship in all but name for the West Bank, headed by two figures who will have to explain their actions to donors but not constituents.

In the analysis below, written last year, I explore the constitutional prerogatives of Abbas under the Palestinian Basic Law and the state of emergency. The analysis makes clear that Palestinian politics has now moved outside of the few legal and constitutional channels that had survived.

When Hamas won a majority of seats in the Palestinian Legislative Council in the January 2006 elections, many observers asked whether President Mahmud Abbas (Abu Mazin), the

popularly elected president from the rival Fatah movement, could prevent Hamas from assuming authority. Once Hamas formed a government, many asked whether Abu Mazin could dismiss or replace it.

These questions are natural. From the United States to Korea to Poland, the first election resulting in an alternation of power provoked questions and debates about the precise meaning of various constitutional clauses and phrases. Despite widespread media commentary concerning gaps and silences in the Palestinian “Basic Law”—the interim constitution for the Palestinian Authority—the document is actually unusually clear on most matters. It is untested, however, and its contents are not widely known. For this reason, there has been considerable confusion about its provisions, aggravated by the tendency of Abu Mazin’s advisors to pressure Hamas by hinting that the president might use constitutional powers that he simply does not have. Existing arrangements give Abu Mazin very few tools to act unilaterally. Almost any change would require either Hamas’s consent or a violation of the Basic Law.

1. Can Abu Mazin dismiss Prime Minister Ismail Haniyya (of Hamas)?

Yes. Article 45 states clearly that the President may “remove or accept the resignation” of the prime minister.

2. How would a new government be formed?

Only with the support of Hamas.

Any new government would have to receive the support of an absolute majority of deputies (not just a majority of those voting) according to Article 67.

Under current circumstances, this would make it impossible to form a government without Hamas’s support. But it would also be impossible right now for Hamas to form a government without the support of other parties. One-third of Hamas deputies cannot vote because they are imprisoned by Israel.

Any new government would thus have to receive support from both Hamas and Fatah to obtain the necessary majority.

3. Who would govern if Abu Mazin dismissed Haniyya and no cabinet obtained a majority?

Under Article 78, Haniyya’s cabinet would continue to serve in a caretaker capacity.

4. Can a technocratic government be formed?

Only if Hamas agreed.

A technocratic government composed of experts (perhaps including some with party affiliations but probably excluding party leaders) has been proposed occasionally as an alternative to a Hamas-led government. Such a cabinet—which might be able to meet Quartet conditions for the resumption of aid to (and engagement with) the Palestinian Authority—could indeed be formed. Yet it could take office only if Hamas deputies in the Legislative Council voted for it. In other words, it might be a way for Hamas and Fatah to compromise, but a technocratic government could not be imposed on Hamas.

5. Can Abu Mazin order early elections?

No. His aides constantly hold out this threat, but the president has no authority to end the term of the Legislative Council early. Much of the Western media coverage has claimed that the Basic Law is ambiguous on the issue. But it is extremely clear and definitive. Article 47 (as amended in 2005) provides that “the term of the Legislative Council is four years from the date of its election.” There is no loophole—under existing constitutional provisions, Abu Mazin has no more basis for early parliamentary elections than President George W. Bush has for ordering new Congressional elections if he does not like the result. Parliamentary elections before 2010 would require that the constitution be amended—which only the Hamas-dominated Legislative Council could do.

6. Can Abu Mazin declare a state of emergency?

Yes. Under Article 110, the President may declare a state of emergency for up to thirty days. After that, it may be renewed after that only with the consent of two-thirds the Legislative Council.

7. What would Abu Mazin be allowed to do under a state of emergency?

Very little without the consent of the Legislative Council, as I make clear below. Under a state of emergency, the cabinet has far stronger claims to special authority than the president. And even if the president tried to take emergency powers himself, the Legislative Council could overturn any of his actions.

8. Can Abu Mazin use a state of emergency to dismiss the Legislative Council?

Absolutely not. Article 113 is clear: “Dissolving the Legislative Council or suspending it during the period of a state of emergency is not permitted.”

In order to prevent Abu Mazin from suspending this article (as the amir of Kuwait did with a similar article in the Kuwaiti constitution), Article 113 specifically states that the Article itself cannot be suspended.

9. Can Abu Mazin call a referendum?

No. He did so once anyway but then cancelled the call.

When leading imprisoned figures from Fatah and Hamas negotiated a common political understanding, Abu Mazin asked that Hamas endorse the “prisoners’ document.” When Hamas hesitated, Abu Mazin issued a decree ordering a referendum on the subject. There was no legal basis for the decree. Its proponents argued that the Basic Law’s silence on the matters of referenda allowed the president to do as he pleased. And they attempted to lessen the gravity of the constitutional violation by declaring the referendum to be “advisory” rather than “binding.”

This remarkably expansive view of presidential authority—that the president may do anything not explicitly prohibited—seems unsupported by the Basic Law, which insists (Article 38) that the president only exercise authority in accordance with its provisions. Further, the referendum depended not simply on the presidency’s authority but also on the cooperation of bodies that did not answer to the president. The decree simply ordered the independent

Central Elections Commission to administer the voting. And a sound election would have required the cooperation of bodies that answered to the Hamas-led government, like the ministry of interior (responsible for security) or the ministry of education (because most polling places are located in schools).

When Hamas and Fatah agreed to a modified version of the “prisoners’ document,” the referendum became superfluous and a constitutional crisis was avoided.

In recent days, however, Abu Mazin has suggested that he may revive the referendum, perhaps this time in support of a technocratic government.

10. Why was the Basic Law written this way?

To restrain the president.

Most of the provisions that tie Abu Mazin’s hands were specifically and consciously inserted into the Basic Law to fill legal gaps exploited by Yasser Arafat. Arafat resisted the Basic Law but finally succumbed to intense domestic and international pressure to sign it in 2002. One year later, the same coalition imposed on him a series of amendments that closed more loopholes, created the position of prime minister, and strengthened the parliament and the cabinet at the president’s expense.

11. Can Abu Mazin disband the Palestinian Authority?

It depends on one’s perspective.

From one point of view, the Palestinian Authority was created by the Oslo Accords, a series of agreements between Israel and the Palestinian Liberation Organization (PLO). Thus the Palestinian Authority could only be dissolved by an Israeli-PLO agreement.

Most Palestinians insist that the Palestinian Authority derives its legitimacy not from Israeli consent but solely from the PLO, whose Executive Committee deputized the Authority to govern in the West Bank and Gaza. According to this view, Abu Mazin—who doubles as PLO chair—could dissolve the Palestinian Authority with the consent of the PLO’s Executive Committee (a body dominated by Fatah). Some Fatah leaders have indeed floated the idea.

Hamas does not accept the authority of the Oslo Accords or the PLO (as presently constituted). It viewed the Palestinian Authority quite warily until it won the elections. But Hamas would still likely resist the dissolution of the Authority and regard the move as a trick to remove the party from power.

Were it integrated into a reconstituted PLO, Hamas’s attitude might change. While Hamas and Fatah have agreed to the principle of bringing Hamas into the PLO, it seems unlikely that they will agree to terms any time soon.

12. Does the Basic Law matter—couldn’t Abu Mazin simply ignore it?

Yes, but he is unlikely to do so both because of his style of leadership and because the costs could be high.

To date, Abu Mazin has led more by coaxing than commanding. There are certainly senior Fatah leaders who do not see the Basic Law as a serious obstacle. Abu Mazin has occasionally echoed their views but has not acted on them consistently.

Since the Basic Law places so many cards in the hands of Hamas, Hamas would probably regard the abrogating the Basic Law (or any fundamental violation of its provisions) as tantamount to a coup or even a declaration of war against the movement.

Thus, while Palestinian governance has rarely shown an inclination to observe all legal niceties, violating the Basic Law would deeply aggravate political conflict between Hamas and Fatah, raising the specter of civil war.

Hamas might retreat in the face of such a challenge—its leaders recognize that they are in a state of political crisis, heading a government that cannot pay salaries to its workers. It has prided itself on refraining from violent confrontation with other Palestinian groups (its record on this count is more ambiguous than its rhetoric, but it has indeed shown genuine self-restraint on many occasions).

Abu Mazin cannot be sure that Hamas would surrender the reins of power it won in an election, and his record of caution suggests he is unlikely to gamble that Hamas would acquiesce in the cancellation of their electoral victory.

UPDATE:

States of Emergency under the Palestinian Basic Law

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The current political crisis in the Palestinian National Authority has led to speculation about the president's authority to declare a state of emergency, dismiss Prime Minister Ismail Haniyya, dissolve the parliament, and/or appoint an emergency or technocratic cabinet. Much of this speculation is badly ill-informed, implying that a state of emergency allows Abu Mazin to call for new elections or appoint a new government. As made clear above, the Basic Law is very clear: the parliament must serve for its full term of four years and no government (or even minister) can serve without the parliament's consent. Nothing in a state of emergency would change these restrictions on presidential authority.

What is the president's authority under a state of emergency? A president may indeed declare a state of emergency for thirty days on his own, but his authority after making such a declaration is limited (actually, as I will make clear below, he may have no additional authority since it is probably the cabinet and not the president that is supposed to exercise emergency powers). The president may not appoint an emergency government without PLC consent (though there is a very dubious and limited legal precedent that suggests otherwise).

Because of the confusion of terms and claims, I am providing a short guide on the "state of emergency" in Palestinian law.

Those who seek refuge in a presidential declaration of a "state of emergency" should be aware that while there is such a thing, it has (in Palestinian eyes) a very shady constitutional history. Further, the authors of the Basic Law, aware of this history, evidently tried to circumscribe it in some fairly serious ways. And they appear to have succeeded.

Historical background

States of emergency in Arab constitutional systems have two parents, neither of them altogether legitimate in the eyes of many in the region: European imperialism and Arab authoritarianism.

European imperialism, when it established direct control over societies in the Arab world, generally did so when those societies were passing through profound political crises—pre-existing regimes were generally weakened by bankruptcy, military defeat, and/or domestic turmoil. When imperial rule was established, it was not merely undemocratic but antidemocratic: any domestic movement toward building democratic procedures and structures was shut down by the imperial power. But if imperial rule was antidemocratic, it was not arbitrary: imperial authorities tended to build (or, more often, add on to preexisting) legal structures. In other words, imperial authorities established clear procedures, laws, and structures. Yet they also built ways around them, generally in response to domestic turmoil or international crisis. The current system of emergency rule in Egypt, for instance, dates back to World War I, when the British authorities declared martial law to allow their military authorities to act unimpeded for the duration of the conflict.

Arab authoritarian rulers generally seized upon these mechanisms and expanded them. Theoretically temporary periods of “martial law” were replaced by nearly permanent “states of emergency.” And the authorities granted to the government were expanded. British martial law in Egypt placed exceptional authority in the hands of a “military governor” who was indeed a military figure; authoritarian Arab rulers have tended to place emergency authority in the hands of a senior political figure (generally the prime minister), ensuring that expanded powers are used to serve broad political (and not narrow security) purposes.

In the Arab world, states of emergency are generally covered in three legal documents: the constitution (which usually makes only limited and skeletal provisions for emergency); an emergency law (a regular piece of legislation that fills in the details left vague in the constitution); and a declaration of a state of emergency (which explains how the legal and constitutional provisions are being exercised).

Declaring a Palestinian State of Emergency

Palestinians have a long history of living under various exceptional legal regimes—British, Jordanian, Egyptian, and Israeli rulers all used emergency powers very extensively. And it should therefore be no surprise that the legal framework of the Palestinian National Authority—such as it exists—reacts very much against that history.

Overall, in the Palestinian case, the legal provisions do not give much guidance on presidential authority under a state of emergency. The matter is covered in Articles 110 to 114 of the Basic Law. These allow the president to declare a state of emergency only under specific circumstances: “When there is a threat to national security caused by war, invasion, armed insurrection, or at a time of natural disaster for a period not to exceed thirty days.” The declaration of the emergency “must state its purpose, the territory to which it applies, and its duration.” It may be renewed only with PLC approval, and all actions taken under the state of emergency are subject to PLC oversight.

There is no other legislation (or “emergency law”) to put meat on these few constitutional bones. In fact, the only relevant legislation on the books was explicitly repealed by the Basic Law, demonstrating that it was written in reaction against British, Egyptian, Jordanian, and Israeli misrule rather than to enable Palestinian rulers. Article 114 states “All provisions which regulate emergency states implemented in Palestine prior the implementation of this Basic Law shall be canceled, to include the mandate civil defense (Emergency) regulations issued in 1945.”

Despite all this unpromising background, it does seem fairly clear that Abu Mazin as president can declare a state of emergency for 30 days. Any renewal would require a positive vote by the Legislative Council. At present, with Israeli troops in areas under Palestinian jurisdiction in the West Bank and Gaza, the Basic Law’s condition of invasion seems to have been met.

Abu Mazin might also cite ongoing intra-Palestinian violence as justifying a declaration of emergency, though since his own party is often seen as instigating much of that violence, such a move would require an unhealthy measure of chutzpah.

Authorities under a State of Emergency

What would a state of emergency accomplish? Much less than its enthusiasts might hope. Two actions are explicitly barred:

- Dissolving the PLC
- Revoking or suspending the right of those detained to an attorney

Other provisions make fairly clear that the president cannot use the emergency to form a new government, as explained above.

So what can be done? The Basic Law's wording anticipates two kinds of measures: detentions and restrictions on rights and freedoms.

With regard to detentions, the Basic Law requires that they be "shall be reviewed by the Attorney General, or by the concerned court during a period not exceeding fifteen (15) days from the date of detention;" in addition, as mentioned above, the detained may appoint an attorney.

Basic rights and freedoms may not be restricted under a state of emergency "except to the level that is necessary to achieve the objective stated in the decree that announces the state of emergency."

Implicitly, then, an appropriate authority may order arrests and issue decrees so long as they fall within these bounds and are clearly aimed to address the situation that is specified in the declaration of an emergency.

The president does have the authority to issue decrees with the force of law without declaring a state of emergency if the PLC is not in session, but only if the matter admits of no delay. He must submit such decree-laws to the parliament at its next meeting (Article 43).

A Dubious Precedent for an Emergency Government

The Basic Law has no provision for an "emergency government" if that means a cabinet appointed by the president without the approval of the Legislative Council. He can dismiss the current prime minister whether there is an emergency or not, but the dismissed cabinet would continue to serve until a new one received parliamentary approval. Nothing in the emergency provisions suggests any exception.

The Basic Law provides (Article 78) that a government that completes its term continues as a caretaker until replaced. The exact meaning of "completes its term" seems unclear in English, since the cabinet does not serve for a specific term. But the Arabic is far clearer; it refers to the government's "*wilaya*"--i.e. its authority to govern--having ended. This phrasing would cover a cabinet dismissed by the president.

There is a clear and categorical requirement that any cabinet (and indeed, any individual minister) receive a vote of confidence from the Council before exercising authority. Article 79 insists that new ministers may not assume their duties until they have received the confidence of the parliament. This was inserted because earlier (in 2002), Arafat had appointed a government which he allowed to operate for months before having the parliament vote on it. Reformers wanted to prevent the president from appointing acting ministers.

There is, however, a fairly dubious historical precedent for an emergency government. Three years ago, Abu Mazin served as prime minister under the presidency of Yasser Arafat. Abu

Mazin resigned as prime minister effective September 6, 2003. He was asked to stay on in a caretaker capacity, which he did.

Arafat then turned to the speaker of the Legislative Council, Ahmad Qurei, to form a government. But this proved to be a very difficult task because of conflicting pressures from the president (who wanted to regain some of the authority he had lost to the prime minister) and reformers in the parliament (who saw some potential ministers as corrupt), Qurei also tried to balance factions in Fatah but could only do so by appointing more ministers than was allowed. He also tried to leverage the US, asking for guarantees that the Israelis would not harm Arafat. By the time his legal period was up, Qurei had no cabinet to present to the Council.

So on October 5, 2003, Arafat declared a state of emergency for 30 days. The declaration was unconstitutionally vague and it also took the illegal step of appointing Qurei head of an emergency government.

On October 30, while the state of emergency was still in effect (and the apparently illegal government in office), Arafat formally charged Qurei with assembling a regular government to replace the emergency body. Qurei could not finish that task until November 12, at which point the Legislative Council allowed the government to take office. This was after the state of emergency expired (it only lasted 30 days from October 5), so there was a legal vacuum for about a week.

Who Exercises Emergency Powers?

An odd lacuna in the constitutional provisions is the failure to specify who exercises emergency authority. While almost all discussions of states of emergency in the Palestinian context are based on the assumption that the president will exercise any emergency powers, there is a far stronger argument for designating the cabinet or the prime minister instead. Allowing the official charged with declaring the emergency to exercise loosely regulated emergency authorities raises clear problems with conflict of interest and separation of powers.

More important, the text of the Basic Law clearly favors the cabinet and prime minister over the parliament in wording that is just short of definitive: the cabinet, not the president is the supreme executive and administrative body in the country (Article 63). The cabinet, not the president, is given responsibility for preserving public order and internal security (Article 69). The president is enjoined to exercise his authority only in accordance with the provisions of the Basic Law (Article 38) which nowhere suggest any emergency authority.

Thus, the president can declare an emergency but once he does so, he would seem to hand all resulting authority to the cabinet. It is difficult to understand how the president can claim emergency authority in light of these provisions. Yet absent any clear legal text that explicitly prohibits him from assigning emergency authority to himself, Abu Mazin might issue a decree (assuming he does proclaim a state of emergency) that resolves the matter in his favor.

Unlike the PNA's previous experience with a state of emergency (the dubious precedent referred to above), this time there is likely to be vocal and vigilant opposition to the move. That may force the current president to pay closer attention to legal niceties than his predecessor who ignored them. A declaration of a state of emergency is therefore likely to be more detailed than Arafat's unconstitutionally laconic 2003 decree and might well spell out precisely what authorities the president is claiming and how they will be exercised.

All the details in the world will not prevent two limitations on emergency authority. First, the PLC can overturn any action taken (presumably by a simple majority, though it should be noted that Hamas may have difficulties mustering votes with so many deputies in jail). Second, any extension of the state of emergency beyond thirty days requires PLC approval—

and this time it is Abu Mazin who would have trouble mustering the votes, since he would need 2/3 of all PLC members. It has been PLC practice since the first time deputies were arrested by Israel (before the current intifada) to count imprisoned deputies in the denominator but not in the numerator—in other words, being in prison is equivalent to abstaining on any motion brought before the full chamber.

The courts are not likely to be much of an actor in any disputes over emergency powers. First, Arab courts (and indeed most courts throughout the world) have been extremely deferential to the executive when it comes to declaring a state of emergency, generally treating it as an “act of sovereignty” not subject to judicial review. There have been some Arab courts (in Egypt, Jordan, and, of all places, Syria) that have insisted that even if they cannot review the declaration of the state of emergency, they can invalidate actions taken based on the emergency if there is no reasonable connection between the declared emergency and the action taken. But Palestinian courts have not been particularly assertive nor are they likely to be sympathetic to challenges from Hamas.