



Strasbourg, 6 March 2009

Opinion no. 504/2008

CDL(2009)010*
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE LAW
ON THE HIGH CONSTITUTIONAL COURT
OF THE PALESTINIAN NATIONAL AUTHORITY**

On the basis of comments by:
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1. During the Seminar "Models of Constitutional Jurisdiction", organised in cooperation with the Ministry of Justice of the Palestinian National Authority (Ramallah, 25-26 October 2008), the Minister of Justice, Mr. Ali Khashan, requested the Venice Commission to give an opinion on the Law of the High Constitutional Court (No 3) 2006 (CDL(2009)009), issued on 17 February 2006 in by the President of the Palestinian National Authority (hereafter, the PNA). This Law has not yet been implemented.

2. The Commission invited Messrs Paczolay and Pinelli present at the seminar, as well as Messrs Bradley to act as rapporteurs in this issue.

3. The request and the seminar are to be seen in the context of the wider programme co-operation between the Arab Constitutional Courts and Councils and the Venice Commission, funded by the Government of Norway. On 15 May 2008, the Committee of Ministers of the Council of Europe had granted special co-operation status to the Palestinian National Authority, enabling it to request opinions from the Commission.

4. The present opinion has been adopted by the Venice Commission at its ... Plenary Session on

Constitutional basis

5. Two translations of the Law are available, CDL(2009)009 and another version available at the site of the Bir Zeit University. Neither translation is free of difficulty, and where necessary the translation that appears more satisfactory has been used. A few points made in the present opinion refer to problems in the original text in Arabic, which seem to have been 'settled' in the translation, which thus might have departed from the original text.

6. A draft for a "[Constitution of the State of Palestine](#)" has not entered into force. While this draft refers in numerous articles to the Constitutional Court and devotes it a separate chapter, the constitution in force is the Basic Law of 2003 (as amended in 2005, CDL(2009)008), which refers to the Constitutional Court in a more limited way in three articles only (Articles 37, 103 and 104, of which the latter is a transitional provision). Article 103 of the Basic Law provides that:

- "1. A High Constitutional Court shall be established by law to consider:
 - (a) The constitutionality of laws, regulations, and other enacted rules.
 - (b) The interpretation of the Basic Law and legislation.
 - (c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction.
2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings."

7. Until the Constitutional Court is established, Article 104 provides for the Supreme Court to undertake on a temporary basis all the functions assigned to the High Constitutional Court. It must however be doubtful whether this is a satisfactory way of enabling constitutional questions to be decided, even as an interim measure. The matter has a current significance in that by Article 37 of the Basic Law the High Constitutional Court is required to rule on disputes as to the legal competence to hold office of the President of the Palestine National Authority.

8. The Basic Law thus leaves a very wide scope to the Law on the Constitutional Court. Given the key position of the Constitutional Court also as an arbiter within the system of state powers, it seems advisable that specific guarantees for the Court be included in the Basic Law itself once the political conditions for a constitutional amendment come into existence. Until then, the Law on the Constitutional Court fulfils this function.

Formation of the court

9. Article 1 provides for the Court to be an independent judicial body (by Article 6, no member of the Court may occupy any other position or have business or political activities). It will comprise the President, a deputy President and seven other judges. In its judicial functions, at least the President (or deputy President) and six other judges must sit (Article 2). To be appointed, an individual must be aged at least 40 years and must meet one of the following qualifications

(a) to be or have been a member of the High Court of Justice for at least five continuous years

(b) to be a current president of the Courts of Appeal who has been in office for at least seven years

(c) to be or have been a law professor for at least five years at a Palestinian university (or recognised university) or to have been an associate law professor for at least ten years

(d) to be a lawyer who has practised for at least fifteen years (Article 4).

10. The Arabic text of Article 2 refers erroneously to the formation of the “Commission”. This should be read as the formation of the “Court”.

11. These provisions on qualifications appear satisfactory, except that (1) it is difficult to see a reason for the difference in length of service requirement between members of the High Court and Presidents of the Courts of Appeal; (2) the basis on which universities shall be recognised for the purposes of qualification (c) is not stated; (3) qualification (d) does not state whether the lawyer must have practised in Palestine or may have practised in other legal systems. The need to include associate law professors could be reviewed.

12. Article 5 is not very clear. It may be that there is here a problem of drafting or translation. This provision appears to distinguish between the initial formation of the Court and subsequent appointment of members of the Court. It seems that Article 5(2) sets out the regular procedure for appointment of judges – by the President of the PNA upon recommendation of the Constitutional Court itself. Article 5(1) seems to be a transitional provision for the first composition and provides that the judges shall be appointed by the President of the PNA in consultation with the High Judicial Council and the Minister of Justice.

13. The Palestinian Legislative Council is excluded from the procedure of appointment. In countries with specialised Constitutional Courts, Parliament is often involved in the appointment of judges. This is done to ensure a balanced composition of the Court, which to the extent possible should reflect various tendencies in of society (see the Venice Commission’s [Report on the Composition of Constitutional Courts, Science and Technique of Democracy, no. 20](#)). It is true that an appointment by the executive is more usual in countries with a common law background (e.g. Cyprus). Given that the Constitutional Court is to decide on a wide range of issues including very sensitive ones, its **composition, especially the first one, has to be established in a way which results in the trust of society in the Court as a neutral arbiter.**

14. In this respect **the “consultation with the High Judicial Council” will be of utmost importance and this consultation and the subsequent appointment of judges needs to be made in full transparency.**

15. By Article 8, the General Assembly of the Court comprises all its members and has competence to make ‘interior regulations’ on various subjects which are to complement the legislation. It is not clear whether these regulations are intended to be rules of procedure which parties to proceedings must observe, but possibly ‘rules of court’ would be a better

translation. By Article 8, **the Assembly must be consulted before laws are made that affect the Court, this is a useful precaution.** Article 10(2) provides for decisions to be made by absolute majority of those attending and (in effect) gives the President a casting vote if the votes are equally divided. However, a different rule applies when the voting is secret (on an equality of votes, the resolution is treated as defeated). The rules of procedure should state when voting shall be in secret. By Article 52, the 'interior regulations' (rules of court) are to be issued by the President of the Court once they have been ratified by absolute majority of the Assembly.

16. By Article 11, what can be called an **Urgency Committee of the Assembly** may be appointed, comprising the President and two or more other members. In the Arabic text, title of Article 11 should read "Formation of the Temporary Committee".

17. The powers of the Committee are wide, but the Committee's decisions must be submitted to the next meeting of the Assembly, when they must be approved by an absolute majority if they are to remain effective. The provision is *a priori* understandable given the peculiar situation of the Palestinian National authority, especially the fragmentation of the country and the isolation of the Gaza strip. However, the transfer of the authority of a Court of nine judges (with a quorum of six) to a panel of three judges remains questionable. Articles 16(1), 17(2) and 18 even seem to presuppose the permanent existence of the "provisional" (in another translation "temporary") committee because it is competent to decide in cases other than those envisaged in Article 11 itself (court holidays). **Before such a committee be established other means of communication should be exhausted**, e.g. video or even telephonic conferences. The rules of procedure should make it clear that the emergency procedure cannot be used to discard judges from decision making. The competencies of the provisional committee in Articles 16(1), 17(2) and 18 should be read as those of the Assembly of the Court during the time of its regular activity (out of court holidays).

Rights and duties of the members

18. By Article 12, members of the Court are subject to the Law of the Judiciary as regards recusal, inability or dismissal, independence, secondment etc. This is probably satisfactory. However, it would be helpful to have seen a translation of the Law of the Judiciary, since in many European countries special provision is made for the members of the Constitutional Court (e.g. in respect of term of office, and re-appointment) that does not apply to the ordinary judiciary.

19. Article 15 applies the Law on Civil and Commercial Procedure to the Court, in a way that appears to have the effect of enabling decisions as to recusal of a judge of the Court to be made in the same ways as decisions as to the dismissal of a judge. Certainly, dismissal of a judge from the Court is more serious than recusal of a judge from a particular case. But the text of the Law on Civil and Commercial Procedure has not been supplied, and there may be a translation difficulty here. **A dismissal of a judge should always involve a decision of the High Council of the Judiciary.**

20. Article 16 makes complex provision for enabling other members of the Court to deal with allegations against one or more members that may have disciplinary consequences. It is rather difficult to see how in all cases, particularly if more than one judge is affected, a proper decision could be given by other members of the Court. Instead of transferring the case to the small provisional committee (see above under Article 11), there may be a **need for a wider body taking disciplinary measures** like the Assembly excluding the person(s) concerned, maybe reinforced by the addition of extra persons – for example, senior members of the legal profession or of the judiciary.

21. Articles 17-20 provide for procedure in the event of criminal accusations against a member of the Court. Article 21 gives a list of events that terminate a judge's membership of the Court. This termination may in some circumstances be automatic (e.g. death) but in general a decision to terminate is made when the General Assembly of the Court requests the President of the PNA to issue a decision to this effect.

22. Article 23 provides for a **deemed resignation** to have taken place when a judge is absent or abstains from work for 15 continuous days without a reason acceptable to the President of the Court. The drafting of this provision may not provide sufficient safeguards against application of this 'deemed resignation' rule in doubtful or marginal cases. An **appeal to the Plenary of the Court should be available**.

Jurisdiction of the Court

23. The jurisdiction of the Court is stated in very broad terms in Article 24 and again there may be problems of translation. In particular as concerns point 3, what is meant by conflicts of jurisdiction 'between the judicial authorities and administrative authorities with judicial jurisdiction'. Are there executive bodies vested with judicial functions? Does this relate to military and *Shari'a* courts referred to in Article 101 of the Basic Law? (see also the further provision relating to this form of conflict in Article 29). It is also not clear what the effect may be of the provision that the Court should have exclusive competence over all matters there listed.

24. The list of competences follows broadly those set out in the Basic Law:

- Article 24, point 1 ("constitutional supervision and control on the laws and regulations") corresponds to Article 103, point a of the Basic Law.
- Article 24, point 2 ("explaining the provisions of the Basic Law and other laws in the cases where there is a conflict relevant to the rights of the three authorities, their duties and competencies") relates to Article 103, point b of the Basic Law ("Interpretation of the Basic Law and legislation").
- Article 24, point 3 ("to settle conflict of jurisdiction between the judicial bodies and the administrative bodies having judicial competences") corresponds to Article 103, point c of the Basic Law
- Article 24, point 4 ("to settle the disputes that arise concerning the execution of two contradicting final decisions whereby one of the decisions is issued by a judicial body or a body having judicial competencies and the other from a different side of it") has no direct correspondence but could relate to Article 103, point c as well.
- Article 24, point 5, corresponds to the competence specifically given to the Court by Article 37 (1), point c of the Basic Law (termination of the mandate of the President of the PNA).

25. The interpretation of ordinary laws usually does not pertain to the competence of a Constitutional Court; it should be limited to interpretation of the Basic Law. Usually such interpretations are given by a Supreme (High) Court. The removal of this competence would however require an amendment of the Basic Law itself. The Constitutional Court can use this competence restrictively in its judicial practice.

26. Points 2, 3 and 4 relate to the **settlement of conflicts of competence between the three state powers and could probably be formulated in a more general way**.

Effects of judgements

27. The language of Article 25 suggests that the Constitutional Court does not have the jurisdiction to annul an unconstitutional provision but it becomes only '*unenforceable*', and

the legislator should only *amend* the law and *correct* the situation. Both for ensuring its authority and for the sake of legal certainty, **a Constitutional Court should be able to annul or quash a provision in a law that conflicts with the Constitution**. As a consequence Parliament would adopt a new law to fill the gap. In the context of the Law as it stands it is at least clear that the law becomes unenforceable and that the competent authorities must adopt the now unenforceable act to conform with the Basic Law (see also Article 41, dealing with the binding effect of the Court's decisions).

28. Article 25(1) states that the Court reviews and decides the unconstitutionality not only of any legislation but also of any "act" inconsistent with the Basic Law. The meaning of the word "act" appears somewhat too broad for the purposes of constitutional review, giving the Court a fairly unlimited power to scrutinize any behaviour of public powers. The Court will have to be restrictive in the interpretation of this term.

29. It is **positive** that Article 25(3) opens up the **possibility to compensate the aggrieved party for the damage caused by the legislator**.

30. Article 25(2), refers to "law, decree, regulation, bylaw or decision", whereas Article 24 refers instead only to "laws and regulations". It seems necessary to choose either to adopt the longer version in Article 24 or to adopt the shorter one in Art. 25.

Proceedings of the Court

31. Article 27 sets out four forms of proceedings before the Court :

- (1) a direct action raised by an aggrieved person in the Court
- (2) a reference to the Court by another court of a constitutionality question that has arisen in the course of other proceedings
- (3) a stay of proceedings in another court where a party has pleaded a constitutionality question, granted in order that an action may be instituted in the Court within 90 days, failing which the pleading ceases to have effect
- (4) where in a dispute before the Constitutional Court, it emerges that there is a constitutionality issue relating to the dispute and the Court decides to deal with this issue.

32. Point 1 seems to open an **individual appeal to the Constitutional Court against normative acts** (the constitutionality of laws and regulations referred to in Article 24). Such a procedure is **to be welcomed**.

33. However, it is not clear what the interaction of these four forms of proceeding would be in practice, as the subject-matter between one and the other appears very likely to overlap, especially between points 2 and 3. It seems that in point 2 the request comes from a court or a panel itself, whereas in point 3 the request comes from a party to judicial proceedings.

34. In any case, **the requirements for these competencies should be regulated in a more detailed way**. Is there a need for the exhaustion of other remedies under point 1? If so, and if the aggrieved person first has to appeal to an ordinary court, how does this relate to the possibility to make a request under point 3? If there is no requirement of exhaustion of remedies, the Constitutional Court could be overwhelmed with direct appeals under point 1.

35. What happens if an ordinary judge shares the doubts raised by a party? Will the judge make a request under point 2 or will he or she request the party to make the request under point 3?

36. Point 4 seems to refer to a procedure similar to the "incidental norm-control" used at the Austrian Constitutional Court, where the Court stays its proceedings, for example on a

conflict of competence, when it has doubts about the constitutionality of a law it has to apply in these proceedings. It will then settle the issue of unconstitutionality of the law before it resumes its main proceedings.

37. Article 30 states who may apply for a decision of interpretation (presumably of the law or constitutional provision in dispute) but it is not obvious how this fits in with the forms of proceedings listed in Article 27.

38. By Article 31, Court proceedings require the services of a representative of the State entities affected, or those of an attorney of at least ten continuous years. The President of the Court may appoint an **attorney for an insolvent plaintiff**. The first part of this provision appears rather stringent in requiring an attorney to have had ten years experience (and does it give an advantage to the State entities, if they may act by a less experienced attorney?); the second part of the provision appears to provide **too rudimentary a form of legal aid** (is the term 'insolvent' to be interpreted literally as bankrupt, or more loosely as someone with insufficient resources to pay for an attorney?).

39. By Article 36, the Court may make decisions on the basis of written pleadings and without an oral hearing, but the Court may consider it necessary for there to be an oral hearing. Should the Court be required to find out whether either of the parties have asked for an oral hearing, before deciding that this is not necessary?

Decisions and Rulings

40. By Article 41, decisions and rulings of the Court are binding on all state authorities and all other persons, and are not subject to appeal. By Article 41(2), a provision in legislation that is held to be unconstitutional is declared to be inapplicable (see also remarks relating to Article 25 above). Article 43 gives the Court authority to deal with all disputes regarding execution of its decisions in accordance with the Law of Execution. And by Article 44, enforcement shall be in accordance with the Civil and Commercial Procedural Law, so far as this is compatible with a particular decision.

Fees

41. Article 45 provides for a fixed fee of 100 Jordanian dinars to be paid when a new proceeding is instituted. However, by Article 46, the President of the Court has power to waive payment in whole or in part when a party is unable to pay.

Financial and administrative issues

42. By Article 48, an annual independent budget must be allocated to the Court in accordance with the rules of public accounting. It may be assumed that the decision on the amount of this budget is a matter for the usual budgetary authorities, but **the proposed budget is developed by the President of the Court and is subject to ratification by the General Assembly of the Court. This seems a satisfactory provision**, even though it stops short of guaranteeing that the Court will receive the budget that it has requested.

43. The Court is to have a Chief Clerk and 'a sufficient number' of other administrative staff, who are to be supervised by the President of the Court and the Minister of Justice 'each one within the limits of his legal jurisdiction', and in accordance with the Law of the Judicial Authority. There is a danger that this scheme of supervision by two authorities would in practice cause disputes over the division of supervision. The **administrative supervision of the staff of the Constitutional Court by the Minister of Justice endangers the independence of the Court**.

Final provisions

44. Article 51 provides for the transfer to the Court of existing actions and cases that are before the High Court but raise issues that come within the jurisdiction of the Court.

45. The general declaration of the rule that any provision contradicting this Law is annulled in Article 54 is somewhat vague and superfluous under the *lex posterior* principle. Prior law will be derogated anyway and, being on the level of ordinary law itself, Article 54 is not strong enough to protect the present Law from derogation by later legislation.

Conclusion

46. If this Law had been sent to the Venice Commission when it was in draft, certainly there are a number of issues that could have been presented to the authorities in Palestine as warranting further consideration, and on which the draft could have been improved.

47. Main issues in this respect are:

- The establishment of a provisional committee within the Court should be reviewed. There is a danger that this body becomes a standing committee and could exclude part of the judges from decision making in critical matters.
- Disciplinary measures against judges should not be taken by this provisional committee but by a wider body.
- The dismissal of a judge should always involve a decision of the High Council of the Judiciary.
- An appeal to the Plenary of the Court should be available against the declaration of a “deemed resignation” by the President of the Court.
- The administrative supervision of the staff of the Constitutional Court by the Minister of Justice may endanger the independence of the Court.
- The jurisdiction of the Court should be regulated in a more detailed way.
- The Constitutional Court should be able to annul legal provisions and not to make them unenforceable only.

48. In the light of the difficult political situation and especially the absence of a an operating Parliament, the issues raised above do not exclude that the Law of 2006 be brought into operation before until it has been improved. The rules of procedure of the Court can be a means to remedy to some of the defects of the Law

49. However, the establishment of a Constitutional Court is a catalyst in a society in transition to democracy, the protection of human rights and the rule of law. In addition to protecting the individual rights set out in the Constitution, the Court ensures that the state powers remain within the limits of the Constitution and settles conflicts between them. The legitimacy of a Constitutional Court and its ability to fulfil these functions depend to a good part on its balanced and transparent composition, which allows the various stakeholders and the public in general to trust in the impartiality of the Court. The establishment of a Constitutional Court, which was widely seen as serving the interests of one side only would devalue the judgements by that Court, even if they were sound in substance.