

DRAFT OPINION ON THE DRAFT TEMPORARY CONSTITUTIONAL LAW FOR THE PALESTINIAN NATIONAL AUTHORITY IN THE TRANSITIONAL PERIOD

**prepared by the Secretariat
on the basis of observations by
C. Economides (Greece)
J. Helgesen (Norway) and
J. Robert (France)**

The present opinion, given within the framework of the Venice Commission's participation in the work of the task force on human rights and the judicial system in the autonomous Palestinian territories of the Parliamentary Assembly of the Council of Europe, relates to the 7th draft of the constitutional law for the Palestinian national authority prepared by the Legal Committee of the Palestinian Legislative Council (PLC) on 9 July 1996 (document CDL(96)61).

The Commission is aware of the fact that this constitutional law is still under consideration and that it is possible that other drafts be prepared during the discussion before the Palestinian Legislative Council. Under these circumstances, the Commission's observations will be limited to the main points of the project. Moreover, one should note that the Commission has not considered the compatibility of the present project with the Israeli-Palestinian Agreements of 13 September 1993 and 4 May 1994. The text of the draft has been examined as it stands, having regard to its nature as a basic law for Palestine.

First of all, the Commission finds, that the draft temporary constitutional law for the Palestinian national authority in the transitional period is a modern constitutional text very closely based on democratic principles.

The following comments should be made with regard to the text:

Article 3

While it is entirely normal that in its first article the constitutional text indicates that Palestine is a part of the Arab world and that the Palestinian people are part of the Arab nation (a statement which generally appears in several Arab Constitutions, in particular in the countries of the Maghreb), it is surprising that Article 3 states without hesitation that "Jerusalem is the capital of Palestine". This city is not part of the Palestinian territories and its status, if it had to be modified, should be the object of very delicate diplomatic negotiations.

Article 5

The fact that Islam is proclaimed the official religion in Palestine does not raise problems as such. Several legal systems in Europe recognise official religions and State churches without it being in conflict with international standards of protection of human rights and in particular with the European Convention on Human Rights (ECHR). Actually, since emphasis is given to freedom of conscience and religion, the only question which must be put is whether, notwithstanding the existence of an official religion, any individual enjoys freedom of conscience and religion. In this respect the provision of Article 5 must be read in conjunction with the guarantee of freedom of religion set out in Article 22 (see also *infra*). Consequently, no problem of conformity with international standards of protection of fundamental rights may arise at the level of constitutional law. It is in the implementation of these two provisions through legislation that problems may appear (e.g. religious education in public schools; right to be exempted from State church taxes).

Secondly, it is questionable, or even dangerous, to set out explicitly that the principle of Islamic Sharia is the main source of legislation in Palestine. The terms used are also ambiguous. Do they mean that the principles of the Sharia are as such the basis of the law in Palestine or do they simply mean that these principles should inspire the Palestinian legislator?

In the first case it would be difficult to determine exactly which are the principles and what is their precise signification. The Sharia being at the same time theological and jurisprudential, this task would obviously be uneasy and the results uncertain.

Moreover, it would come within the competence of the High Constitutional Court to examine whether a law challenged before it is in conformity with the principles of the Sharia or not. However, the court which is competent to interpret constitutional texts will probably be unable to interpret holy texts which seem to have a "supra-constitutional" value.

One may add that it should be asserted that the principles of the Sharia are not in conflict with the principles, fundamental rights, public liberties and duties of the citizens set out in chapter II (Articles 11 to 39) of the constitutional law of Palestine. In case of conflict what should the Palestinian legislator do? Apply the Sharia or respect the principles of the constitutional law?

Article 9

Article 9 states that Palestinians are Arab citizens who were normally resident in Palestine until 1947 and that the children of Palestinian parents are considered Palestinians.

Several questions arise:

- a. about those Arabs who claim themselves to be Palestinians although they were never in Palestine during the above period?
- b. what about the Palestinian diaspora all over the world?
- c. must one necessarily be Arab to be Palestinian, or even Muslim?

Article 12

This provision states that Palestine will recognise the fundamental rights of the individual which are enshrined in international law and that the Palestinian authority shall work to become party to these international treaties and agreements. The Commission welcomes this provision.

It nevertheless notes that contrary to the recent tendency in the new Constitutions of European states no provision of the draft gives international instruments for the protection of human rights precedence over internal Palestinian law.

Article 13

This provision allows restrictions to personal liberty in accordance with the law. The basic law as such simply states that arrest and detention of a person are allowed in the case of *flagrante delicto*.

This constitutional guarantee appears insufficient. It is preferable that the Constitution itself lists in an exhaustive way the reasons for which deprivation of liberty is allowed. The legislator will then have to determine on the basis of the Constitution the modalities and the procedure in accordance with which this deprivation of liberty can be decided.

Articles 19 and 21

The previous remark is also valid for the provisions whereby restrictions to the right to respect for home, correspondence and private life are permitted when they are in accordance with the provisions of law. In fact, granting the legislator discretionary power to restrict the exercise of human rights appears contrary to international standards. The Constitution should limit the power of the legislator. The latter must not be able to restrict the exercise of fundamental freedoms unless this restriction is necessary in a democratic society and pursues one of the aims which the Constitution recognises as legitimate (cf. the wording in Article 23 of the draft).

Article 22

It is stated in this provision that the performance of religious rituals is guaranteed "in accordance with the customs in Palestine". This is unclear and does not seem necessary since in the same provision it is stated that the exercise of this right should not violate public order and public morals. This reservation as to protection of public order and public morals is sufficient as regards international standards. However, if a reference to customs is maintained in this provision it would be at least useful to precise its scope.

Article 33

This provision, according to which the right to address to public authorities on behalf of groups is allowed only for "estimable individuals" appears to be unclear and may raise problems.

Article 45

It is indicated in Article 45 that the Council shall elect a President, two deputies and a Secretary General. It would be useful if the Constitution made clear what would be the powers conferred on the two deputies.

Article 72

In Article 72, it is provided that the President can refuse to promulgate a law that has already been approved by the Council but the Council can veto this refusal if it passes the same text again with a majority of two-thirds.

It is not indicated in the text whether those two-thirds apply to members voting or to all members of the Council. In other words, should the Council pass again the text with the two-thirds majority of its 88 members in order to override the presidential veto or does a mere majority of two-thirds of the members present at the time of the vote suffice for this purpose? A clarification is necessary on this point.

Article 76

Article 76 is rather incomplete. What are the competences of the "personal deputy" that the President can appoint and present to the Legislative Council for approval?

The same article (b) allows the President to delegate some of his powers at his discretion to any one of his "assistants" he chooses. How are those assistants designated? Are they mere collaborators, members of the Council, or members of the government?

Article 90

Article 90 states that the President or ten members of the Council can request a vote of confidence for the Cabinet before the Council. A vote of no confidence requires an absolute majority. It is not indicated whether the required majority is a majority of the members present or one of all members of the Council.

In case of no confidence, the Prime Minister must submit his resignation to the President.

Article 90 says nothing on the possibilities for the President to revoke, on his own initiative, even without any vote of no confidence. However, such a possibility should exist if one refers to Article 87 which clearly indicates that ministers are responsible to the President and the Legislative Council for the general policy of the country.

Finally, the provisional constitutional law does not mention any right for the President to dissolve the Council. However, Article 6 of the text clearly states that the government of Palestine "shall be based on parliamentary democracy". And it is well-known that the right to dissolve the Parliament as a counterpart of the responsibility of the government is one of the characteristic features of parliamentary regime.

Article 116

This Article provides that the Court rulings shall be promulgated in accordance with the law, the Islamic Sharia's principles and the principles of justice. It might be useful to mention that they must also be promulgated in accordance with the Constitution.

Article 121

This provision guarantees the freedom of press and excludes any measure of censorship by an administrative act. It follows that the Constitution does not prevent censorship measures being taken by means of Court decisions. In this case it is necessary that the Constitution sets out the principles that would make the framework within which these measures restricting the freedom of press could be taken (see above the observations under Articles 13, 19 and 21).

Article 125-130

The following remarks should be made as regards these articles which concern the state of emergency:

The competences of the Legislative Council in the declaration of the state of emergency must be further clarified. It seems useful to grant more

competences in this field to the body representing the people.

The Constitution could provide that details concerning the declaration of the state of emergency be regulated by special law.

Article 129 allows restrictions to all fundamental rights in case of declaration of the state of emergency (provided that these measures or limitations are necessary). However, it is generally admitted that several individual rights cannot suffer any restriction even in a case of emergency (cf. Article 15 ECHR).