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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

REPORT

**ON THE EVOLUTION
OF THE LEGAL FRAMEWORK
OF NATIONAL PALESTINIAN AUTHORITY**

Note by the Secretariat

At its 45th Plenary Meeting the Venice Commission decided to examine the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, dated on 30 November 2000, which invited the Commission to examine the following two questions:

1) Does the existing legal framework provide sufficient protection of human rights and the rule of law in the Territories under the control of the Palestinian National Authority, and if not, which ameliorations are possible within the framework and to the framework itself?

2) In this context, should the Assembly encourage the setting-up of specific institutions charged with overseeing the day-to-day observance of human rights and the rule of law by Palestinian bodies of self-government, for example, an ombudsman's office or a human rights commission?

The present report was adopted by the European Commission for Democracy through Law at its 46th Plenary Meeting in Venice, (Venice, March 9-10 2001) basis of a draft project makes by the Secretariat, in the objective to transmit at the Committee on Legal Affairs and Human Rights of the Parliamentary assembly.

First of all, the Commission emphasises that its analysis of the legal framework is based only on the various provisions in the texts and not on the current situation in the Territories.

The Palestinian Autonomous Territories

The judicial regime of the Palestinian Autonomous Territories and its implementation are part of the peace process between Israel and the Palestine Liberation Organisation. Since 1993, Israelis and Palestinians have signed numerous agreements, declarations, letters and protocols granting the Palestinian National Authority certain powers and responsibilities. Many of those texts constitute the basis of the judicial regime of the Territories. Some of them even govern the daily life of Palestinians. It should not be forgotten that the Palestinian legal regime is particularly complex as it stems from different origins. These include, in addition to the above-mentioned agreements, custom (*urf*), Islam (*shari'a*), Ottoman real property law, British Mandate emergency regulations, Israeli civil law for East Jerusalem and Jewish settlers, Jordanian civil law in the West Bank, Egyptian civil law in Gaza, Israeli military law and legislation and executive decrees issued by the Palestinian Authority.

There are two main peace agreements. First, in May 1994, the Israelis and Palestinians concluded the Gaza-Jericho Agreement¹ (Oslo I). A Palestinian Authority was thereby created with prerogative over all matters falling within its territorial, functional and personal jurisdiction that was previously administered by Israelis. Then, in September 1995, a second agreement was signed: the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip² (Oslo II), which enlarged the scope of jurisdiction of the Palestinian authority to other regions of West Bank.

¹ Gaza-Jericho Agreement, signed in Cairo on 4 May 1994, by Israel and PLO.

² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, 28 September 1995.

This agreement specifies, for example, the structure, powers and responsibilities of the Council, its legislative powers and the organisation of institutions and elections. It also divides the region into three areas, excluding East Jerusalem. Area A consists mainly of the large urban strip of the West Bank where the authority assumes responsibility for public order and interior security. In area B, which comprises mostly villages, the Authority is responsible for public order and internal security for Palestinians, whereas Israel is responsible only for its nationals and for the fight against terrorism. In area C, civil responsibilities are under the control of Israeli military, but should gradually be conceded to the Palestinian Authority.

The institutions

The Oslo Peace Accords set up a Palestinian Council, which assumes all the rights, responsibilities and obligations of the Palestinian Authority. The Palestinian residents of the Gaza Strip and of the West Bank proceed to the election of the members of the Council and of a President of the Executive Authority of the Council (“ra’ees”). These two entities form the Palestinian Interim Self-Government Authority. This authority shall possess both legislative and executive power. In practice, however, instead of replacing the Palestinian Authority, the Council, intended as the representative organ of the people, has become the legislative organ of the Autonomous Territories and is now frequently referred to as the “Palestinian Legislative Council”.

For the time being, the Palestinian Council is composed of 88 representatives directly elected in the West Bank, Jerusalem and the Gaza Strip constituencies. The Palestinian Executive Authority is exercised by the President of the Executive Authority and by the Cabinet. The President was directly elected in January 1996. He has absolute authority over the executive branch of the government. He appoints a Cabinet whose members come principally, but not exclusively, from the Palestinian Legislative Council, which confirms the appointments. Generally, each member of the Cabinet has a ministry or department. The President is the commander in chief of the Palestinian armed forces and also has a legislative function, and also promulgates the laws adopted by the Legislative Council in order that they may enter into force. The executive also consists of all civil servants and military personnel – estimated at around 85 000 persons.

Electoral procedures

The setting up of democratic, free and direct elections in the Gaza Strip and West Bank goes back to Article III of the Declaration of Principles³ and its Appendix I. It is mentioned in Oslo I, but it was not until Oslo II and in particular Annex II – Protocol Concerning Elections, that its basis and limits could be observed. The first elections were held in January 1996 and according to the Parliamentary Assembly report, “the election followed democratic rules and the voting can be considered to have been free and fair”. However, it seems that the next elections will be held only at the end of the transitional period. Article III of Oslo II provides that the Council and the President shall be elected for a period not exceeding five years from the signing of Oslo I on 4 May 1994; however, since then, some delays have occurred and the peace process has been disrupted.

³ Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993.

Basic Law

During the negotiation of the Peace Accords, the Palestinian Legislative Council drafted the Basic Law, which was intended to serve as an interim constitution⁴. This document, completed in October 1997, was an attempt by the democratically elected parliamentarians of the Autonomous Territories to join the community of nations possessing democratic constitutions. However, the Basic Law has never been signed by the President of the Palestinian Authority and therefore has still not entered into force. Consequently, the President of the Authority exercises his power within a deficient and precarious framework. The entry into force of the Basic Law, which establishes checks and balances, would have filled the constitutional vacuum and brought to an end the legal possibility of governance by executive fiat on the basis of the British Emergency Laws⁵.

The Basic Law enshrines fundamental principles of universally recognised human and civil rights and allows the Palestinian community to elect its own representatives. Further, the Basic Law lays down standards to be observed by police and government officials and provides guarantees for the review of the legality of their conduct and for the examination of complaints of abuse of government authority. The Basic Law also lays down a legal framework for the functioning of the legislative, executive and judicial branches of power. No other law or laws currently in place in the West Bank or Gaza Strip provide a substitute for the Basic Law⁶, which is in fact one of the most liberal constitutional documents of the Arab world⁷. The fact that the Basic Law is still not in force leaves the Palestinian executive a great leeway for its actions.

In September 1996, at the 28th plenary reunion of the Venice Commission, some observations were made on the draft Basic Law⁸. Those observations concerned the question of the designation of Jerusalem as the “capital of Palestine”, the fact that the Islamic Sharia is the main source of legislation in Palestine and the guarantees concerning the declaration of a state of emergency. The Commission notes that since then, the Basic Law has been modified along the lines of some of its observations.

General rules

The Basic Law stipulates that the government of Palestine shall be based on parliamentary democracy and pluralism. The President is directly elected by the people and the government reports to the President and the Palestinian Legislative Council. The rule of law is the basis of government in Palestine. The Basic Law also

⁴ It should be noted that the « Palestine Order-in Council » was the last constitution governing the territory, which covered the State of Israel as well as that of the current Palestine, and dates from the British mandate.

⁵ KATHERINE A., *The Palestinian basic law: Embryonic constitutionalism*, *Case Western Reserve Journal Law*, Cleveland, Spring 1999, p. 10.

⁶ BISHARAT G.E., *Symposium: The Legal foundations of peace and prosperity in the Middle East: Peace and the political imperative of legal reform in Palestine*, *Case Western Reserve Journal Law*, Cleveland, Spring 1999, p. 17.

⁷ BROWN N.J., *Constituting Palestine: The effort to write a basic law for the Palestinian authority*, *The Middle East Journal*, Washington, Winter 2000.

⁸ VENICE COMMISSION, *Draft Opinion on the Draft Temporary Constitutional Law for the Palestinian National Authority in the Transitional Period*, 5 September 1996, CDL (1996) 066f-restr.

states that “all Palestinian authorities and organs as well as all individuals and persons in Palestine shall be subject to the law”. It does not, however, make clear that all laws should be subject to the constitution⁹. It is essential that the Basic Law should provide that laws are subject to its provisions, because this is the only guarantee that the population has against possible arbitrariness by a Council majority.

Rights and Public Freedoms

The Basic Law includes, in Chapter 2 – Rights and Public Freedoms, an impressive list of rights, freedoms and guarantees granted to the population. In particular, it recognises the principle of equality before the law, individual liberty, the prohibition of torture and inhuman and degrading treatment, the right to physical integrity and to participate in political activity, freedom of conscience and worship, freedom of expression and the freedom of the press. It also provides for procedural safeguards surrounding the right to a fair trial, such as: the right of access to courts; the presumption of innocence; the right to be informed about the charges; the right to counsel and the principle of *nullem crimen, nulla poena sine lege*. Similarly, it lays down economic rights, for example, commercial freedom, the right to education and the right to strike. It should be noted that many rights and freedoms are limited by expressions such as: “in accordance with the law” or “subject to observance of restrictions by law”; this kind of wording could make constitutional guarantees dependent on ordinary legislation; however, it should be noted that many European constitutions do contain similar provisions. Moreover, the death penalty is a punishment still allowed and imposed in the Territories.

It should be noted that on September 1993, President Arafat created the “Palestinian Independent Commission for Citizen’s Rights”. This Commission, established by decree¹⁰, is a quasi-governmental board charged with monitoring the activities of the Palestinian Authority, and particularly with ensuring the compliance of the public institutions with human rights principles. The Basic Law also makes provision for the creation of an independent commission for human rights¹¹. Its composition, functions and powers shall be defined by law. This Commission will submit its reports to the President of the National Authority and the Palestinian Legislative Council.

State Institutions

The Basic Law seeks to establish a Palestinian government based on the rule of law and the separation of powers. The legislative, executive and judiciary were designed to be separate and independent authorities. However, the Basic Law does not seem to be at all protected, whether against laws or subsequent revisions. Even if the Basic Law is an interim text, provision for a mechanism of revision is a fundamental element of the rule of law.

According to the Basic Law, the powers of the legislature shall continue until the end of the transitional period. Every member of the Council has the right to submit to Executive Authority all necessary and legitimate demands that enable him to exercise

⁹ KATHERINE A., *The Palestinian basic law: Embryonic constitutionalism*, *Case Western Reserve Journal Law*, Cleveland, Spring 1999.

¹⁰ Decree Number 59 of 1993, published in the Official Gazette and became effective only in 1995.

¹¹ Article 38.

his legislative duties. The Legislative Council also has the right to withdraw confidence in the Government or a Cabinet Minister following the established procedure.

As regards the executive branch of power, the Basic Law provides that the President has the power to appoint a Cabinet of Ministers. It also sets out the procedure for the election of the President, whose term of office shall be for the duration of the transitional period. Further, it provides for the procedure to be followed if the position of the President becomes vacant, a topic which appears to be particularly sensitive in the Territories. Finally, the Basic Law grants the President certain legislative functions.

Since the Oslo Peace Agreements, the Palestinian Authority has had full competence in civil and criminal questions¹² in area A and in certain circumstances in area B. Articles 88-97 of the Basic Law incorporate the principles contained in the UN Basic Principles on the Independence of the Judiciary. Furthermore, the Council has adopted a law on the Judicial Authority, which has to date not been signed by the President and which takes up largely the same principles as those found in the Basic Law. This law states that the Judicial Authority shall be independent and no other authority shall interfere in judicial matters. It adds, further, that judges are independent and shall not be subject to any authority other than the authority of law.

State of emergency

The Basic Law permits the President to declare a state of emergency within certain limits: the declaration cannot exceed a period of 30 days, this period may be extended only for the same amount of time, upon approval by the majority of two-thirds of the Council; the decree shall state clearly its goal, the area it covers and its duration, and the Council has the right to review all the measures and arrangements adopted during this period.

Conclusion

The Commission reiterates that the report is based strictly on the existing statute law. It is aware of the disparity between the guarantees enshrined in the texts and their implementation in reality. Nevertheless, it observes that the drafts adopted by the Palestinian Legislative Council, that is the provisional Constitutional Law of the Palestinian National Authority and the Law on the Judicial Authority, constitute legal instruments that should ensure the implementation of the rule of law and provide important guarantees of the protection of human rights. Certainly, improvements could be made in order to clarify the extent of the respective state institutions' powers, the guarantees of the independence of the judiciary and the effective protection of fundamental rights and the constitutional order. The establishment of special independent institutions responsible for the application of human rights, as envisaged by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, could be seriously considered. The establishment of an ombudsman could be envisaged. This institution, in a post-conflict society, brings a consensual and non-

¹² See, Annex III – Protocol Concerning Civil Affairs & Annex IV - Protocol concerning Legal Affairs, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, 28 September 1995.

conflictual dimension to the system of protection of rights, with its authority based more on equitable considerations and flexible procedures adapted to different situations.

However, it would seem appropriate to wait until the political and economical context becomes less strained before analysing the real possibilities of implementing the fundamental texts adopted by the Legislative Council, the effective guarantees of democracy offered by them and their possible dysfunctions. The creation of additional or supplementary institutions should be carefully weighed, as their proliferation might damage the credibility and effectiveness of political and judicial institutions that are already planned.

The Commission remains at the disposal of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly to examine further, at a later date, the question of possible improvements to the constitutional regime of the Palestinian Autonomous Territories.