

# THE REGIME'S VIOLATION OF THE RIGHT TO PROPERTY IN THE WEST BANK, PALESTINE: RAWABI PROJECT AS A CASE STUDY

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## Abstract

The purpose of this paper is to assess the Palestinian Constitutional Court's reasoning of its judgment in Rawabi Case, a case in which the Government's expropriation of a large area of privately-owned land was challenged before the Court. The expropriation was to transfer the ownership of that land to Bayti Real Estate Investment Company, a private company that later on built the first planned city in Palestine: Rawabi. This paper explains what implications the judgment in this case has on the relationship between the regime and other major private investors in the West Bank. The paper starts with explaining how some constitutional courts perform the function of providing credible commitments in the economic sphere, where such courts are situated in authoritarian settings. Then, it moves to the specific case of Rawabi, explaining the facts of the case and describing Rawabi's connections to the regime's interests. The paper concludes that the Constitutional Court has failed to perform its main function of upholding the Palestinian Basic Law and, in particular, protecting the right to property for the owners of the expropriated lands.

**Keywords:** Palestinian Constitutional Court, Rawabi Project, Right to Property, West Bank.

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## I. INTRODUCTION

In 2007, the Palestinian Authority held its second parliamentary elections.<sup>1</sup> The result was in favour of the Hamas Party by winning 74 seats out of 132. Thus, for the first time, the opposition party has a majority in the Parliament. Fatah, the party which is the inheritor of the Palestinian Liberation Organisation and the primary loser in the elections, refused to allow the new government, formed by Hamas, to take control. The situation escalated to a civil war that led Abbas, the President of the Palestinian Authority and the Head of Fatah party, to apply Article 110(1) of the Palestinian Basic Law. This Article allows the President to declare the state of emergency for thirty days in all territories controlled by the Palestinian Authority under the pretext that there is “a threat to national security caused by ... armed insurrection”.

Certain significant presidential decrees followed Abbas's declaration.<sup>2</sup> The most relevant to the topic of this paper is suspending the Parliament's powers and moving legislative authorities to the President, who practices it in the form of enacting decrees-by-law, justified by “Urgent Necessity” as the Basic Law phrases it. The President used these decrees-by-law to unconstitutionally serve substantial interests of major private corporations.

For example, in case 12-2016, also known as “Rawabi” case, some owners of 1525.348 Km<sup>2</sup> lands filed a direct action to the Supreme Constitutional Court (‘SCC’) against the Presidential Decree of expropriating these lands.<sup>3</sup> The Decree transferred the ownership of these lands to a private Palestinian company called “Bayti Real Estate Investment Company”, to build the first Palestinian master planned-city project, known as “Rawabi City”. The Constitutional Court, which in 2016 consisted of twelve judges that the President has single-handedly appointed, dismissed the case because of “lacking jurisdiction over the Presidential Decrees”, disregarding Article 103 of the Basic Law that highlights the Court's

<sup>1</sup> “Timeline: Key events since 2006 Hamas Election Victory,” Reuters, 20 June 2007, <http://www.reuters.com/article/us-palestinians-timeline-idUSL1752364420070620>.

<sup>2</sup> “Presidential Decrees Issued on June – July 2007,” JMCC, 2016, Internet Archive <https://web.archive.org/web/20071012102508/http://jmcc.org/goodgovern/07/eng/presidentdecrees07.htm>.

<sup>3</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016.

jurisdiction over such decrees. Importantly, the Court referred to case 9-2012, in which it pronounced the same judgment, declaring its lack of jurisdiction over Presidential Decrees.<sup>4</sup>

This dismissal relates to a form of corruption in public-private relationships, which is to unlawfully provide commitments in the economic sphere.<sup>5</sup> In this dismissal, Bayti Company, as a local investor, received a credible commitment from the regime to protect the company's interests. By offering that protection, the regime had significant gains: making a tremendous profit from taxing imported materials, and, more importantly, increasing the confidence of potential investors that their projects would also be protected, even if that required a presidential decree to expropriate privately-owned lands.

The purpose of this paper is to assess the Court's reasoning of its judgment in Rawabi Case, and what implications does this judgment have on the relationship between the regime and other major private investors in the West Bank?

The paper starts with explaining how some courts perform the function of providing credible commitments in the economic sphere, where such courts are situated in authoritarian settings. Then, it moves to the specific case of Rawabi, explaining the facts of the case and the describing Rawabi's connections with the regime. After that, because the Court referred to its judgment in case 9-2012 to justify that of Rawabi case, an assessment of the former is conducted, which will serve as a basis of the conclusion about the Rawabi Case. The assessment of case 9-2012 constitutes the bulk of this paper. Lastly, the paper concludes with explicating the effect of Rawabi Case on the regime's commitments to prospective private investors.

<sup>4</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016.

<sup>5</sup> For more about this topic see: Krithika Ashok, Paul T. Babie, and John V. Orth, "Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, And The United States," *Fordham International Law Journal* 42, no. 4 (2019), 999; JM Baynard, "Private or Public Right? Who Should Adjudicate Patentability Disputes and is the Current Scheme Really Constitutional?" *21 Marquette Intellectual Property Law Review* 57 (2017); Gerald S Dickinson, "Federalism, Convergence, and Divergence in Constitutional Property," *University of Miami Law Review* 73 (2018): 139; Karolina M, "Protection of Private Property Expropriation," *The Scientific Journal of Bielsko-Biala School of Finance and Law* 35 (2018); Ijiyoung Kim and Lee H, "Constitutional Principles of Regulatory Takings: A Utilitarian Perspective," *26 Supreme Court Economic Review* 81 (2018); N Monebhurrin, "Chronicles of International Investment Law," *Brazilian Journal of International Law* 33 (2015); Ganesh Sitaraman, "The Puzzling Absence of Economic Power in Constitutional Theory," *101 Cornell Law Review* (2016): 1445.

## II. PROVIDING CREDIBLE COMMITMENTS IN THE ECONOMIC SPHERE

Because economic power is fundamental to every regime, some authoritarian regimes employ courts to serve as providers of credible commitments for investors –more importantly for foreign ones– to enhance the economic condition of the regime, with disregard of the welfare of the society.<sup>6</sup> A dilemma that faces these regimes is that any judicial system empowered enough to guarantee the trustworthy protection of property rights is possibly capable of standing against these regimes as well.<sup>7</sup> This dilemma requires regimes to give reliable promises to private investors while at the same time, avoid empowering courts in aspects that might weaken the regime. These promises can be given by establishing independent courts that can supervise and punish any violations against property rights, especially vis-à-vis the state itself and other governmental actions.<sup>8</sup>

However, with regard to authoritarian regimes, there is a variation in their way of utilising courts for this function. The fact of having pre-existing judicial power incentivises regimes to utilise this power rather than establishing a parallel judicial system for economic matters. For example, it is harder to utilise courts for that function in Cambodia than in post-colonial Hong Kong because judicial power is more robust in Hong Kong, which is also much more developed than Cambodia.<sup>9</sup>

Economic liberalisation, in its global context, has significant impacts on judicial institutions, particularly in developing countries. Encouraging judicial

<sup>6</sup> See Peter Solomon, "Law and Courts in Authoritarian States," in *International Encyclopedia of the Social & Behavioural Sciences* (Oxford, Elsevier, 2nd edition, Vol 13), 427–34.

<sup>7</sup> Barry R Weingast, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development," *Journal of Law, Economics, & Organization* 11, no.1 (April 1995). See generally Sisay Alemahu, "The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia," *Journal of Ethiopian Law* 135, no. 2 (2008).

<sup>8</sup> Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008), chapter 12. See generally Katie Boyle and Edel Hughes, "Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights," *International Journal of Human Rights* 22, no. 1 (2018): 43.

<sup>9</sup> Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia," in *Beyond democracy in Cambodia*, ed. Joakim Ojendaland Mona Lilja (Nias Press, 2009), 70-100. See generally Adèle Cassola, Amy Raub and Jody Heymann, "Do Constitutions Guarantee Equal Rights across Socioeconomic Status? A Half Century of Change in the World's Constitutions," *Journal of International & Comparative Social Policy* 32, no. 3 (2016): 235.

reform is the most comprehensible example of those impacts, because courts are the best forums to encounter governmental attempts of expropriating investors property.<sup>10</sup> All WTO members are required to provide judicial, or quasi-judicial, forums in matters related to trade and investment, besides bilateral treaties that assure investors access to the impartial dispute resolution process.<sup>11</sup> The World Bank, as an example, gives ample financial support for judicial reform projects in developing countries, since it is a major economic risk for authoritarian regimes, particularly in developing countries, not to make available –for investors– courts that are predictable and efficient.<sup>12</sup>

In the context of authoritarian regimes, providing these credible commitments does not mean that such regimes will undertake a broad-based economic growth, because that type of growth would weaken their dominance, especially when this sort of growth involves demands of complete independence for courts.<sup>13</sup> Saudi Arabia is a typical example of an authoritarian regime that does not aim for the economic growth of that sort, because it is a resource-rich country, and investments are expected to continue regardless of the economic growth in it. It highlights how resources availability affects the capabilities and desires of regimes' leaders to employ courts in this function. Nevertheless, a regime with a desperate need for foreign investors might disregard such calculations, and temporarily provide courts with independent competences, that are sufficient to those investors, until the economy develops, then the regime will deprive the courts of these competencies to protect its interests again.<sup>14</sup>

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<sup>10</sup> See Nathan Jensen, "Political Risk, Democratic Institutions, and Foreign Direct Investment," *The Journal of Politics* 70, no. 4 (2008), 1040-52. See generally Danwood Mzikenge Chirwa, "A Full Loaf Is Better Than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi," *Journal of African Law* 2 (2005): 207.

<sup>11</sup> Bernhard Zangl, "Judicialization Matters! A Comparison of Dispute Settlement under GATT and the WTO," *International Studies Quarterly* 52, no. 4 (2008), 825-54. See generally Oliver Hailes, "The Politics of Property in Constitutional Reform: A Critical Response to Sir Geoffrey and Dr Butler," *New Zealand Journal of Public and International Law* 15, no. 2 (2017): 229.

<sup>12</sup> Matthew Stephenson, "Judicial reform in developing economies: Constraints and opportunities," in Annual World Bank Conference on Development Economics-Regional 2007: Beyond Transition (2007), 311-28.

<sup>13</sup> See generally Peter Solomon, "Judicial Power in Authoritarian States: the Russian experience," in *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008), 261-82.

<sup>14</sup> Tom, *Rule by Law*. See generally Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*, *Cambridge Studies in European Law and Policy* (Cambridge University Press, 2018).

### III. CASE 12-2016 "RAWABI CITY"

This case is about lands' expropriation for private investors.<sup>15</sup> Some owners of the expropriated land filed a direct action to Constitutional Court against the Presidential Decree of expropriating their lands in the West Bank.<sup>16</sup> They claimed that according to Article 21(2) of the BL, expropriation is only permissible for public interests. The Article declares that:

Private property, both real estate and movable assets, shall be protected and may not be expropriated except in the public interest and for fair compensation in accordance with the law or pursuant to a judicial ruling.

They highlighted the fact that in this decree, the ownership of this land was transferred to a private company called "Bayti Real Estate Investment Company," which is jointly owned by Qatari Diar Real Estate Investment Company and Massar International, to build the first Palestinian master planned-city project, known as "Rawabi City."<sup>17</sup> According to Al-Monitor agency, the city is "designed to include 6,000 housing units and accommodate a population of up to 25,000. The prices of the units range from USD 65,000 to 110,000."<sup>18</sup> Based on these facts, the plaintiffs argued that there is no public interest in expropriating these lands, which means that the BL Article mentioned above does not justify the contested presidential decree.<sup>19</sup>

In response to this case, the SCC dismissed the case on the grounds of lacking jurisdiction over the Presidential Decree of expropriation and asserted

<sup>15</sup> For various studies about the Palestinian legal system, see Osayd Awawda, "Armed Resistance in Gaza Strip against Israeli Occupation: Legitimate Requirement to Achieve Self-Determination," *IUP Journal of International Relations* 12, no. 1 (2018); Osayd Awawda, "Funding Palestinian NGOs: A Trojan Horse against Liberation?" *IUP Journal of International Relations* 12, no. 3 (2018); Osayd Awawda, "Palestinian Workers in Israeli Settlements: Their Status and Rights," *IUP Journal of International Relations* 12, no. 2 (2018); Osayd Awawda, "Reforming the Indirect Tax Sector in Palestine: Justifications and Avenues," *IUP Journal of International Relations* 13, no. 2 (2019).

<sup>16</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 2.

<sup>17</sup> "About Bayti," 2008, [http://www.rawabi.ps/bayti/about\\_bayti.php](http://www.rawabi.ps/bayti/about_bayti.php).

<sup>18</sup> Ramy Jabbar, "Qatar Funds Rawabi, New-Look Palestinian City," *Al-Monitor*, 2015, <http://www.al-monitor.com/pulse/culture/2014/02/rawabi-revolution-palestine-clans-family-units.html#ixzz4wgLRkpvw>. The US\$850 million investment project is largely being financed by Qatar. It is estimated that the city will provide 3,000 to 10,000 permanent jobs, and accommodate a population of 40,000 residents.

<sup>19</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 3. See Howard Chitimira, "An Analysis of Socio-Economic and Cultural Rights Protection under the Zimbabwe Constitution of 2013," *Journal of African Law* 171, no. 2 (2017).

that such decree falls under the jurisdiction of the HCJ.<sup>20</sup> In this assertion, the Court relied on its judgment in a previous case, case 9-2012. Thus, it is vital to analyse the judgment of the latter case, and then use that analysis to explain the judgment in Rawabi Case.

#### IV. CASE 9-2012 “DAHLAN’S PARLIAMENTARY IMMUNITY”

In 2011, the Palestinian President ordered the General Prosecutor to file a case in the Court of Corruption Crimes against Dahlan,<sup>21</sup> who is a Palestinian Member of Parliament and the main rival of the President in the Fatah party.<sup>22</sup> The President believed that Dahlan was forming a coalition against him within that party, so the President wanted to prevent that.<sup>23</sup> The Court refused to try Dahlan on the basis that he enjoys parliamentary immunity, according to Article 53(1) of the BL.<sup>24</sup> This Article states that:

[Legislative] Council Members may not be questioned in civil or criminal proceedings due to opinions they express, facts they mention, their voting in Council sessions or committee meetings, or because of any action they undertake outside the Council in the course of performing their parliamentary duties.

To deprive Dahlan of his immunity, the President issued a Decree-by-Law No. 4 of 2012 on 2 January 2012, to lift the parliamentary immunity from Dahlan,<sup>25</sup> claiming that this lifting was necessary pursuant to Article 43 of the BL:

The President of the [PA] shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law.

<sup>20</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 4. See generally Pedro Felipe De Oliveira Santos, “Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-Economic Rights,” *Washington University Global Studies Law Review* 3 (2019): 493.

<sup>21</sup> محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22-2014.

<sup>22</sup> He is still a member as there have been no parliamentary elections in the WB since the Coup.

<sup>23</sup> Dahlan’s attempt to form a coalition.

<sup>24</sup> “Exiled Abbas rival sentenced to three years in absentia over corruption,” *Middle East Eye*, 2016, <http://www.middleeasteye.net/news/exiled-abbas-rival-sentenced-three-years-absentia-over-corruption-1844523482>.

<sup>25</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 2.

In response, Dahlan filed a case before the SCC on 18 December 2012, objecting to that Decree-by-law and demanding the Court to declare it unconstitutional based on violations of Article 53(1) of the Basic Law mentioned above, and Article (96) of the Parliament's Rules of Procedure, which sets the legal steps to lift the parliamentary immunity of Parliament members.<sup>26</sup> It stipulates that:

1. A request for waiver of immunity shall be submitted in writing by the General Prosecutor to the President, accompanied by a memorandum containing the type, place, time, and evidence necessary to take legal action.
2. The President shall transfer the request for lifting immunity to the Legal Committee and inform the Parliament accordingly.
3. The Committee shall examine the request and submit its report to the Parliament. The Parliament shall take its decision to lift the immunity by a minimum two-thirds majority vote.
4. A member whose immunity has been lifted and has not been suspended shall have the right to attend meetings and committee meetings and to participate in the debate and vote.<sup>27</sup>

Dahlan's counsel filed his case as direct, original action because the Decree-by-law seemed to aggrieve Dahlan.<sup>28</sup> The General Prosecutor responded to the case, claiming that the Court lacks jurisdiction over this Decree-by-law.<sup>29</sup> The Court approved this claim and dismissed the case, declaring that it lacks jurisdiction over that Decree-by-law.<sup>30</sup>

#### 4.1. Assessment of the Court's Reasoning

The SCC started its reasoning by acknowledging that Dahlan has access to the SCC since in the direct action, any person aggrieved by the application of a specific legislative provision that seems inconsistent with the BL has the right to file a direct case.<sup>31</sup> As that Decree-by-law aggrieves Dahlan, then filing such a

<sup>26</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 3.

<sup>27</sup> المجلس التشريعي الفلسطيني: النظام الداخلي [The Palestinian Legislative Council: Rules of Procedure] <http://muqtafi.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2000&MID=14227>.

<sup>28</sup> Fathi Fikry, "2012/6 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 6 من سنة 2012," *العدالة والقانون* [Justice and Law] 20 (July 2013): 171, 172.

<sup>29</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 6.

<sup>30</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

<sup>31</sup> Fat'hi Fikry, "2012/6 التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 6 من سنة 2012," *العدالة والقانون* [Justice and Law] 20 (July 2013): 171, 172.

case is lawful according to Article 27(1) of the Law of the Supreme Constitutional Court (LSCC).

After confirming Dahlan's lawful access, the Court moved to Article 24(1) of the LSCC, which stipulates in its first paragraph what legislative matters the Court has jurisdiction over:

The Court shall exclusively have jurisdiction over the constitutionality of laws and regulations.

The Court started applying the above Article by first classifying the Decree-by-law, i.e., identifying its legal nature, whether it has the elements of a Decree-by-law and thus should be dealt with as a "law" for the purposes of this Article, or it lacks certain elements that make the Decree-by-law de facto not a law.<sup>32</sup>

The Court explained that according to legal jurisprudence and judicial principles, to be considered a law, a legislative text, the contested Decree-by-law in this case, must be "general and abstract," i.e., it must not address its subjects by their names, or other distinctive personal characteristics;<sup>33</sup> rather, addressing them must be by the legal description of these subjects.<sup>34</sup> For example, if the President issues a Decree-by-law, and it addresses a minister in the government by his name, not by his legal description of being a minister, then that Decree-by-law lacks the element of being "general and abstract," which leads to consider it de facto not a Decree-by-law, but an administrative decree, even if the President gives it the former title.<sup>35</sup> The same also applies in the case of laws that the Parliament enacts, if they lack that element, then they are de facto parliamentary orders, not laws.<sup>36</sup>

Fathi Fikry, a professor of Constitutional law in Egypt, provides a similar explanation in his commentary on this case:

<sup>32</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 9.

<sup>33</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 9-10.

<sup>34</sup> Al-Mur Awad, *Judicial Review of the Constitutionality of Laws in its Primary Features* (Cairo: 2003), 307.

<sup>35</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 9.

<sup>36</sup> Abd Al-Aziz Saliman, " قرار المحكمة العليا بصفتها محكمة دستورية رقم 6 من سنة 2012، " *التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 6 من سنة 2012، " العدالة والقانون* [Justice and Law] 20, (July 2013): 181, 186-8.

It is important to highlight that all general legal rules are subject to judicial oversight by the Constitutional Court, whether it is a law issued by the PLC, a decree-by-law issued by the executive authority officials in events stipulated in the constitution, or regulation issued by executive officials. The common element between all these legal sources is the characteristic of being general and abstract, which means that they must not address individuals by their names.<sup>37</sup>

According to its explanation, the Court asserted that the legal nature of this Decree-by-law is not a law and that it is de facto a presidential, administrative decree since it addresses Dahlan personally as a distinctive individual, not by referring to his legal description.<sup>38</sup> From that assertion, the Court concluded that this Decree is, in fact, not a law, and thus it does not fall under the categories of 'laws and regulation' that the above Article mentions.<sup>39</sup> Therefore, the Court lacks jurisdiction over this Decree, because its legal nature is, in fact, an administrative decree, and as a result, falls under the jurisdiction of the HCJ.<sup>40</sup> Accordingly, the Court dismissed the case on the form.<sup>41</sup> It is noteworthy that after the dismissal, Dahlan's counsel challenged the Decree in the HCJ, two years after its date of issue.<sup>42</sup> Expectedly, the HJC dismissed the case on form pursuant to Article 284 of the Civil and Commercial Procedure Law, which stipulates that:

The time limit for presenting a summons to the HCJ is sixty days from the date the contested administrative decision is published or notified to the interested party.<sup>43</sup>

To begin with, the bottom line of the Court's argument consists of two propositions: First, this Decree-by-law is de facto a presidential decree, and presidential decrees are neither laws nor regulations; second, according to Article

<sup>37</sup> Fat'hi Fikry, "2012/6 المحكمة العليا بصفتها محكمة دستورية رقم 20 (July 2013): 171-173. [Comment on SCC Judgment in Case No. 6 of the Year 2012, "العدالة والقانون" [Justice and Law] 20 (July 2013): 171-173.

<sup>38</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

<sup>39</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

<sup>40</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

<sup>41</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 6-2012, 10.

<sup>42</sup> See محكمة العدل العليا الفلسطينية [the Palestinian High Court of Justice], No. 230-2014, 4.

<sup>43</sup> Civil and Commercial Procedure Law No 2 of 2001 (Palestine) <http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2001&MID=13849>.

24(1) of the LSCC, the Court has jurisdiction only over laws, which decrees-by-law is part of and regulations. Therefore, it lacks jurisdiction over presidential decrees, and subsequently, this Decree.

To analyse this judgment, it is critical to highlight that the first proposition is correct; Dahlan was addressed by his name, and hence the Decree lacks the element of being “general and abstract,” therefore, it is not a law.<sup>44</sup> However, it is vital to assert that a serious reservation can be raised against the second proposition, making it unlikely to be correct, and concludes that the Court does have jurisdiction over this Decree.

Notably, the Court referred to Article 24 of the LSCC to highlight the boundaries of its jurisdiction and erroneously disregarded Article 103(1)(a) of the BL. The latter Article, according to usual English translation, states that:

A High Constitutional Court shall be established by law to consider: (a) The constitutionality of laws, regulations, and other enacted rules.<sup>45</sup>

The Arabic text of that Article may have a more plausible interpretation. If translated literally, paragraph (a) says The constitutionality of laws, bylaws or regulations, and others. The reader of this article would be confused by the meaning of the word “others,” because there are no legal rules in the Palestinian legal system outside “laws, bylaws, or regulations,” which are both mentioned before that word.<sup>46</sup> Stated differently, including the word ‘others’ at the end of the article, demonstrates that the BL extends the jurisdiction of the SCC beyond what is stated before that word. Hence, the critical question is what “others” consist of?

To answer that, it is required to look for hints from other articles that discuss the same matter in the Palestinian legal system, which also helps to maintain coherence and cohesion between legal texts.<sup>47</sup> In the BL, there are no

<sup>44</sup> Abd Al-Aziz Saliman, “التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6” [Comment on SCC Judgment in Case No. 6 of the Year 2012], *العدالة والقانون* [Justice and Law] 20 (July 2013): 181, 188.

<sup>45</sup> Italicised by the Author.

<sup>46</sup> Omar Hamzah Al-Turkmani, “القضاء الدستوري في فلسطين وفقاً لقانون المحكمة الدستورية العليا رقم (3) لسنة 2006” [the Constitutional Judiciary in Palestine According to the Supreme Constitutional Court Act No. 3 of 2006] (Master of Public Law Thesis, Al-Azhar University, 2010), 84-5.

<sup>47</sup> Abu Sawi, Mahmoud, “الرقابة على دستورية القوانين في فلسطين” [the Judicial Review of Laws’ Constitutionality in Palestine] (The Arab association of constitutional law, 2009), 13.

such articles, as this matter was discussed only once in Article 103, which makes it necessary to refer to other laws as means of finding a proper explanation of that word.<sup>48</sup> The LSCC does contain such an article, which is Article 25(2), that helps to interpret the word 'others' in the BL because that is the most plausible interpretation of Article 103(1)(a) since there is no mention of this matter in other laws.<sup>49</sup> Thus, utilising this Article of the LSCC does lead to the best-possible, coherent understanding of both articles with the least degree of inconsistency between both laws.<sup>50</sup> Article 25(2) states that:

Upon the pronouncement on the unconstitutionality of any law, decree, by law, regulation or decision partially or wholly, the legislative authority or the competent authority must amend such law, decree, by law, regulation or decision in a manner that conforms to the provisions of the Basic Law and the Law.

According to this Article, a decree, in its original meaning as not having the element of being "general and abstract", might be pronounced unconstitutional, which affirms that it, a fortiori, does fall under the jurisdiction of the Court. Since a decree is neither law, by law, nor a regulation, and yet falls under the SCC jurisdiction, then it is part of what the word "others" refer to. This conclusion is necessary because it maintains coherence between this Article and that of the BL. Abeer Dirbas, a researcher at the Palestinian Institution of Law, agrees with this conclusion, she affirms that by reading the BL articles and the LSCC, it becomes clear that the BL expands the jurisdiction of the SCC to include laws, bylaws, regulations, presidential decrees, decrees-by-law, and executive orders.<sup>51</sup> Furthermore, Mahmoud Abusawi, a Palestinian constitutional jurist, also agrees with this conclusion, asserting that the BL includes presidential decrees, decrees-by-law, and executive orders in the jurisdiction of the LSCC, contrary to the LSCC, which is in a lower degree in the hierarchy of Palestinian

<sup>48</sup> "A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority" (A compilation by the International Bar Association's Human Rights Institute, 2009), 16.

<sup>49</sup> Abeer Dirbas, "الرقابة القضائية على الدستورية في فلسطين" [Judicial Review of Constitutionality in Palestine], in *الحالة التشريعية في فلسطين 2007-2012* [the Legislative Status in Palestine 2007-2012] (Institute of Law - Birzeit University, 2012), 285, 310.

<sup>50</sup> Zeed Al-Kailany, "الطعن في دستورية القوانين: دراسة مقارنة" [Appealing in the Constitutionality of the Laws: Comparative Study] (Master of Public Law Thesis, An-Najah University, 2012), 27-9.

<sup>51</sup> Abeer Dirbas, "الرقابة القضائية على الدستورية في فلسطين", 285, 309.

legislation when compared to the BL.<sup>52</sup> Thus, since the BL is superior to the LSCC, a contradiction between both laws results in upholding the BL's Articles and thus confirm the LSCC to suit the BL. Such confirmation of this case takes the form of expanding the SCC' jurisdiction beyond Article 24(1) of the LSCC, to include what Article 103(1) of the BL mentioned.

Additionally, the International Bar Association, in its commentary on the LSCC, affirmed that:

The experts overwhelmingly agree that the LSCC provisions on jurisdiction ... must be harmonised with Article 103 of the Basic Law to ensure consistency and to avoid redundancy and confusion. Some experts mention that it would be particularly helpful in Article 24, subparagraphs 1 and 2, to quote directly from the Basic Law.<sup>53</sup>

This affirmation demonstrates how the LSCC reduces the jurisdiction of the Court, as expressed in the BL.

Moreover, and one of the key hints that the word "others" encompass presidential decrees, is the SCC judgment in the case 1-2006. In this case, Parliament members from the Fatah party submitted a case against the constitutionality of the newly-elected Parliament's decisions.<sup>54</sup> The contested decisions were made in the first session by the Hamas majority to annul the decisions that the previous Parliament has made in its last session.<sup>55</sup> The defendant, who represented the Hamas Parliament members, argued that the SCC lacks jurisdiction over decisions made by the Parliament because these decisions are neither laws nor regulations.<sup>56</sup> In response, the SCC declared, by referring to Article 103 of the BL, that the word "others" include all actions that directly relate to the provisions of the BL and might directly contravene it.<sup>57</sup> This

<sup>52</sup> Abu Sawi, Mahmoud, " الرقابة على دستورية القوانين في فلسطين " [the Judicial Review of Laws' Constitutionality in Palestine]" (The Arab Association of Constitutional Law, 2009), 13.

<sup>53</sup> "A Comparative Analysis of the Law on the Supreme Constitutional Court of the Palestinian National Authority," (the International Bar Association's Human Rights Institute, 2009), 16.

<sup>54</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 1. A full translation of the Court's judgment in this case is available at: <<http://muqtafi.birzeit.edu/en/courtjudgments/ShowDoc.aspx?ID=52112>>.

<sup>55</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 6.

<sup>56</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 3.

<sup>57</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 5.

declaration was a consensus between the judges, even those who dissented in the final judgment.<sup>58</sup>

By this analysis, it can be concluded that according to Article 103 of the BL, which overrules Article 24(1) of the LSCC, and in light of Articles 25(1) and 25(2) of the LSCC, the Court does have jurisdiction over presidential decrees, which are not required to have the element of being general and abstract, such as this Decree. Therefore, the Decree of lifting Dahlan's immunity falls under the Court's jurisdiction. Hence, there is a substantial indication that the SCC has failed in applying the legal texts related to its jurisdiction, particularly that of the BL. Importantly, the jurisdiction of constitutional courts in authoritarian regimes should include executive actions if these courts want to be effective in departing from authoritarianism. Other courts might use the excuse of "political question" or "act of sovereignty" to escape clashes with the regime.

Such failure leads to infer that its reasoning was erroneous and mainly neglectful as it completely disregarded Article 103 of the BL and other Articles of the LSCC. That disregard resulted in leaving the inconsistency between the BL and the LSCC without solving, which is, in fact, the task of the SCC, as it is required to maintain the superiority of the BL over all other legal texts. In his commentary on this case, Fathi Fikry avows that "the Court did wrongly decide on the issue of lacking subject-matter in this case."<sup>59</sup>

This disregard by the SCC raises a vital inquiry: was this disregard unintentional? If yes, then this can be a major concern regarding the bench's adequacy; a judge failing to apply the BL rules when addressing the SCC jurisdiction is rather substantial incompetence of that judge.<sup>60</sup> If the answer is no, then the concern is even greater, because it asserts on the ill intention of such a bench, and justifies characterising its judges as lacking integrity.<sup>61</sup>

<sup>58</sup> Dissident Opinion of Chief Justice Hammad, and Judges Gizlan, Nasirudeen, Takrory, and Tanjeer, "العليا الفلسطينية بصفتها محكمة دستورية المحكمة [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 1-2006, 8."

<sup>59</sup> Fathi Fikry, "A Commentary to the SCC Judgment in Case No. 6 of the Year 2012," *Justice and Law Journal, Palestine*, 175.

<sup>60</sup> Fahid Abū al-Athm Nusūr, *القضاء الدستوري بين النظرية والتطبيق* [Constitutional Judiciary: Between Theory and Practice] (Dar Al-Thaqafah, 2016), 419, 431.

<sup>61</sup> Nusūr, *القضاء الدستوري بين النظرية والتطبيق* [Constitutional Judiciary: Between Theory and Practice].

Before moving to the dissenting opinion, it is noteworthy that the Court did not discuss the second claim by Dahlan's counsel, which relates to the President's authority to lift parliamentary immunity. The Court considered the issue of jurisdiction as a primary matter. Since it declared lacking jurisdiction over the Decree, it did not discuss that authority, as being secondary to jurisdiction. Nevertheless, Article 96 of the Parliament's Rules of Procedure mentioned above clearly states that a request to lift immunity must be submitted from the Parliament's Legal Committee. Two-thirds of the Parliament members must approve it to become valid. This article implies that the President does not have the competence to lift Dahlan's immunity; rather, it is the exclusive, non-delegable competence of the Parliament.<sup>62</sup> A counter-argument to this analysis may refer to Article 43 of the BL mentioned earlier, which provides the President with the competence of issuing Decrees-by-law in states of necessity.<sup>63</sup> This counter-argument may proceed by claiming that such competence may allow the President to overrule Article 96. However, such an argument is based on a fallacious understanding of Article 43. Article 43, according to many Palestinian jurists, does not allow the President to violate already-set rules;<sup>64</sup> rather, it only allows him to enact new rules that would be necessary to fill a legislative vacuum and face an imminent danger that threatens Palestine, without violating what was already regulated by the Parliament.<sup>65</sup>

<sup>62</sup> Abd Al-Aziz Saliman, "التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6" [Comment on SCC Judgment in Case No. 6 of the Year 2012], *العدالة والقانون* [Justice and Law] 20 (July 2013): 181, 184.

<sup>63</sup> Abd Al-Aziz Saliman, "التعليق على قرار المحكمة العليا بصفتها محكمة دستورية رقم 2012/6" [Comment on SCC Judgment in Case No. 6 of the Year 2012], *العدالة والقانون* [Justice and Law] 20 (July 2013): 181, 187.

<sup>64</sup> Newar Bdair and Asem Khalil, "State of Necessity" (Working Paper, Constitutional Law Unit, Faculty of Law and Public Administration, Birzeit University, 2018), 6; Mohammad Al-Laham, "القرارات بقوانين الصادرة عن رئيس السلطة الوطنية الفلسطينية والآثار القانونية المترتبة عليها" [Decrees-by-Law Issued by the President and Their Legal Impact] (Masters in Law Thesis, The Islamic University - Gaza, 2015), 42; Abu-Hanood, Hussain, Sami Jabarin and Tariq Toukan, "قراءات قانونية في القرارات بقوانين الصادرة عن الرئيس وفقاً لحالات الضرورة" [Legal Readings in Decrees-by-Law Issued by the President in States of Necessity] (The Palestinian Initiative for the Promotion of Global Dialogue and Democracy - MIFTAH, 2008), 39.

<sup>65</sup> Newar Bdair and Asem Khalil, "State of Necessity" (Working Paper, Constitutional Law Unit, Faculty of Law and Public Administration, Birzeit University, 2018), 6; Mohammad Al-Laham, "القرارات بقوانين الصادرة عن رئيس السلطة الوطنية الفلسطينية والآثار القانونية المترتبة عليها" [Decrees-by-Law Issued by the President and Their Legal Impact] (Masters in Law Thesis, The Islamic University - Gaza, 2015), 42; Abu-Hanood, Hussain, Sami Jabarin and Tariq Toukan, "قراءات قانونية في القرارات بقوانين الصادرة عن الرئيس وفقاً لحالات الضرورة" [Legal Readings in Decrees-by-Law Issued by the President in States of Necessity] (The Palestinian Initiative For The Promotion of Global Dialogue and Democracy - MIFTAH, 2008), 39.

To summarise the majority's opinion, the Court justified its lack of jurisdiction by referring to Article 24 of the LSCC, while disregarding Article 103 of the BL. The loophole in Article 24(1) of the LSCC was a result of the last-minute changes to the Article by the previous Fatah Parliament. This loophole has created the contradiction between this Article and that of the BL and another contradiction between Article 24 and 25 of the LSCC itself, as shown above.

#### 4.2. The Regime's Influence and Gains

The fact that the Chief Justice, namely Farid Al-Jallad at the time of this case, who was also the Head of the HJC, was appointed single-handedly by the President, and that the President has the authority to remove him, raises the possibility that Al-Jallad was seeking to maintain his tenure through showing loyalty to the President. Observations about this possible practice by the Chief Justice provides further support for the argument that lack of balance between state powers in appointment and removal procedures to the HJC and the HCJ opens room for such undue consideration of interests by public officials in the judiciary, the Chief justice himself in this case.

The regime made significant political gains by the Court's judgment. After the dismissal, the Court of Anti-Corruption accepted the General Prosecutor's case against Dahlan, and pronounced him guilty of corruption, sentencing him to three years in prison and a fine of USD 15,000,000.<sup>66</sup> Recently, a report claims that the President is seeking Interpol's help to arrest Dahlan, who currently resides in the United Arab Emirates, on the basis of this latter judgment.<sup>67</sup>

This result of the Court's judgment relates to one function of courts in authoritarian regimes: controlling administrative agents and maintaining elite cohesion. Dahlan, which reports showing that he made considerable efforts

<sup>66</sup> محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22-2014. Marius Pieterse, "Beyond the Welfare State: Globalisation of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa," *Stellenbosch Law Review* 3, no.1 (2003).

<sup>67</sup> "Palestine to Seek Dahlan's Arrest Through Interpol, Officials Say," *Middle East Eye*, 2017, <http://www.middleeasteye.net/news/palestine-seek-dahlans-arrest-through-interpol-officials-say-23623380>. See generally Manisuli Ssenyonjo, "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa, The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa," *Netherlands International Law Review* 64 (2017), 259-289.

to form his own coalition within the Fatah party and be subsequent of the President, is now “a fugitive from justice.”<sup>68</sup> Labeling Dahlan as such allowed the President to prevent the former from holding a legitimate position inside the Fatah party, and facilitated dismissing Dahlan's allies from the PA on the pretext of ‘terminating disloyal, misdeameaning Fatah members’.<sup>69</sup>

Based on this analysis, the SCC declaration of lacking jurisdiction over de facto presidential decrees, which include Decrees-by-law that lacks the element of being ‘general and abstract’, allowed the President to use this Court in maintaining his elite cohesion within the Fatah party. Importantly, the SCC upheld this declaration in another case, and performed other functions in favour of the regime, as the following part explains.

## V. CONCLUSION

As the analysis of Dahlan's case showed, by dismissing Rawabi Case on the claim that the SCC lacks jurisdiction over presidential orders, the SCC disregarded Article 103 of the BL that highlights the Court's jurisdiction over such orders, since they fall under the meaning of the word ‘others’ mentioned in that Article. This disregard raises the same concerns about the judges; was the disregard unintentional or, more worrying, ill-intended. It is not plausible that it was unintentional since the BL is the foundational text in the Palestinian legal system, that every constitutional judge is aware of. The BL allowed the SCC to review what falls beyond laws and regulations, namely presidential orders. The jurisdiction over these orders is also apparent in other Articles of the LSCC. Therefore, it is likely that the majority of judges were aware of that but chose to avoid it, which indicates their lack of integrity in both cases.

This dismissal permitted the regime to provide credible commitments in the economic sphere to private investors. In this dismissal, Bayti Company, as a

<sup>68</sup> محكمة جرائم الفساد [Court of Corruption Crimes] (Palestine), No. 22-2014, 3. Paul O'Connell, “The Death of Socio-Economic Rights,” *Modern Law Review* 74, no. 4 (2011): 532.

<sup>69</sup> See especially Adnan Abu Amer, “Dahlan Encouraged to Form Palestinian Party outside Fatah,” *Al-Monitor*, 2018, <https://www.al-monitor.com/pulse/originals/2018/03/uae-request-dahlan-form-new-party-dissociated-from-fatah.html>. See Igor Vila, “Constitutional Court Protection of Economic and Social Rights During the Economic Crisis,” *Pravni Zapisi* 66, no. 1 (2014).

local investor, received a credible commitment from the regime to protect the company's interests.<sup>70</sup>

By offering that protection, the regime had significant gains: making a tremendous profit from taxing imported materials, and, more importantly, increasing the confidence of potential investors that their projects would also be protected, even if that required a presidential decree to expropriate privately-owned lands.<sup>71</sup> This protection is an example of corruption, but a unique form of corruption, which is based on unconstitutional actions by the regime itself, supported by the misapplication of the law by the Constitutional Court.

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<sup>70</sup> See المحكمة العليا الفلسطينية بصفتها محكمة دستورية [Supreme Court of Palestine in its capacity of a Constitutional Court], No. 12-2016, 4. See generally Daniel McDougall, "The Vibe of the Thing: Implementing Economic, Social and Cultural Rights in New Zealand," *Mata Koi: Auckland University Law Review* 21 (2015): 86.

<sup>71</sup> Elliot Abrams, "Rawabi: The New City in The Palestinian Territories, Council on Foreign Relations", 2016, <https://www.cfr.org/blog/rawabi-new-city-palestinian-territories>.

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