

**The Legality of the Presidential
Decree to Dissolve the Palestinian
Legislative Council**

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I- Introduction

Before delving into the topic of this article, a fundamental reservation must be made. The author believes that, legally speaking, the Oslo Process has been the root of all evils that has befallen the Palestine question. The institutions created by the Oslo Accords, including the so-called Palestinian Authority (PA), the Palestinian Legislative Council (PLC), and the government, in all their forms and whatever their names, are short of all sovereign attributes except for what pertains to security crackdowns and repression against our oppressed people on behalf of the occupation authorities. There is no question in my view that the division that has plagued the Palestinian front is one of those evils caused by the Oslo Accords. With all due respect to those who have claimed that the PLC is sovereign and that dissolving it paves the way to transitioning to state authority, this has neither legal nor logical basis. With this introduction, I did not intend any harm to our friendship, for it will remain intact, regardless of our differences in jurisprudence and opinion.

Nonetheless, I will address the presidential decree in light of the constitutional verdict, within the existing laws and legal jurisprudence, and express reservation on all of them on account of their being the product of the Oslo Accords in order to highlight the fundamental flaw in the entire Palestinian status quo and institutions created thereby. Furthermore, I want to highlight that the only source of the power for the PA is through the military governor, who alone commands “*de facto* authority.” Actual “legitimate sovereignty” (which is overshadowed but not nullified by the occupation authority), is held by the occupied people as international law unequivocally dictates.

II- The Presidential Decree and Comments

On 22/12/2018, the Palestinian President Mahmoud ‘Abbas issued a decree dissolving the PLC, based on legal advice issued by the Palestinian Constitutional Court (the Court) on 12/12/2018. The advice claimed that the national interest required dissolving the PLC as soon as the opinion was published in the Official Gazette, demanding of President ‘Abbas to call for legislative elections within six months. Following the presidential decree to dissolve the PLC, reactions came quickly from Palestinian bodies, factions and figures; some supporting and others opposing.

* This is a liberal translation of an article in Arabic by the writer that first appeared in Al-Zaytouna Centre for Studies and Consultations, on January 7, 2019 (Beirut).

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Hamas quickly denounced the presidential decree, deeming it a politicized decision issued by an unlawfully constituted court with no legal or constitutional weight. Hamas said “the PLC is the “master of itself”, meaning no one other than its members had the authority to dissolve it. PLC Speaker ‘Aziz Dweik said any decrees targeting the PLC were “invalid.” Ahmad Bahr, First Deputy Speaker, said the verdict of the Court was “unlawful,” and denied that President ‘Abbas had any authority in dissolving the PLC. Jamal al-Khodari, an independent PLC member said: “The Council is the master of itself, and the Basic Law did not give any entity or person whatsoever the power to dissolve it.” But Saeb Erekat, Secretary of the PLO Executive Committee, was quoted as saying that the verdict of the Constitutional Court is in line with the decision of the Palestinian National Council (PNC) “calling for ending “the phase of the [Palestinian] Authority and moving to statehood phase” urging for general elections of a constituent assembly of the “State of Palestine” and of presidential elections, then building up the components of the state after it had acquired legal personality at the United Nations. However, perhaps the comment of Mahmoud ‘Abbas himself was the most revealing and unequivocal, showing the real reason behind his decision to dissolve the PLC. In a meeting with the PLO Executive Committee on 22/12/2018, ‘Abbas said that there were certain steps to be taken. He said “specific measures” had been decided vis-à-vis three parties: the United States “by acceding to conventions we have been prevented from joining”; Israel “where we demanded abolishing or amending the Paris economic agreement”; and Hamas “by dissolving the PLC.” This proves that the decision to dissolve the PLC, from the President’s point of view, was a “punishment” for Hamas.

But does President ‘Abbas have the authority to dissolve the PLC? Answering this question first requires analyzing the opinion issued by the Constitutional Court, the grounds of its opinion, and the law establishing the Court and setting out its jurisdiction.

III- The Constitutional Court and its Competence

The Court was established by virtue of Law No 3 of 2006 as amended by Presidential Decree No 9 of 2017 dated 2/10/2017 (collectively the “Law”).¹ Article 24 (as amended) of the Law set out the jurisdiction of the Court to include interpreting provisions of the Basic law, interpreting legislation if disputes arose regarding their implementation, adjudicating disputes regarding competence of various authorities, and considering challenges to the legal competence of the President to remain in office. These powers find their legal basis in Article 103 of the Basic Law, which stipulates that a High Constitutional Court shall be established by law to consider the

¹ The English translation of this article is from the following: 2003 Amended Basic Law, site of The Palestinian Basic Law, 18/3/2003, <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law>



constitutionality of laws, regulations, and other enacted rules, the interpretation of the Basic Law and legislation, and the settlement of jurisdictional disputes which might arise between judicial and administrative bodies having judicial jurisdiction. Any addition to the Court's jurisdiction included in the Court's Law beyond what is stipulated in the Basic Law does not invalidate the Court's jurisdiction as long as these remain within the general scope of the function of a constitutional court.

Article 30 of the Law states that the power to interpret laws is limited to requests submitted by the head of the state or the head of any of the executive, legislative, or judicial branch of the government or by those whose constitutional rights have been violated. Article 30 sets out the procedural requirements for requesting the Court's opinion, which request is to be submitted to the Court's registry through the Minister of Justice. In other words the applicant may not go directly to the Court's registry, but rather must go through the Minister of Justice. Article 31 provides that the proceedings before the Court must be conducted through the Public Prosecutor or the person representing him.

So who requested the interpretation of the Law in the case under consideration? By reading the opinion, it appears that the person who requested the Court's opinion was the President of the Supreme Judicial Council, i.e., the head of the judicial branch, who filed it through the Minister of Justice in line with Article 30 of the Court's Law. The request was recorded in the Court's registry on 2/12/2018. The President of the Judiciary requested the interpretation of Articles 47, 47 bis, and 50 of the Basic Law as amended. Article 47 of the Basic Law states, "The term of the Legislative Council shall be for four years from the date of its election and the elections shall be conducted once every four years in a regular manner."² Article 47 bis reads that: "The term of the existing Legislative Council shall terminate when the members of the newly elected Council take the constitutional oath."³ Article 50 states that the PLC must elect the members of the Legislative Council Office in its first meeting.

IV- The Ruling of the Constitutional Court

The Court responded to the request and cited important facts in its decision. Indeed, the Court stressed that the election of the PLC took place on 25/1/2006, after which it held its first ordinary session on 18/2/2006 presided over by President Mahmoud 'Abbas. Its first session ended after it was extended to 5/7/2007. After that, the Court said that the PLC did not convene in any session following the division (triggered by the Fatah-Hamas conflict), meaning that since the end of its first session it had not met

² The English translation of this article is from the following: 2005 Amendment to the Basic Law, The Palestinian Basic Law, 27/7/2005, <https://www.palestinianbasiclaw.org/basic-law/2005-amendments>

³ Ibid.

and has been unable to discharge its duties. The Court also noted that the absence of the PLC threatened “social solidarity” and posed “a risk to the legal national security of the country...”

The Court addressed the provisions the interpretation of which had been requested, stating that Article 47 was the foundation of one of the three branches of government that has constitutional status, namely, the legislative branch represented by the PLC which did not convene except for one session ending on 5/7/2007. After that, the Court added, the PLC ceased playing the role entrusted to it as a legislative body, and it refused to abide by the laws and regulations governing its functions including holding its ordinary session as called by the President in line with the law under Presidential Decree No 27 dates 5/7/2007, with the opening session scheduled for 1//7/2007. The PLC did not comply because of the division [between Hamas and Fatah] that emerged on 14/6/2007. Whereas the PLC was in a suspended state and remains so to the present day, the Court said, this has invalidated its capacity as a legislative council.

The Court added that despite the fact that the PLC had not convened its sessions since 2007, therefore not discharging its duties for which it was elected, “its members nevertheless continued to receive allocations, salaries, allowances, miscellaneous expenses, and so on... Therefore, the court claimed that the PLC was draining the funds of the Palestinian state...without performing its duties...”. The Court then exclaimed whether “these [were] not sufficient grounds to dissolve the PLC...go to the people...to hold new elections?”

The Court then addressed Article 47 bis, which is central to this matter, as it sets out how the previous PLC’s term ends upon the members of the new elected council taking the oath. It must be noted here that the Court, in an astute gesture, observed that that Article 47 bis was added by virtue of Law No 9 of 2005, approved by the PLC on 18/6/2005, and “was agreed upon by consensus among the movements, factions, and organizations of the Palestinian people, in the context of national accord, before being put forward for approval by the PLC”. In the course of interpreting this article, the Court said its implementation must be preceded by legislative elections on the constitutionally scheduled date, that is every four years, which had not occurred meaning that the article could not be implemented. In the view of the Court, implementing this article properly required having two councils in place: One whose term has expired, and one that is newly elected; Article 47 bis covers the transition between the two councils, and since this was not the case, the article could not be implemented in the present case.

The Court concluded that the PLC had lost its capacity as a legislative body for not having convened since 2007. Therefore, the Court concluded that Article 47 bis did not apply, and the PLC members were not eligible to receive financial remuneration. In conclusion, the Court said “the national interest required dissolving the PLC...and



considered it dissolved from the date of the issuance of this decision”. The Court called on President Mahmoud ‘Abbas to announce holding legislative elections within six months from the date this verdict is published in the Official Gazette.

V- Discussion of the Interpretative Ruling

The interpretative ruling was issued on 12/12/2018. The announcement that President Mahmoud ‘Abbas would dissolve the PLC came at the meeting of the Executive Committee on 22/12/2018. In other words, the President and his advisers took ten days to analyze and study the interpretative ruling and reach a decision to dissolve the PLC, meaning that alternatives had been entertained before reaching this decision.

Before discussing the interpretative ruling, we must include some observations from the body of constitutional jurisprudence regarding constitutional rulings in general, and interpretative rulings in particular. The decisions issued by the Constitutional Court, whether in regard to resolving disputes or interpreting laws, has profound and long-term effects because they have the rank of legislation. A ruling concluding that a text of the law is unconstitutional for example would invalidate it, and the legislature would have to undertake to amend it in line with the ruling. The same applies to an interpretative ruling, which, similar to legislation, becomes binding as soon as it is published in the Official Gazette.

Accordingly, settled constitutional jurisprudence assumes that legal texts that require interpretation must be of crucial importance in relation to the rights it regulates, and the interests it intends to preserve. The authority of interpreting laws must elaborate on the legislator’s intention for achieving a specific goal. Therefore, when interpreting a legal text, the Court must consider it within its context or from the legislator’s point of view. The ruling of the Court in any case does not produce a new rule, but it is an interpretation that becomes part of the text. That is, its ruling merely reveals the intention of the legislator.

Discussing this legal verdict does not require a lot of effort, because it has fallen into clear contradiction and overstepped its authority of interpretation. The Court fell into contradiction by saying that interpreting Article 47 bis required the presence of both an old and a newly elected PLC, with the term of the first expiring only when the members of the new council take the constitutional oath. Article 47 bis sets out a transitional term between two legislative councils, “which cannot be achieved” as the Court claimed, “except by holding elections regularly every four years.” What the Court is saying is correct legally and its interpretation is sound, especially since Article 47 bis was amended in 2005, as the Court accurately observed, in a way that reflects the intention

of the legislator to avert a constitutional vacuum between two legislative councils. However, the interpretation adopted by the esteemed Court should have reached the inevitable conclusion that the existing PLC may not be dissolved until the election of a new council. Therefore, it was odd that the Court announced the dissolution of the existing council before a new council was elected, and requested President ‘Abbas to hold elections within six months. In other words, the Court clearly ignored the intention of the legislator when adding Article 47 bis to the Basic Law.

Even if we assume, for the sake of argument, that Article 47 bis was not included in the amendment of 2005, the esteemed Court should have sought an analogy between the case before it and the situation where a government has resigned and yet continues to discharge its duties in a caretaking capacity until a new cabinet is formed and has won the confidence of parliament when it delivers its ministerial statement which is then debated and voted on. This is the normal internationally accepted practice, and the Palestinian Basic Law has endorsed the same approach (Articles 66 and 78/3).

It must be said that it is shocking that the esteemed Court did not abide by its own interpretative ruling No. 3 of 2016 rendered on 3/11/2016, in which it addressed the issue of interpreting a number of articles of the Basic Law, including Article 47 bis itself. In that case, on 26/9/2016, the head of the judiciary, through the minister of justice, submitted a request to the Constitutional Court “regarding the interpretation of the term of the PLC in the texts of Articles 47 and 47 bis of the amended Basic Law...” The case pertained to revoking the parliamentary immunity of Fatah MP Mohamed Dahlan. The Court at that time was right to conclude that “[Being] keen to prevent a legislative vacuum, the legislator added Article 47 bis to the Basic Law in 2005, to extend the term of PLC members temporarily beyond the four-year term until the members of the new PLC take the constitutional oath”. The Court explained at the time the grounds of this emergency extension by citing a legitimate cause, namely, that the members of the new PLC may not be able to take the constitutional oath on time due to “force majeure” except after a period of time, and therefore, that “it is unlawful for them to begin their legislative duties...except after taking oath...”. To back its view, the esteemed Court cited analogous constitutional texts in the constitutions of some Arab countries addressing legislative vacuum. Some of these countries allowed the existing legislature to remain in place until a new one was elected (e.g. Algeria, Yemen, and Jordan). Others extended the term of existing legislatures temporarily (e.g. Qatar, Kuwait, Tunisia, and Syria). It is also worthwhile to recall a Palestinian precedent in this regard, when the late President Yasir ‘Arafat issued a decree in 1999 extending the first PLC term. This was prior to the promulgation of the Basic Law and the amendment thereof. The extension at the time was approved due to extraneous circumstances, setting a precedent that could be followed.



It would have been better for the esteemed Constitutional Court to abide by its own earlier legal opinion published nearly two years ago. Indeed, the Court's latest ruling contradicts its earlier one. However, it is not permissible to have a contradiction between the rulings of the Constitutional Court,, because according to Article 41/1 of the Court's Law, its "interpretative rulings are binding to all branches of the state and to all others." So which interpretation should be observed and be binding on all, and who can settle this contradiction? Do we need another constitutional court to adjudicate this conflict?

Among the pitfalls that the interpretative ruling fell into, was stating that the PLC had been suspended since its last session in 2007 and yet its members continued to receive their allowances despite not doing their work; however, the problem with this argument is that it sees PLC members as civil servants who are subject to the Civil Service Law, alternatively, it deals with them as workers who are subject to the Labor Law. Indeed, both these laws endorse the rule that there should be no pay for those who do not work. However, PLC members are not and should not be subject to the same norms. They represent a legislative branch of government and receive allocations, but do not receive salaries. They are not under the supervision of an employer, or undergo a probation period, or receive annual leave, sick leave, and maternity leave etc. Some of those members who are in Gaza are still discharging their duties, despite the painful and harmful division that has undermined the national cause. It is not part of the Court's prerogative to address or assess the activities of these members or opine on their work; it is outside its jurisdiction.

The contradiction in the interpretative ruling is not the only problem with it. The Court overstepped its constitutional powers when it decided that: "The supreme interest of the Palestinian people and homeland require dissolving the elected Legislative Council..." and called on "the President of the state to announce holding legislative elections within six months of the date of the publication of this ruling in the Official Gazette."

At the outset, it must be stated that the competence of the Court can be summarized in two main matters: First, adjudicating disputes among the branches of power or between those branches and the citizens (contentious cases). Second, offering opinions and interpretation of laws. In the context of this latter jurisdiction,, the Court may offer its opinion and advice, but it may not issue an executive ruling. So from where did the Court draw the power to decide to "dissolve the PLC," and ask the President to hold elections complete with setting a date for holding them within six months? We did not find anything in the Basic Law or the Court's law that supports its position and "decision" to dissolve parliament and hold elections. In truth, this lapse severely undermines the ruling.

It must be also recalled that the President does not need a ruling from the Court to hold elections, which are legally set to take place regularly according to the time-frame also established in the law.

Remarkably, the Court blamed the PLC's failure to convene on the division that took place in mid-2007 between Fatah and Hamas. Whilst, this has undoubtedly played a negative role in obstructing the PLC from convening regularly; however, the Court should not have exclusively blamed this "division"; it should have also examined the dangerous and harmful role of the Israeli occupation in hindering the work of the PLC by systematically attacking a large number of PLC members, imprisoning them, deporting them, blocking their movements, and intimidating them, to the point that the occupation authorities even targeted the wives of some PLC members. The occupation authorities began to take these repressive measures immediately after the 2006 election results, and escalated after Al-Qassam Brigades captured the Israeli soldier, Gilad Shalit on 25/6/2006, and held him as a prisoner of war.

Reports published by the occupation army itself, as well as Palestinian human rights groups and the International Committee of the Red Cross, documented these abusive measures, which had denied the PLC its quorum and prevented it from holding regular sessions.

The conduct of the occupation authorities is tantamount to "force majeure" preventing commitments from being fulfilled. Therefore, it is a legitimate legal justification for not convening PLC sessions. The conduct of the occupation authorities is also on evidence of the weak nature of the structure that the Oslo Accords promoters tried to create in the Palestinian circles, along with the delusional belief repeated by some about the "sovereignty of the PLC" and the "transition from Palestinian Authority to Palestinian statehood." It may even not be far-fetched to say that in practical terms, it is the Israeli occupation authority, not the interpretative ruling or President Mahmoud 'Abbas, that has caused the dissolution of the PLC.

At the executive level, what President 'Abbas did in terms of announcing the dissolution of the PLC, is a move that has no grounds in the Basic Law or in customary practice. The President is no doubt aware that when Yasir 'Arafat sought to obtain the right to dissolve the council during the drafting of the Basic Law and upon its publication, Fatah's bloc in the Council, successfully blocked it twice.

The Basic Law, as amended under Chapter 3 thereof, (Articles 34-46) addressed the authority of the President of the PA (the State). None of these provisions included the power to dissolve the PLC. There is no practical or legal precedent indicating otherwise.

In addition, Article 113 of the Basic Law states unequivocally and leaving no room for further interpretation: "The Palestinian Legislative Council may not be dissolved or



its work hindered during a state of emergency, nor shall the provisions of this Chapter be suspended” [Chapter Seven – State of Emergency Provisions].⁴ Essentially, this means, that even in states of emergency when tough and unusual measures are usually justified, the PLC may not be dissolved; it therefore follows that in ordinary circumstances the PLC cannot be dissolved or suspended.

The decision to dissolve the PLC and call for elections will no doubt have implications and the President and his advisers were aware of them when assessing the impact of the interpretative rulings. What would the leadership do if Israel disallowed Palestinian residents of Jerusalem to participate in the elections as required in the Oslo Accords? What would the position be if the elections produced results similar to those of 2006? Does the Palestinian leadership not see that holding elections for a new Palestine National Council rather than a new PLC is more compatible with the interests of the entire Palestinian people, especially those in the Diaspora who represent half of all Palestinians? Does the leadership not see that a step like this would be effective in blocking the threat from the so-called Deal of the Century, as it would unite all segments of the Palestinian people who have a strategic interest to foil it no matter where they are?

⁴ 2003 Amended Basic Law, The Palestinian Basic Law, 18/3/2003.

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الخبير القانوني الدكتور
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