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Separation of Powers in the Palestinian Law: Does it Reflect the Democratic System? (A Comparative Approach with Indonesia)

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Abstract *The principle of separation of powers among the three organs of government i.e., the Legislative, Executive, and Judiciary are one of the main pillars of the democratic system. This principle guarantees a balance of powers between these three organs. However, in Palestine, the issue arises as a result of a lack of commitment from these organs to practically apply this principle in accordance with the Palestinian Basic Law of 2003. Nevertheless, in Indonesian Constitution of 1945 has stated that is a democratic country with the foundation of a separation of powers. In addition, the practice in Indonesia shows that there is various constitutional mechanism to split the power. The objectives of this article are to examine the practice of separation of powers in Palestine and Indonesia and to harmonize the theoretical and practical aspects. In order to achieve these objectives, doctrinal legal research using the qualitative approach was engaged. Findings show that the principle of separation of powers was not fully practiced in Palestine between the three*

organs, especially the Executive and there is an absence of constitutional oversight. This article recommends that the role of the Palestinian Supreme Constitutional Court be activated to monitor all three governmental organs to ensure that this principle is fully implemented.

Keywords Separation of Powers, Palestinian Basic Law of 2003, Organs of Government, Indonesian Constitution of 1945, Supreme Constitutional Court

1. Introduction

One of the basic constitutional principles of a liberal democracy is the separation of powers. The concept of separation of powers refers to the distribution of powers among the three organs of a state that are independent of each other. Each of the state's Legislative, Executive and Judicial branches exercise its own functions without interference and with only appropriate checks and balances in order to protect the people from an authoritarian or arbitrary rule.¹

Since the writings of Montesquieu and Locke, separation of powers among the Legislative, Executive and Judiciary is deemed essential to avoid usurpation and tyranny by the holder of these powers. As the quote from Madison illustrates, they were convinced that separation of powers is a necessary precaution, even in a democracy that periodically elects its own rulers.²

Separation of powers means that the powers of the state are not concentrated in a single organ. "Power tends to corrupt and absolute power corrupts

¹ Ibrahim Abdel-Aziz Shiha, *Political System and Constitutional Law: An Analysis of the Egyptian Constitutional System* (Alexandria: Al Maaref Foundation for Publishing and Distribution, 2000).

² T. Persson, G. Roland, and G. Tabellini, "Separation of Powers and Political Accountability," *The Quarterly Journal of Economics* 112, No. 4 (November 1, 1997): 1163–1202, <https://doi.org/10.1162/003355300555457>.

absolutely”.³ Therefore, political freedom can only exist under moderate governments where the regime must be based on the fact that power prevents power.⁴

Most countries in the world have adopted the principle of separation of powers that was introduced by Montesquieu. The Legislative body has the power to enact and promulgate legislations thus giving it the power to oversee the acts of the Executive body, including to approve the general budget and ratify international treaties. The Executive undertakes the functions of managing the public affairs and conducting the affairs of the state, both internally and externally within the limits of legislations enacted by the Legislative. The Judiciary is entrusted with the task of adjudicating disputes between individuals and between the state and individuals, which allows them to oversee the Executive as well as the Legislative branches.⁵ Thus, these branches are to carry out their functions on the basis of separation of powers and that none of them should interfere with functions of the other branches.⁶

Accordingly, the realization of this principle, even as intended by Montesquieu, does not imply an absolute separation or independence of each of them. Instead, it entails a lack of dominance or violation of power against each other and a cooperation among them.⁷ It should be noted that, before the

³ Basim Sobhi Bushnaq, “Separation of Powers in The Palestinian Political System, and Its Impact on The Implementation of Human Rights” (International Islamic University, Malaysia, 2011).

⁴ Abdulrahman F S H Alhajri, “Separation of Powers in the Kuwaiti Criminal Justice System: A Case Study,” *European Journal of Interdisciplinary Studies* 4, No. 2 (July 24, 2018): 59, <https://doi.org/10.26417/ejis.v4i2a.p59-79>.

⁵ Said Bou-Alshayer, *Constitutional Law and Comparative Political Systems* (Palestine: University Press of Publications, 2010).

⁶ Tasneem Sultana, “Montesquieu’s Doctrine of Separation of Powers: A Case Study of Pakistan,” *Journal of European Studies* 28, No. 2 (2012): 55–71.

⁷ Shiha, *Political System and Constitutional Law: An Analysis of the Egyptian Constitutional System*.

enactment of the Palestinian Basic Law, the Legislative Council consisted of only 88 members, but after the enactment of the Basic Law of 2002 and its amendment, it contained 132 members. Regarding the Executive branch before the enactment of the Basic Law, it consisted of only the President of the Palestinian National Authority and a Council of Ministers, but after the enactment of the Basic Law of 2002 and its amendment, it contained of the President of the Palestinian National Authority, the Prime Minister and a number of ministers do not exceed 24 members. As for the judiciary, it was formed from the Supreme Judicial Council, which supervises all judges and courts, but the Executive branch continued to interfere in its work before and after the enactment of the Basic Law of 2002 and its amendment.⁸

However, Article 2 of the Palestinian Basic Law of 2003 explicitly affirms the principle of separation of powers and stipulates that “The people are the basis of power, which shall be exercised through the Legislative, Executive and Judicial authorities, based upon the principle of separation of powers and in the manner set forth in this Basic Law.” Despite Article 2 in which the principle of separation of powers is embedded in the Palestinian Basic Law of 2003, this principle of separation of powers is not fully practiced in Palestine in terms of the three organs especially the Executive. Therefore, the objectives of this study are to examine the practical application of this principle in Palestine and the harmonization of the theoretical and the practical aspects.

⁸ Bushnaq, “Separation of Powers in The Palestinian Political System, and Its Impact on The Implementation of Human Rights.”

2. Method

The authors have been purely adopted doctrine legal research using a qualitative approach. The primary and secondary data have been both utilized in this research to help answer the research question. The primary data are taken from laws, legislations, judicial rulings. On the other hand, secondary data include journals, books, and online sources such as websites, blogs, magazines, newspapers, dictionaries, encyclopaedias, and thesis. Special reference to Indonesia practice is considered as well in order to gain other sight of how separation of powers applied in the government system.⁹

3. Result & Discussion

A. Separation of Powers Before the Enactment of the Palestinian Basic Law of 2003

The Declaration of Principles Agreement in September 1993 and the Gaza-Jericho Agreement in Cairo of May 1994 led to the establishment of the Palestinian National Authority as a legitimate authority to perform the task of self-governance in most parts of the Gaza Strip and some parts of the West Bank.¹⁰

In addition, the organizational structure of the Palestinian National Authority in both Agreements is similar to that of the Palestine Liberation Organization, as

⁹ Emad Mohammad Al-Amaren et al., "An Introduction to the Legal Research Method: To Clear the Blurred Image on How Students Understand the Method of the Legal Science Research," *International Journal of Multidisciplinary Sciences and Advanced Technology* 1, No. 9 (2020): 50–55.

¹⁰ Muhammad Abu Sway, *Separation of Powers and The Independence of The Judiciary in Palestine* (Palestine: Birzeit University, 2015).

there is no separation of powers between the Legislative, Executive and Judicial powers.¹¹

Moreover, during this period in Palestine, the power of the Executive encroached the functions of the Legislative by drafting and enacting legislations and having executive oversight over the function of the Legislative.¹²

The Executive also dominated over the Judiciary, especially during the period when the Supreme Judicial Council had not yet been established, such that the Executive assumed the function of the Council, which was a violation of the principle of separation of powers.¹³ Some examples of encroachment or dominance of the Executive include the preparation and drafting of legislations, prevention of the Legislative to exercise powers with regard to the appointment, dismissal or expulsion of judges and to direct the establishment or closure of courts.¹⁴

In light of the then prevailing system, the Executive dominated the entire political, administrative, legislative and legal processes. This domination over the Legislative led to the disruption of the independence of powers and the cooperation between them which caused the redefining of its role and functions.¹⁵

The above discussion shows that the principle of separation of powers was not clearly applied before the enactment of the Palestinian Basic Law of 2003.

¹¹ "The Basic Law of the Palestine Liberation Organization, Sections 7-13" (1991).

¹² The Independent Commission for Human Rights, "The Situation of Human Rights in The West Bank and Gaza," 2000, <https://www.ichr.ps/en>.

¹³ Ghassan Youssef, "The Effect of Dual Power on The Political Development of The Palestinian National Authority after The Second Election" (An-Najah National University, Palestine, 2009).

¹⁴ Youssef.

¹⁵ A. Khalil, "Beyond The Written Constitution: Constitutional Crisis of, and The Institutional Deadlock In, The Palestinian Political System as Entrenched in The Basic Law," *International Journal of Constitutional Law* 11, no. 1 (January 1, 2013): 34-73, <https://doi.org/10.1093/icon/mos022>.

B. Separation of Powers After the Enactment of the Palestinian Basic Law

According to the discussion on the legal framework governing the principle of separation of powers after the enactment of the Palestinian Basic Law of 2003 requires the tracking of its development and amendments.

After the first Palestinian Legislative election, which was held in 1996, the legal committee within the Legislative Council decided that it was necessary to reformulate the draft of the Basic Law to suit the new reality. Therefore, the legal committee in the Legislative council played a major role in preparing the final version of the draft of the Basic Law that was debated and adopted at the third reading in October 1997.¹⁶

However, the Palestinian Basic Law was only passed in May 2002 and came into force after its publication in the Palestinian Official Gazette on July 2002.¹⁷ It is noted that the Basic Law of 2002 contains provisions on the principle of separation of powers.¹⁸ Although the Basic Law was amended in 2003, it restated the principle of separation of powers in the same article.¹⁹

In addition, the position of a Prime Minister was created to help solve an imperative problem, which was the vesting of all the Executive functions into the hands of the President of the State of Palestine.²⁰

¹⁶ Glenn E. Robinson, "The Politics of Legal Reform in Palestine," *Journal of Palestine Studies* 27, No. 1 (October 1, 1997): 51–60, <https://doi.org/10.2307/2537809>.

¹⁷ Robinson.

¹⁸ "The Palestinian Basic Law, Article 2" (2002).

¹⁹ "The Palestinian Basic Law, Article 2" (2003).

²⁰ Ahmad Abu Dayyeh and Jihad Harb, "The Second Palestinian Presidential, Legislative and Local Elections 2005-2006," 2007.

Moreover, the amendment of the Basic Law in 2003 to create the position of a Prime Minister was considered an inclination towards the separation of powers in the Palestinian political system. Hence most of the Executive functions are transferred from the President to the Prime Minister and his council. Thus, the Council of Ministers becomes responsible before the Legislative Council.²¹

Article 2 of the Basic Law of 2003 states the principle of separation of powers as a constitutional principle which is compulsory on the powers of the state and its prevailing system of government. In addition, it reads “The people are the basis of power, which shall be exercised through the Legislative, Executive, and Judicial authorities, based upon the principle of separation of powers and in the manner set forth in this Basic Law.”²²

In addition, the Palestinian Basic Law of 2003 regulates the three branches of power and clarifies the functions of each power to ensure that the powers are not concentrated in the hands of one person or body. This was done by the following:

Functions of the Executive branch, Article 41 of the Basic Law states that “The President of the National Authority shall spread the rules voted by the Palestinian Legislative Council within thirty days of their transmittal to him. The President might refer a law back to the Legislative Council with his comments and the reasons for his objection within the same period. Then, the law will be deemed promulgated and will be issued in the Official Gazette. If the President returns the proposed law to the Legislative Council in conformity with the time limit and conditions specified in the previous paragraph, the Council shall debate the law again. If the Council passes the act a second time by a majority of two-thirds of its

²¹ Ahmed M A Hamad, Haslinda binti Mohd. Anuar, and Rohizan binti Halim, “Parliamentary Oversight Over the Acts of Government Under The Palestinian Basic Law of 2003,” *Journal of Critical Reviews* 7, No. 11 (2020): 2623–29, <http://dx.doi.org/10.31838/jcr.07.19.383>.

²² The Palestinian Basic Law, Article 2, 2003.

members, the proposed law shall be considered approved and shall be immediately published in the Official Gazette.”

In addition, Article 42 of the Basic Law provides that “The President has the right to grant special pardons or to commute sentences. But, general amnesties or amnesties for crimes might not be granted except by act.”

While Article 43 of the Basic Law specifies that “The President shall have the right, in cases of necessity that cannot be late, and when the Legislative Council is not in session, to issue decrees that have the power of act. These decrees shall be offered to the Legislative Council in the first session convened after their issuance; otherwise, they will cease to have the power of act. If these decrees are offered to the Legislative Council, as mentioned above, but are not accepted by the latter, then they shall cease to have the power of act.”

Article 45 of the Basic Law provides that “The President shall assign the Prime Minister and authorize the latter to constitute his Council of Ministers. The President shall have the right to dismiss the Prime Minister or to accept his letter of resignation and to demand him to convene the Council of Ministers.”

Article 46 of the Basic Law also stipulates that “The Council of Ministers shall assist the President in the performance of the President’s duties and exercise of powers, in the manner stipulated in this Basic Law.”

In addition, Article 63 of the Basic Law provides that “The Council of Ministers (the government) is the chief executive and administrative instrument; it shoulders the accountability for implementing the program that has been accepted by the legislative branch. Excluding for the executive functions of the President of the National Authority, as specified in this Basic Law, executive and administrative powers shall be within the capability of the Council of Ministers.”

Furthermore, Article 65 of the Basic Law states that “1. Once appointed by the President of the Palestinian National Authority, the Prime Minister shall form a Council of Ministers within three weeks of the date of appointment. There shall

be a right to an extension of a maximum of two weeks. 2. If the Prime Minister fails to form a Council of Ministers within the specified deadline or does not gain the confidence of the Legislative Council, then the President of the National Authority shall appoint another Prime Minister within two weeks of the passing of the deadline or the date of the confidence meeting, whichever applies. Provisions contained in the above paragraph 1 shall apply to the new Prime Minister.”

Article 66 of the Basic Law provides that “1. *Once the Prime Minister chooses the members of the government, the Prime Minister shall submit a demand to the Legislative Council to hold a special meeting for a vote of confidence. The vote of confidence shall take place after hearing and discussing the written ministerial declaration which specifies the program and policy of the Council of Ministers. The meeting shall be held no later than one week from the date of submission of the demand.* 2. *The vote of confidence shall be cast for the Prime Minister and the members of the Council of Ministers composed, unless the absolute majority of the members of the Legislative Council chooses otherwise.*”

In addition, Article 68 of the Basic Law states that “*The Prime Minister shall exercise the following powers: 1. To form or adjust the composition of the Council of Ministers, to dismiss or accept the resignation of any of its members, or to fill a vacant place. 2. To convene the Council of Ministers for weekly assemblies, or when necessary, or upon a demand from the President of the National Authority, as well as to set its agenda. 3. To head over sessions of the Council of Ministers. 4. To manage the matters of the Council of Ministers. 5. To supervise the work of the Ministers and public institutions dependent on the government. 6. To promulgate necessary decisions within the Prime Minister’s capability in accordance with the law.*”

Further, Article 69 of the Basic Law provides that “*The Council of Ministers shall exercise the following powers: 9 (a) To found or dissolve agencies, institutions, authorities and similar administrative units belonging to the executive apparatus of the Council of Ministers, provided that each shall be regulated by act. (b) To employ heads of institutions and agencies mentioned above in subparagraph (a), and to oversee them in*

accordance with the provisions of the act. 10. To stipulate the respective areas of responsibilities of all ministries, agencies and institutions, that report to the Executive power, and others of alike status. 11. To assume any other accountability assigned to it, in accordance with the provisions of the act."

While Article 70 of the Basic Law states that *"The Council of Ministers shall have the right to transmit draft acts to the Legislative Council, to issue regulations and to take necessary actions to implement acts."*

Additionally, Article 74 of the Basic Law provides that *"1. The Prime Minister is responsible to the President of the National Authority for his actions and the actions of his Council of Ministers. 2. Ministers are accountable to the Prime Minister, each within the bounds of their jurisdiction and for the actions of their respective ministry. 3. The Prime Minister and members of the Council of Ministers are collectively and individually responsible to the Legislative Council."*

Moreover, Article 75 of the Basic Law states that *"1. The President of the National Authority shall have the right to refer the Prime Minister for examination as a result of crimes assigned to the Prime Minister during, or due to, the performance of official duties, in accordance with the provisions of act. 2, The Prime Minister shall have the right to refer any Minister for examination based on any of the reasons mentioned the above, in accordance with the provisions of act."*

Furthermore, Article 76 of the Basic Law stipulates that *"1. Any suspect Minister shall be suspended from the performance of official responsibilities immediately upon the issuance of an accusation. The termination of service shall not stop continuing the examination or follow-up procedures. 2, The Attorney General, or a representative from the Public Prosecution, shall undertake the examination and accusation procedures..."*

Article 107 of the Basic Law provides that *"The Attorney General shall be chosen pursuant to a decision delivered by the President of the National Authority, based upon a nomination submitted by the High Judicial Council. 2. The Attorney General shall handle*

and assume public cases, in the name of the Palestinian Arab people. The jurisdiction, functions and responsibilities of the Attorney General shall be stated by act."

Functions of the Legislative Council, Article 47 of the Basic Law states that "1. The Palestinian Legislative Council is the elected legislative power. 2. The Legislative Council shall assume its legislative and oversight responsibilities as prescribed in its Standing Orders, insofar as they do not contradict the provisions of this act."

In addition, Article 50 of the Basic Law provides that "In its first meeting, the Council shall elect a Speaker, two Deputies to the Speaker, and a Secretary-General. Composed, they shall make up the Office of the Legislative Council. It shall not be allowed to be a member of the Office and hold at the same time the position of President of the National Authority, or Minister, or any other governmental position."

Article 51 of the Basic Law stipulates that "The Council shall accept the resignation of its Members and found its own Standing Orders, as well as procedures for questioning its Members, in a manner that does not contradict the provisions of this Basic Law or general constitutional principles. The Council shall be solely accountable for maintaining order and security during sessions and committee meetings. Security personnel might not be present in the Council premises unless requested by the Speaker or by a Committee Chair, as the circumstances might require."

Article 56 of the Basic Law provides that "Each Member of the Council shall have the following rights: 1. To submit to the executive power all legitimate requests necessary to allow the Member to carry out parliamentary functions. 2. To propose acts. Rejected proposals might not be resubmitted within the same term. 3. To address inquiries and interpellations to the Council of Ministers, to any Minister or to others of similar rank. Interpellations might only be deliberated seven days after submission, unless the addressee agrees to reply immediately or

within a shorter period. However, the seven-day period can be reduced to three days in urgent cases and with the approval of the President of the National Authority.”

Additionally, Article 57 of the Basic Law specifies that “1. Following an interpellation, a minimum of ten members of the Council might submit a request to withdraw confidence from the Council of Ministers or from any Minister. Voting on such a request might not be held earlier than three days after submission. A decision might be issued by approval of the majority of the Council’s Members. 2. Withdrawal of confidence shall affect in termination of the term of the party from whom confidence was withdrawn.”

Functions of the Judiciary, Article 97 of the Basic Law stipulates that “The judiciary shall be independent and shall be exercised by the courts at different types and levels. The act shall limit the way they are constituted and their jurisdiction. They shall issue their rulings in accordance with the act. Judicial rulings shall be proclaimed and executed in the name of the Palestinian Arab people.”

In addition, Article 98 of the Basic Law states that “The judges shall be independent and shall not be subject to any authority other than the rule of the law while exercising their responsibilities. No other power might interfere in the judiciary or in judicial affairs.”

While Article 99 of the Basic Law specifies that “1. Employment, transfer, secondment, delegation, promotion and questioning of judges shall be as set in the Judicial Authority Act. 2, Judges might not be dismissed except in cases that are permitted in the Judicial Authority Act.”

Further, Article 100 of the Basic Law provides that “The High Judicial Council shall be formed. The law shall stipulate the way it is constituted, its responsibilities and its operating rules. The High Judicial Council shall be consulted about draft rules relating to the Judicial Authority, including the Public Prosecution.”

Although the Basic Law adopted the principle of separation of powers theoretically, many problems did emerge in practice, especially with regard to the nature of the relationship between the Executive, the Legislative and the Judiciary.²³

An example of the conflict in the relationship between the Executive and Legislative power is a declaration made by the current Palestinian President Mahmoud Abbas in 2018 to dissolve the Palestinian Legislative Council which was controlled by Hamas through a majority of its seats in the Legislative Council. The President's said the announcement was affirmed by the decision of the Supreme Constitutional Court in Palestine.²⁴

However, the Palestinian Scholars considered that declaration as an attack by the Executive power against the Legislative Council and regarded the declaration null and void, both in the legal and technical aspects. This is because the Basic Law does not grant the President the right to dissolve the Legislative Council. Consequently, the decision to dissolve the Legislative Council was considered a violation of constitutional principles, especially the principle of rule of law and the principle of separation of the three powers in Palestine.²⁵

Another example of the conflict between the Executive and the Judiciary is the current Palestinian President Mahmoud Abbas's actions in 2019 to isolate the Supreme Judicial Council and form a transitional body with the aim of reform. However, the Palestinian Legal scholars considered such interference by the Executive power over the jurisdiction of the Judiciary a violation of constitutional

²³ Dayyeh and Harb, "The Second Palestinian Presidential, Legislative and Local Elections 2005-2006."

²⁴ Palestinian Civil Society Institutions and the Independent Commission for Human Rights, "Position Paper Issued on The Constitutional Court's Decision to Dissolve The Legislative Council And Call for Legislative Elections," 2018, <https://goo.gl/FWUbkR>.

²⁵ Palestinian Civil Society Institutions and the Independent Commission for Human Rights.

principles, especially the principle of the rule of law, and the principle of separation of the three powers in Palestine.²⁶

C. Check and Balances in Indonesia

The 1945 Constitution of Indonesia has stated that Indonesia is a democratic country with the foundation of separation of powers. According to Article 4, the executive power is referred to President, Article 20 is also added the authority to draft the law by the House of Representatives (DPR). Based on Article 24, the judicial authorities are referred to the Supreme Court and the Constitutional Court. In addition to those institutions there are three other institutions mentioned in our constitution that has the duties based on this separation of powers, namely the People's Consultative Assembly (MPR), the Regional Representative Council (DPD), and the Judicial Commission (KY).

Regarding the authority to make the law, it is merely given to the DPR due to the DPD is constitutionally "not having" the power to make laws. The mechanism is mainly in terms of Legislation, Budget, and Supervision. However, Indonesian constitution in Article 20, in the case of law making, shows potential of unbalanced checks mechanism due to the Government could not deny the power by DPR. It is strengthened by the provision contained in paragraph 5 of the article, that any law draft that has been jointly agreed upon, must be promulgated within 30 days, even without the president's endorsement. The effort of checks from the government can only be done through the Constitutional Court when the law is contrary to the constitution.²⁷

²⁶ Khalid Musa, "Abbas Dismisses The Supreme Judicial Council and Creates a Transitional Body with The Aim of Reform," Independent Arabia, 2019, www.independentarabia.com.

²⁷ Deddy Supriady Bratakusumah, "Actualization of Checks and Balances between Executive, Legislative and Judicial in Indonesia," *Jurnal Perencanaan Pembangunan: The Indonesian Journal of Development Planning* 2, No. 3 (December 22, 2018): 219–26,

Post the 1945 Constitution amendment, there has been a significant change regarding executive power in particular the executive realm to reinforce the presidential system and it was also added the separation of power with the checks and balances principle. The concerned changes as mentioned as follows:²⁸

- a. The power to make laws is no longer on the President or executive power, that it is shifted to the House of Representatives. President has right to propose legislation draft, provides mutual agreement with the Parliament and approve the bill into the law;
- b. The President and Vice President are elected by the people directly through nomination by political parties;
- c. The duration of power for the President is for five years strictly limited to only two periods;
- d. It determines the conditions in more detail to be president and vice president;
- e. It determines the mechanism of impeachment against the President and/or Vice President of involving Parliament, the Constitutional Court, and People's Consultative
- f. The assertion that the president cannot dissolve the House of Representatives;
- g. The exercise of the prerogative of the president as head of state must be with the consent or consideration of the Parliament;

<https://doi.org/10.36574/jpp.v2i3.47>. See also Zainal Arifin Mochtar, and Kardiansyah Afkar. "President's Power, Transition, and Good Governance". *Bestuur* 10, No. 1 (2022): 68-84. <https://doi.org/10.20961/bestuur.v10i1.59098>; Febrian Febrian, Iza Rumesten, Nurhidayatuloh Nurhidayatuloh, and Neisa Angrum Adisti. "Phenomenon of the Increasing Single Candidates and Backsliding Democratic Values in Indonesia". *Hasanuddin Law Review* 8, No. 3 (2022): 248-257. <http://dx.doi.org/10.20956/halrev.v8i3.2880>

²⁸ Ibnu Sina Chandranegara, "Architecture of Indonesia's Checks and Balances," *Constitutional Review* 2, No. 2 (2016): 270.

- h. Appointment of public officials, a case member of the state's financial examiner body, supreme court justice, a member of the judicial commission needs the approval from Parliament;
- i. The President is authorized to form the consultative council as a replacement for Consultative Board to be abolished;
- j. In the establishment, alteration, and the dissolution of the ministry should be regulated in the Act, not free as previous mechanism.

D. Potential Issue of Overlapping Power in Indonesia Practice

In some ways, though the constitution determines the laying of power to a branch of the same powers. Some constitutions in some countries are also able to disperse power to the patterns and formulas are different. In term of initiative in making legislation, Indonesia practise shows that the President has no power to veto the parliament, instead the President has the same formulation in strong design.

The executive power had been fundamentally transformed after the amendment of the 1945 Constitution, especially concerning the executive realm, namely, to reinforce the presidential system and was followed by the separation of the branches of state power major with the principle of checks and balances. There are some significant changes regarding the field of executive power, namely: the President as the holder of executive power no longer holds the power to make laws that have been shifted into the hands of the House of Representatives, it is only entitled to propose draft legislation (*bill*) to the House of Representatives, provides mutual agreement with the Parliament and pass the bill into law. Moreover, the President is authorized to form the consultative council, as a replacement for Consultative Board to be abolished.

In terms of vertical power sometimes the subordinate governmental power has greater autonomy than the provinces, but sometimes the opposite is true where the provincial governments control more than the lowest and the local government provides even more pressure on the central government. In Indonesia, People Consultative assembly (MPR) has a position to function parallel to House of Representatives (DPR). Changes in the system of representation and legislative powers after a constitutional reform to bring renewal legislative power in Indonesia, following a system of representative and institutionally legislative power and its authority. MPR has authority to establish and amend the constitution, inaugurating the President and Vice President. Meanwhile, DPR holds the power to make laws has a legislative function, the function of budget and oversight and the authority to propose the dismissal of the President and/or Vice President to the Assembly through the Constitutional Court.²⁹

Holding authority to form laws together with the President, this DPR's power may limit the authority of the Constitutional Court due to the later has also authority to examine the suitability of the law against the 1945 Constitution. These situations have stimulated a dispute between the Parliament and the Constitutional Court. In the theory of state power, the legislative function is conducted by the legislative body, thus the power of legislative formation is held by legislative chamber and the application is held by the executive.

The current practices show that the relationship among power branches is potentially overlapped, despite the equal and control mechanism through check and balances. Article 24 of the 1945 Constitution has granted authority to the Constitutional Court to examine law against the 1945 Constitution. The power to examine the law is not extended to the authority to develop a new norm to replace

²⁹ Ahmad Mustarudin Effendi. "An Overlapping Legislative Authority: Parliament versus the Indonesian Constitutional Court." *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 5, No. 1 (2018): 50-69.

the abrogated norm. The nature of constitutional court to cancel the law is more concerned with the function of legislation than the judiciary. Therefore, Hans Kelsen named it as negative legislator, while the parliament held the function of positive legislator. The parliament and the president are in inferior position in the situation when the Constitutional Court after its decision, give order the legislative and executive as the lawmakers to provide law amendment or replacement.

There was period when the Constitutional Court cancelled the provision stated in the Article 45A and 57(2a) of the Constitutional Court Law of 2011 which is provided to prohibit the court to go beyond the authority regarding the *ultra petita* power. Up to now, there is absence of a legal mechanism by the parliament of the government to limit the use of *ultra petita*. This practice is contradicted with the principle of *nemo iudex in propria causa* or no one can be a judge in his own case. Thus, the terms of impartial is hard to achieve since the court has authority to examine the laws concerning its existence. Nevertheless, due to the nature of final and binding decision and the lack of other legal remedies, the decision held by the Constitutional Court is assumed as legal truth regardless the issue remains.³⁰

The practice in Indonesia shows that there is various constitutional mechanism to split the power. Apparently, one mechanism applied by a certain country could not be justified as the absolutely correct one. The lesson from the practice of sharing power mechanisms is to give more caution on its different implications. At the end of the day, there is no constitutional system that does

³⁰ Effendi. *Please also compare to Sasmito, Hery Abduh. "Ultra Petita Decision of Constitutional Court on Judicial Review (The Perspective of Progressive Law)". JILS (Journal of Indonesian Legal Studies) 1, No. 1 (2017): 47-68. <https://doi.org/10.15294/jils.v1i01.16568>; Said, Muhtar, Ahasanul Minan, and Muhammad Nurul Huda. "Problems of Horizontal and Vertical Political Accountability of Elected Officials in Indonesia". JILS (Journal of Indonesian Legal Studies) 6, No. 1 (2021): 83-124. <https://doi.org/10.15294/jils.v6i1.43403>.*

everything well; there is always a trade-off, or choice to be made. However, the principle of separation of powers was not fully practiced in Palestine between the three organs, especially the Executive and there is an absence of constitutional oversight. This article recommends that the role of the Palestinian Supreme Constitutional Court be activated to monitor all three governmental organs to ensure that this principle is fully implemented.

E. Issues in Applying the Principle of Separation of Powers in Palestine

1) Legislative Issues

In the field of the Legislative, with regard to executive regulations for legislations approved by the Legislative Council, it is noted that in practice the Executive is not committed to implementing the executive regulations or delayed them for long periods. This led to violations of the provisions of the Basic Law and triggered the imposition of executive regulations upon the Council of Ministers and the President in accordance with Basic Law. However, there is no clear power in relation to the oversight on the constitutionality of these executive regulations formulated by the relevant Ministries and issued by the Council of Ministers.

In addition, Article 116 of the Basic Law states that “Laws shall be promulgated in the name of the Palestinian Arab people and shall be published immediately in the Official Gazette. These laws shall come into force thirty (30) days from the date of their publication unless the law states otherwise.”³¹

However, the manner legislations are promulgated which are deemed enforceable and binding upon their publication in the Official Gazette has caused

³¹ Dayyeh and Harb, “The Second Palestinian Presidential, Legislative and Local Elections 2005-2006.”

problems.³² This is a task undertaken by the Fatwa and Legislation Bureau of the Ministry of Justice. There is no obligation in practice to immediately publication a legislation, which in many cases constitutes a tool to obstruct the legislation and prevent it from being enforced by the Fatwa and Legislation Bureau of the Ministry of Justice.³³

2) Issues in Establishing and Dissolving Public Institutions

The Civil Service Law of 1998 and other special laws regulate public institutions, with the participation of the Council of Ministers and the President in the procedures for the appointment of heads of public institutions, such as the Head of the Office of Financial and Administrative Supervision and the Governor of the Monetary Authority. While the President is allowed to participate with the Council of Ministers to appoint heads of other public institutions and senior officials of the state who do not require their presentation to the Legislative Council.³⁴

In addition, Article 69 of the Basic Law clarifies the responsibility of the Council of Ministers in respect of all public institutions and the possibility of establishing or dissolving them according to the appropriate needs and situation and to the Council of Ministers' policies.³⁵

However, the Law of Service in the Palestinian Security Forces No. 8 of 2005 at the same time gives the President the power to establish or appoint heads of

³² The Palestinian Independent Commission for Citizen's Rights, "The Powers of the President of the Palestinian National Authority in Comparison with the Powers of the Council of Ministers and the Legislative Council in the Basic Law," 2006, <https://www.ichr.ps>.

³³ The Palestinian Independent Commission for Citizen's Rights.

³⁴ Aziz Kayed, *Overlapping of Powers in the Palestinian National Authority Institution* (Ramallah, 1999).

³⁵ "The Palestinian Basic Law, Article 69" (2003).

certain public institutions. This led to the violation of article 69 of the Basic Law and the principle of separation of powers.³⁶

3) Issues in the Appointment of Senior State Employees and Special Category Staff

The Civil Service Law of 1998 does not specify the mechanism for the appointment of employees of a special category stipulated in Section 9 thereof, which includes heads of public bodies or advisors with ministerial rank but provides for the recommendation of the Council of Ministers on the appointment of employees of the higher category (A1-A4) and the issuance of the decision on the appointment by the President.³⁷

The Basic Law grants powers to the Council of Ministers to appoint heads of institutions from the units of the administrative apparatus in accordance with Article 69 thereof. However, some special laws such as the Law of Service in the Palestinian Security Forces of 2005 and The Civil Service Law of 1998 also grant power to the President on the appointment of several higher positions. This has created a conflict between the Basic Law and these special laws and led to a violation of the provisions of the Basic Law and the principle of separation of powers.³⁸

³⁶ “The Law of Service in the Palestinian Security Forces No. 8” (2005).

³⁷ “The Civil Service Law, Section 9” (1998).

³⁸ The Palestinian Independent Commission for Citizen’s Rights, “Legal Report on Parliamentary Oversight on the Performance of Security Services,” accessed January 24, 2021, <https://www.ichr.ps>.

4) *Issues of Subordination of the Security Apparatuses*

The Basic Law states that the President is the Commander-in-Chief of the Palestinian Forces but did not clarify the subordination of the security apparatuses.³⁹

However, Article 69 of the Basic Law which includes the regulation of the security apparatus would seem to indicate that the Council of Ministers is their point of reference. It should also be noted that according to Article 69, the Minister of Interior is appointed by the Council of Ministers. The three security agencies which are subordinates of the Ministry of Interior are the preventive security, the police apparatus, and the civil defence agencies.⁴⁰ This clearly shows that the security apparatus is a subordinate of the Council of Ministers and not the President.⁴¹

For instance, the conflict in relation to subordination of the security apparatus between President Arafat, the Council of Ministers and the Ministry of Interior began within the framework of the one-party Fatah. Subsequently, under the rule of Hamas, the conflict developed between the presidency institution led by Fatah along with the Council of Ministers, and the Ministry of Interior which was held by Hamas. This conflict continues even to this date.⁴²

In addition, Section 7 of the Law of Service in the Palestinian Security Forces of 2005 provides that the National Security Forces is a military body that performs its functions and is headed by the Minister of National Security under the

³⁹ "The Palestinian Basic Law, Article 39" (2003).

⁴⁰ Adelina Rakaj and Armend Podvorica, "Does the State Fail to Protect Defendant Rights in the Criminal Justice Process? A Case in Kosovo," *Sriwijaya Law Review* 4, No. 2 (2020): 172–86, <https://doi.org/http://dx.doi.org/10.28946/slrev.Vol4.Iss2.595.pp172-186>.

⁴¹ Maan Idais, "The Status of Separation of Powers in the Palestinian System and Its Impact on Human Rights and the Rule of Law" (Palestine, 2010).

⁴² Idais.

leadership of the Commander-in-Chief. On the other hand, Section 8 of the Law of Service empowers the President to decide on the appointment of the Commander-in-Chief of the National Security Forces without the need for any recommendation or consultation of the Minister of National Security.

This caused a contradiction between the sections 7 and 8 and between the Minister of National Security who is a part of the Council of Ministers, and the Commander-in-Chief of the National Security Forces who is appointed by the President to command and manage the National Security Forces, including to appoint heads of bodies, directors of directorates, commanders of military regions and military attaches, especially in light of the struggle for power between Fatah and Hamas. This is another violation of the provisions of the Basic Law and the principle of separation of powers.⁴³

5) Issues in Financial Affairs

Article 61 of the Basic Law reads “Taking into consideration the provisions of Article 90 of this Basic Law: 1. The government shall present the draft budget to the Legislative Council at least two months prior to the start of the fiscal year”. However, in practice the Council of Ministers have on certain occasions failed to comply with this provision of the Basic Law on the regulation and control of the financial affairs.⁴⁴

In addition, the Council of Ministers, except in a few cases, did not submit the draft budget to the Legislative Council for approval within the specified time. In

⁴³ “The Law of Service in the Palestinian Security Forces, Section 7-8” (2005).

⁴⁴ Ayman Youssef and Omar Rahal, *Separation of Powers and the Rule of Law in a Democratic System* (Palestine: Centre for Human Rights and Democracy Media, 2010).

fact, often a fiscal year ends without submitting a budget for it, for instance, the years 2002, 2006, and 2016.⁴⁵

The Council of Ministers also neglected to submit the final account to the Legislative Council except in for the years 2003 and 2004. This is clearly a violation by the Council of Ministers to the functions of the Legislative Council and the provisions of the Basic Law and the principle of separation of powers.⁴⁶

6) Issues between the Executive and Judiciary

Sections 13, 23, and 33 of the Law on Judicial Authority of 2002 grant extensive functions to the Minister of Justice in judicial affairs. This can be considered an interference by the Executive power into the functions of the Judiciary especially article 97, 98, and 99 of the Basic Law, such as the intervention of the Minister of Justice in the formation of the Supreme Judicial Council and allowing him the right to call for its meeting or determining the courts or places of work for judges. These issues led to the conflict of functions among them.⁴⁷

The continuing conflicts between the Executive, represented by the Minister of Justice and the Supreme Judicial Council keeps the Judiciary in the constant preoccupation with their powers, which could weaken this apparatus and threaten the independence of one of the most important pillars of the national integrity system.⁴⁸ In addition, the interference of the Executive in the Judiciary poses a threat to the independence of the Judiciary and removes the confidence in it.⁴⁹

⁴⁵ The Palestinian Centre for Human Rights, "The Palestinian Legislative Council, Ten Years of Absence of Issue and Accountability, the Palestinian Legislative Council," 2006, <https://www.pchrgaza.org/en/>.

⁴⁶ The Palestinian Centre for Human Rights.

⁴⁷ The Palestinian Independent Commission for Citizen's Rights, "Legal Report on Parliamentary Oversight on the Performance of Security Services."

⁴⁸ Hanin Muhammad Hijab, "The Role of the Legislative President in the Palestinian Political System" (An-Najah University, Palestine, 2011).

⁴⁹ Youssef and Rahal, *Separation of Powers and the Rule of Law in a Democratic System*.

Thus, the authors have concluded that the aforementioned issues clearly indicate the domination of the Executive over the Legislative as well as the Judiciary and the failure to implement the principle of a balanced separation of powers in Palestine. In practice, this domination includes the legislative issues, the issues in establishing and dissolving public institutions, issues in the appointment of senior State employees and special category staff, issues of the subordination of the security apparatus, issues in financial affairs and issues between the Executive and the Judiciary.

F. Constitutional Oversight in Palestine

Many countries have introduced a body which oversees the functions of the Legislative, Executive and Judiciary to ensure that there is no encroachment in respect of the provisions of the constitution or the Basic Law, known as a constitutional oversight over the constitutionality of laws or regulations.⁵⁰

In Palestine, the constitutional oversight is regulated by the Supreme Constitutional Court. Section 5 of the Law of the Supreme Constitutional Court stipulates that “The onset formation of the court by appointment the president of the court and the judges therein and by a decision of the President of the state of Palestine, and after consultation with the High Judicial Council and the Minister of Justice.”

In addition, Article 103 of the Basic Law affirms that “1. A High Constitutional Court shall be established by law to consider: (a) The constitutionality of laws, regulations, and other enacted rules. (b) The interpretation of the Basic Law and legislation. (c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities

⁵⁰ Mohammed Abu Matar, *Constitutional Law and Political Systems* (Palestine: Al-Azhar University, 2017).

having judicial jurisdiction. 2. The law shall specify the manner in which the High Constitutional Court is formed and structured, the operating procedures it will follow, and the effects resulting from its rulings.”

Therefore, the establishment of the Supreme Constitutional Court relates to the Basic Law of 2003. The Law of the Supreme Constitutional Court was approved and came into force on February 17, 2006 and it is known as the Law of the Supreme Constitutional Court No. (3) of 2006.⁵¹

In 2016, the President of the State of Palestine issued a presidential decree regarding the formation of the Supreme Constitutional Court, according to which the first independent, non-dismissible, judicial, and independent constitutional body was formed which exercises its functions under the Basic Law and the Law of the Supreme Constitutional Court. The purpose of this court is to guard the supremacy of the Basic Law and the legal progression to establish the rule of law in the state.⁵²

However, it should be noted here that this Court has been suspended in 2019 as a result of the Palestinian Political Division and it has been settled only a few cases. The authors would recommend the reactivation of the role of the Palestinian Supreme Constitutional Court to carry out its functions to establish the rule of law and accordingly, achieve the principle of separation of powers.⁵³

4. Conclusion

Palestine and Indonesia have clearly stated the principle of separation of powers in terms theoretically. However, the practice in Indonesia shows that there

⁵¹ “The Law of the Supreme Constitutional Court No. (3)” (2006).

⁵² Matar, *Constitutional Law and Political Systems*.

⁵³ Sway, *Separation of Powers and The Independence of The Judiciary in Palestine*.

is various constitutional mechanism to split the power. Apparently, one mechanism applied by a certain country could not be justified as the absolutely correct one. The lesson from the practice of sharing power mechanisms is to give more caution on its different implications. At the end of the day, there is no constitutional system that does everything well; there is always a trade-off, or choice to be made. In Palestine, the principle of separation of powers was not fully practiced between the three organs, especially the Executive and there is an absence of constitutional oversight. The principle of separation of powers rests upon the recognition of the global fact that the concentration of absolute power in one man or one body inevitably leads to abuse and tyranny. Therefore, democratic states distribute the powers of the state to different organs namely the Executive, the Legislative, and the Judiciary. The activation of the role of the Palestinian and Indonesian Supreme Constitutional Court in monitoring the three branches i.e., the Executive, the Legislative, and the Judiciary within the state is essential to carry out its functions and to propel the establishment of the rule of law and accordingly achieve a system that practices the principle of separation of powers in the state of Palestine.

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The authors state that there is no conflict of interest in the publication of this article.

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