

Problems of the Separation of Powers and Independence of the Judiciary in Palestine: Conflict of Powers in the Justice Sector “The Relationship between the High Judicial Council and the Ministry of Justice as Case Study”

Abstract

This thesis seeks to explain the differences in the application of the Separation of Powers, and the resulting functions and powers to the people and institutions in light of the tension in the relationship between the High Judicial Council (HJC) and the Ministry of Justice (MOJ) in the Palestinian case in spite of the obvious adherence to the principle of Separation of Powers and of the Judicial Independence. While HJC rejects the intervention of MOJ arguing that it violates the vested principle of Judicial Independence, MOJ demands to exercise its role in the management of this important part of the public sector; the two have taken the lead to different results in terms of the nature of the relationship between the institutions of the justice sector.

In this thesis, the researcher adopts a concept of separation of powers that is based on the principle of limited government, where no party has to monopolize all authorities. The actions of the justice institutions will be measured in light of this principle, through the in depth research of the conceptual framework, legal and legislative legacy, and policy orientations of those defending them. All these establishes, along with many others that cannot be confined to a single search, the different orientations regarding the concept and practice of Separation of Powers and Judicial Independence principles which are advocated by the two parties.

To achieve this, the researcher has used the descriptive analytical method to study the concept of Separation of Powers and Judicial Independence, as reviewed in the literature and writings of some intellectuals on the historical development of these concepts, and the most important fundamentals on which they are based. The researcher has also used the historical method to analyze the historical development of the separation of powers principle and how to deal with the principle of judicial independence in Palestine since the British Mandate up to the establishment of the

Palestinian National Authority by referring to the constitutions of various colonial countries that ruled Palestine. The researcher also analyzed the texts and referred to the relevant literature which touched this subject, to describe a case study through studying the existing Palestinian situation in reality in the era of the Palestinian National Authority, under the theme of Separation of Powers and Judicial Independence in light of the relationship between MOJ and the HJC, through studying and analyzing the various legislation, studies and reports relevant to the subject of these two principles in the institutions of the Palestinian National Authority, and to shed light on the role and powers of both MOJ and HJC in the justice sector, in particular the issue of judicial power management; to serve the idea the researcher seeks to achieve.

To achieve this endeavor, the thesis has been divided into three chapters; the first chapter dealt with the essence of separation of powers and judicial independence principles, the second chapter dealt with the historical developments of the separation of powers principle and the extent of ensuring the application of the principle of judicial independence in the Palestinian reality, the third chapter dealt with the dispute between MOJ and HJC on the separation of powers in the era of the Palestinian National Authority and its causes.

The researcher has reached a number of results, some of the most important results are the following: there is no clear and consistent concept of the principle of separation of powers, however, its main purpose is represented in the distribution of state functions on separate entities independent from each other to prevent tyranny, control and concentration of power in the hands of one entity, regardless the method or mechanism to be applied.

It turned out that the principle of the judicial independence, is one of the logical and certain results for the emergence of the principle of separation of powers, which demonstrates the evolution of the concept of separation of powers so that the respect for the principle of judicial independence is an integral part of the concept. Therefore,

it turns out that the absence for a clear concept of the principle of separation of powers contributed to the creation of a different understanding of the separation of powers in the institutions of the Palestinian National Authority.

In addition, it turns out that Palestine and the Palestinians knew a historical heritage represented by different historical experiences to institutionalize the concentration of powers that the Palestinian National Authority inherited, which contributed to a state of confusion of powers in the Palestinian National Authority, and which explains the different narratives of the MOJ and HJC concerning the separation of powers.

Moreover, the legal texts governing the relationship between HJC and MOJ are contributed in heating up the conflict between the two sides. Also, the individuals who represent both sides in the dispute, and the institutions they represent, also contributed in heating up the conflict between the HJC and the MOJ, through competing between the representatives of the executive and the judiciary to take over control the justice sector. As a result, each party adopted its own interpretation of the principles of separation of powers and judicial independence. Moreover it was clear that all these grounds contributed to establishing a different understanding of the separation of powers in the institutions of the Palestinian National Authority, which led ultimately to hinder the potential success of the institution of the separation of powers in the Palestinian territories.