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The Legal Value of International Treaties in the Palestinian Constitutional System: The Problem of Combining the Theories of Monism and Dualism

Ahmad Hosni Ali Ashqar
Assistant Professor of Public Law, Faculty of Graduate Studies, Legal Sciences Department- Arab American University, Ramallah–Palestine
Ahmadashkar1@gmail.com

Abstract

This research aims to study the status of international treaties in the Palestinian constitutional system in light of the confusion regarding the relationship between local laws and international treaties as a result of the ambiguous interpretation of jurisprudence by the Palestinian Supreme Constitutional Court. This confusion led to the emergence of the combined theories of monism and dualism in determining the relationship between Palestinian legislation and international treaties ratified by the State of Palestine. This comes as a result of the failure of the Palestinian constitutional legislator to define the nature of this relationship and the place of ratified international treaties within the hierarchy of legislation. The researcher followed the descriptive and analytical approach to arrive at the results and recommendations. The author concludes that the theory of unilateralism is the theory that constitutes the true approach to ensuring the supremacy of international treaties over domestic law. This is because the amended Palestinian Basic Law of 2003 did not provide any mechanism to integrate rules derived from ratified international treaties into the domestic legal system. This research is significant in studying the status of international agreements by analyzing judicial jurisprudence without a constitutional text defining this status.

Keywords: International treaties; Theory of Monism; Theory of Dualism; Constitutional court; Constitution

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المجلة الدولية للقانون
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القيمة القانونية للاتفاقيات الدولية في النظام الدستوري الفلسطيني: إشكاليّة المزاوجة بين نظامي الوحدة والثنائية

أحمد حسني علي أشقر
أستاذ القانون العام المساعد، كلية الدراسات العليا، قسم العلوم القانونية، الجامعة العربية الأمريكية، رام الله–فلسطين
Ahmadashkar1@gmail.com

ملخص

يهدف هذا البحث إلى دراسة مكانة المعاهدات الدولية في النظام الدستوري الفلسطيني في ظل الارتباك في العلاقة بين القوانين المحلية والمعاهدات الدولية نتيجة التفسير الغامض للاجتهاد القضائي من قبل المحكمة الدستورية العليا الفلسطينية. وأدى هذا الخلط إلى ظهور نظريتي الأحادية والازدواجية مجتمعتين في تحديد العلاقة بين التشريع الفلسطيني والمعاهدات الدولية التي صادقت عليها دولة فلسطين. ويأتي ذلك نتيجة تقاعس المشرع الدستوري الفلسطيني عن تحديد طبيعة هذه العلاقة ومكانة المعاهدات الدولية المصادق عليها ضمن هرم التشريع.

وقد اتبع الباحث المنهج الوصفي التحليلي للوصل إلى النتائج والتوصيات. يخلص المؤلف إلى أن نظرية الأحادية هي النظرية التي تشكل النهج الحقيقي لضمان سيادة المعاهدات الدولية على القانون المحلي. وذلك لأن القانون الأساسي الفلسطيني المعدل لعام 2003 لم ينص على أي آلية لدمج القواعد المستمدة من المعاهدات الدولية المصادق عليها في النظام القانوني المحلي.

ويكتسب هذا البحث أهمية خاصة في دراسة مكانة الاتفاقيات الدولية من خلال تحليل الاجتهاد القضائي في ظل عدم وجود نص دستوري يحدد هذه المكانة.

الكلمات المفتاحية: اتفاقيات دولية، الأحادية، الثنائية، المحكمة الدستورية، الدستور

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1. Introduction

The relationship between international and domestic law constitutes one of the most prominent challenges facing jurists of constitutional and international law. This is because the state, through its Constitution, is obligated to develop mechanisms that guarantee the enforcement of international treaty requirements at the level of national law, for the state to avoid the effects of international responsibility. Many national constitutions have stipulated specific mechanisms for this and have clarified the status of international treaties in the domestic legislative hierarchy, by their supremacy over domestic legislation, their equality in strength with national legislation, or in rare cases their supremacy over the constitution itself. In Palestine, the current constitutional document does not specifically include the status of international treaties in the domestic constitutional system and the domestic legislative hierarchy. The State of Palestine's accession to and ratification of dozens of international treaties without reservation makes the issue of studying the status of international treaties in the Palestinian constitutional system a problematic one at the level of the judicial application of these international treaties.

1.1 Research Problem

In light of the Palestinian constitutional legislature's inaction in clarifying the status of international treaties in the Palestinian constitutional system, as well as its inaction in explaining the mechanisms of integrating international treaties into the domestic legal system, this study focuses on the consequences of the judicial application of treaties when they are invoked before national courts, raising a problem in the combined application of both theories of monism and dualism, which emerged clearly in the relevant jurisprudence of the Palestinian constitutional judiciary.

1.2 Significance of the Research

The significance of this research lies in its attempt to ground modern theories in the relationship between domestic and international law by extrapolating views on jurisprudence and regarding relevant constitutions and projecting those onto the Palestinian constitutional system. The importance of this research also highlights the analysis of the rulings issued by the Supreme Constitutional Court of Palestine regarding the status of international treaties in the domestic law system and the resulting analysis in terms of placing the constitutional system in the context of pairing monist and dualist theories. This pairing may contribute to framing the relationship between the international treaties that the State of Palestine has ratified and acceded to, as well as explaining the effects and consequences of their enforcement through judicial application.

1.3 Research Questions

This research poses a pivotal question: What is the status of the international treaties that the State of Palestine has ratified and acceded to in the domestic legal system? Three sub-questions arise from this central question:

1- Has the Palestinian constitutional system adopted the theory of monism or dualism?

2- What are the mechanisms for integrating international treaties into the Palestinian domestic legal system?

3- What is the position of the Palestinian Constitutional Court's jurisprudence regarding the relationship between domestic and international law?

2. Mainstream Theories Regarding the Relationship of International Treaties to Domestic Law

Jurisprudence interacts with two basic theories to determine the relationship between international and domestic law. While the dualism theory is based on the concept of separation of international law and domestic law, the theory of monism is based on the idea of the unity of international and domestic law, so that they form a single legal bloc.[1]

As for defining the relationship between international and domestic law and approaching it with views that can be projected onto the Palestinian constitutional system, research is required into these two theories as the division among them is still unclear and does not stop at the point of jurisprudential disagreement. The argument has also touched the judicial application within the national courts. This embrace requires clarifying the idea on which each of the two theories is based, by the following two main points:

2.1 Research Structure

Monism is based on "the unity of both international and domestic law and its formation of one legal system according to a gradual hierarchy, such that the lower rule is subject to the higher rule, reaching the basic upper rule that governs all rules." This theory is considered an extension of the modern positivist school, which maintains that international and domestic law constitute one legal system.[2] Although the proponents of this theory agree on the unity of international and domestic law, they differ in determining the superiority of any law over the other, and this reflects a difference in the concept of gradation of the rules of these two laws in terms of which rules are applicable when a conflict occurs between them.

The proponents of this theory are divided into two different categories. The first calls for the unity of international and domestic law with the supremacy of domestic law. This category is expressed mainly by the jurist Eric Kauffman (1880-1972)[3], who said, "The basic rule of the international and domestic legal system is found in domestic law, given that national constitutions express the will of states to accept their international obligations, and this is what places the constitution and domestic

1 H. Al-Ghwanmeh, The Status of International Treaties Within the Principle of Hierarchy of Laws in the Palestinian Constitutional System, *Arab Journal for Scientific Publishing* 60, sixth edition (230) , p. 165.

2 A. Abu Al-Khair, Enforcement of International Treaties in the Domestic Legal System (Dar al-Nahda, first edition, 2003) , p. 31.

3 For a detailed understanding on the theory of monism, see Stanley L. Paulson, Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann, https://scandinavianlaw.se/pdf/48-17.pdf.

3 Ibid.

laws in a higher rank than international law, especially since the constitution undertakes the process of organizing international obligations and determining the arrangement of these rules of international law in the domestic legal system, plus the authorities competent to conclude treaties determine the constitutional conditions associated with their conclusion, ratification and entry into force."[4] Accordingly, proponents of the theory of monism with the supremacy of domestic law believe that public international law is nothing but a branch of domestic law.

The second category is based on the recognition of the unity of international and domestic law but with the supremacy of international law as the basic rule under which the rules of domestic law fall. The proponents of this category, including the jurists Hans Kelsen (1881-1973)[5] and Alfred Verdross (1890-1980),[6] base their opinion on the fact that "international law is supreme because its rules have a broader application, as the state itself, with all its legal institutions, is subject to international law that applies to all states, and therefore international law will apply to all legal institutions existing in all states around the world, which makes international law superior to domestic law."[7]

In light of this idea, and with the prevailing theory of monism indicating the supremacy of international law over domestic law, this theory has become, according to this perception, "one of the basic paths for integrating international obligations into the domestic legal system. The feature that distinguishes it in the case of a conflict between the rules of international law and the rules of domestic law is the predominance of international rules as they have hierarchical supremacy over domestic rules." The proponents of this theory liken the relationship of international law to domestic law and to the nature of the relationship that exists between state laws in the federal and central legal system, which gives priority to the enforcement of the federal and central laws in the case of a conflict.

2.2 The Theory of Dualism

The theory of dualism is considered an extension of the non-legally binding school in explaining the basis of the binding force of international law. It is based on the different sources of both international law and domestic law, and the difference in the legal nature and structure of the two legal systems, in addition to the difference in the subject and persons addressed by legal rules in the two systems. Adopting this theory results in complete independence between the two systems, and the domestic judiciary refrains from applying international legal rules unless they are transformed into domestic legal rules through what is called reception, which is "the process of converting the rules of international law into domestic rules by creating domestic rules from the legislative authority in the state."[8] This is

4 S. Al-Sinjari, *International Human Rights Law and State Constitutions,* PhD diss., College of Law, University of Mosul (2004) , p. 73.

5 For detailed understanding on the theory of monism, see also F. Rigaux, Hans Kelsen on International Law, *European Journal of International Law* (1998) , p. 9.

6 Ibid.

7 Al-Sinjari, Op. cit., p. 74.

8 S. Bourouba, *Jurisprudence in the Application of Human Rights Standards in Arab Courts, Algeria - Iraq - Jordan - Morocco - Palestine*, publications of the Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Sweden, Amman Regional Office (2012) , p. 25.

because international laws cannot be applied internally in countries that adopt the theory of dualism unless their ratification at the international level is accompanied by an internal procedure that gives them the status of application within the domestic legal system.

In light of the mechanisms included in the reception process for transforming international rules into domestic legal rules, it is evident that this process is not merely a process that includes formal procedures for putting a treaty into application, but rather one that represents an objective process related to the idea of dualism of law. For instance, Article 29 of Ireland's constitution states, "No international convention shall constitute part of the domestic law of the state except what may be approved by Parliament." Additionally, the Kuwaiti Constitution, issued in 1962, contains a ruling similar to that of the aforementioned ruling in Article 70 that states "The Emir shall conclude treaties by decree and notify them immediately to the National Assembly, accompanied by an appropriate statement. The treaty shall have the force of law after its conclusion, ratification, and publication in the Official Gazette. However, peace and alliance treaties, treaties related to the state's lands or natural resources, sovereign rights, or the public and private rights of citizens, trade, navigation, and residency treaties, and treaties that charge the state treasury some expenditures not included in the budget or include an amendment to the laws of Kuwait, must be issued by law to enter into force. In no case may a treaty contain secret terms that contradict its public terms."[9]

The proponents of this theory, led by the German jurist Karl Strupp (1886-1940) and the Italian jurist Dionisio Anzilotti (1867–1950) argue that international and domestic law do not overlap and are separate, so that each is independent of the other, for multiple considerations, including the differences in the sources, persons, and topics of the two, plus the structure and legal composition of the two systems differ.[10] The proponents of this theory justify their opinion by saying "domestic law is formed by the solo will of the state, while international law is formed by the common will of a number of states, which leads to a discrepancy in the sources of both laws. The same concept applies in terms of the people being addressed, because the rules of domestic law primarily address individuals, while international rules address states. This also applies to the subjects of the two laws, because international law regulates relations between states, while domestic law regulates relations between individuals."[11]

The proponents of this theory also believe that "The state's failure to comply with its international obligations does not invalidate the domestic law that violates the international obligation. Rather, the domestic law remains valid, and the violation only results in the state's bearing international responsibility. This requires that the concept of independence means that international laws cannot acquire binding character at the domestic level unless the state takes legislative action by which the content of international rules is transformed into domestic rules, through the normal procedures for issuing domestic legal rules."[12] This is what leads the author to say that the role of the domestic judiciary is limited only to considering what is before it based on interpreting and applying domestic law only, without applying international rules, unless the legislative authority takes the formal procedures

9 Abu Al-Khair, Op. cit., p. 15.

10 Ibid.

11 Ibid, p. 16.

12 Al-Sinjari, Op. cit., p. 73.

prescribed to transform those rules into domestic rules. Countries that adopted the theory of dualism of law; include France before 1940, the United Kingdom, Kuwait, and Jordan, where measures are required by the legislative authority or the head of state to enforce them in the domestic legal system.[13]

Despite the importance of the dualism theory, modern international legal jurisprudence has come to believe that this theory is untenable in light of the stability of many international treaties to address individuals in countries directly, as well as their imposition of obligations on individuals such as those related to preventing human rights violations. It has become clear that "The rules of international law are not limited to regulating relations between states, but rather extend that to concern for human rights in states. In addition, the difference between the sources of international law and domestic law is apparent and it does not reflect a difference in the legislative structure between them.

As a result, despite the importance of these two theories in the academic arena, they have become currently irrelevant. This is because countries, through their constitutions, have begun to adopt practical positions. For example, a single constitution adopts monist trends and at the same time takes on some aspects of dualism, including what was stipulated in the new Moroccan Constitution of 2011, where some scholars went on to say that this constitution has moved "toward a compromise theory" between these two theories. This aligns with what Charles Rousseau (1902-1993) proposed regarding the description of international law, in form and content, as a law of coexistence and coordination.[14]

The dualism theory in many countries, such as the United Kingdom, considers international law a part of domestic law immediately after being received into the domestic legal system. In other countries, this difference tends to be unclear.[15] In most democratic countries outside the Commonwealth of Nations, the legislative authority is responsible for ratifying international treaties so that they become directly enforceable in domestic law. The United States, for example, has a mixed system, as treaties ratified by the constitution automatically become part of domestic law. Some treaties are applied automatically. For instance, Article VI of the United States Constitution stipulates that treaties are part of the supreme law of the state. However, the United States Supreme Court reaffirmed that some treaties are not self-executing, as in the 2008 case *Medellín v. Texas*.[16] These treaties must be implemented under domestic rules before their provisions can be enforced by national courts. As for customary international law, the U.S. Supreme Court stated in the 1900 case *Paquete Habana*,[17] "International law is part of American law," but also stated that international law would not apply in the event of a conflicting legislative, executive, or judicial law.

13 A. Salahdin, Introduction to the Study of International Law (Dar al-Nahda, Cairo, 2003) , p. 80.

14 A. Laroussi, *Moroccan Legislation and International Human Rights Conventions*, Legal and Constitutional Accommodations, Publications of the Moroccan Journal of Local Administration and Development, Current Topics Series, Issue 87, 1st edition, 2014, p. 57.

15 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Seventh edition, Harper Collins, London, 1997) , p. 45.

16 Medellin v. Texas, United States Supreme Court, 552 U.S 491 (2008). https://www.quimbee.com/cases/medellin-v-texas

17 The Paquete Habana, United States Supreme Court, 175 U.S. 677 (1900). https://supreme.justia.com/cases/federal/us/175/677/

The French legal system stipulates that a treaty to enter into force in French domestic law must be ratified by the competent authorities and published in the Official Gazette. The publication procedure aims to inform the public authorities and individuals within the country of the treaty so that there is sufficient evidence, and so that the legal effects arising from its conclusion are produced in terms of establishing rights for individuals, institutions and companies, or burdening them with obligations, according to the circumstances. For these reasons, ratification of the treaty and then publication are required for it to enter into force within French domestic law.[18] Another approach entails that "A valid treaty is considered effective and enforceable without the need to issue domestic legislation, as it is in the Spanish and the Dutch Constitutions."[19] Others maintain: "There is nothing in the field of application of international law that favors one of the previous two theories over the other, but rather this application tends to the ideas of separation and connection together. The truth of the matter is that international and domestic law - even if they are not a single legal bloc - are not at the same time separate, as the connection between the two sets of laws exists to a large extent, but without reaching the point of saying that they are merging into one system. Rather, each of them maintains itself as an entity and sphere of authority independent of each other." [20]

In general, international law jurists, regarding determining the rank of international treaties about domestic law, have settled on the superiority of international legal rules over domestic law. However, they have differentiated between Human Rights treaties and others, considering that, "International human rights rules are peremptory rules that must be respected even if there is no contractual agreement regarding them because violating these rights is violating the public interest of the international community, as violating these rights results in a violation of rules related to human values, which objectively exceed the political borders of states. Additionally, violating these rights leads to violating values that the international community is enabling to prevail, which are well-founded in international practice. The proponents of this trend agree with the International Court of Justice's 1951 Advisory Opinion regarding the 1948 reservations made to the Convention on the Prevention and Punishment of the Crime of Genocide, which included considering the principles contained in that agreement as binding even in the absence of contractual obligations."[21]

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18 A. Abu Hani, The Problem of the Enforcement of International Treaties in Domestic Laws, *Journal of Scientific Research and Studies*, Faculty of Law, University of Medea, Algeria, vol. 3, no. 1 (2009), p. 10,

19 F. Al-Shammari, *The Legal Impact of International Treaties on the National Judicial System*: *Comparative Study,* Master's Thesis, United Arab Emirates University, College of Law, Department of Public Law, November, (2018), p. 35.

20 I. Abu Musameh, *The Legal Regulation of Commitment to International Treaties in Palestinian Legislation', A Comparative Study of Islamic Sharia*, Master's thesis, Islamic University, Gaza, Palestine, (2017), p. 111.

21 The jus cogens norm of general international law means: "A norm accepted and recognized by the international community as a whole, as "a norm that cannot be violated and which cannot be modified except by a subsequent norm of general international law that has the same character, and in this sense it constitutes restrictions on freedom of contract, and herein lies the problem of jus cogens rules at the international level, as states must take into account these rules while concluding international treaties and conventions, noting that describing international human rights rules as jus cogens rules does not hold true for all human rights. The Charter of the United Nations except for the right to equality, non-discrimination, and the right to self-determination, did not mention in detail human rights and did not make specific obligations on the state regarding certain rights." See, A. Al-Anazi & S. Al-Obaidi, *The Concept of International Protection of Human Rights and the Constrains it Faces*, *Al-Mouhaqqiq Al-Hilly Journal of Legal and Political Sciences*, second issue, sixth year, (2014), p. 230

In the same sequence, "The jurisprudence of the international judiciary has settled on affirming the principle of the supremacy of international treaties over domestic law, in implementation of the provisions of Article 27 of the Vienna Convention on the Law of Treaties of 1969, which stipulates that, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."[22]

2.3 The Status of International Treaties in the Palestinian Basic Law and the Jurisprudence of the Constitutional Judiciary

In this section, the author will address the perspective of the Palestinian Basic Law and jurisprudence on determining the rank of international treaties in the domestic legal system through two divisions. The first division reviews the position of the Palestinian Basic Law on determining the rank of international treaties in the domestic legal system, while the second reviews the position of the Supreme Constitutional Court on determining the rank of international treaties in domestic law.

3. The Status of International Treaties in the Palestinian Basic Law

In the amended Palestinian Basic Law of 2003, the constitutional document applicable in Palestine, the constitutional legislature followed the approach of inaction about the text regarding the place of international treaties in the domestic legislative pyramid. This is because it lacked an explicit reference to the place of treaties in the Palestinian legal system and it was content with an implicit reference to the important value of international human rights treaties. Article 10 of the Palestinian Basic Law of 2003 states, "1-Basic human rights and liberties shall be protected and respected. 2- The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights."[23]

A part of scholars believes that the failure of the Palestinian Basic Law to address rank and integration mechanisms of international rules through its articles in the text; leads one to believe that the priority has been determined in favor of the constitution and laws, given that no status has been determined for international rules in the national system. Accordingly, all the rights contained in these treaties will remain, from a constitutional standpoint, at the mercy of the ordinary legislator. This denies the supremacy of international treaties and their meaning. In addition, the document does not include numerous factors that must be present to determine the status of the treaties in domestic law. Among them is the failure to address the authority competent to conclude and ratify treaties and the mechanisms for localizing and enforcing them, as they were enforced through the executive authority by issuing some of them in the form of a law which is issued by the Legislative Council, or in form of a decree that issued by the President of Palestine. Others were issued in the form of a decree-law, and

22 The Convention was adopted on 22 May 1969 and opened for signatures on 23 May 1969 by the United Nations Conference on the Law of Treaties. United Nations, Treaty Series, vol. 1155, p. 331. For more details about other articles see: https://legal.un.org/ilc/texts/instruments/englih/conventions/1_1_1969.pdf.

23 The Amended Palestinian Basic Law of 2003, Official Gazette, (Palestinian Gazette), No. (0) (2003) , p. 5.

some of them were through decisions issued by the Council of Ministers, without any legal basis.[24]

In this regard and based on the aforementioned Article 10 of the Palestinian Basic Law, the Palestinian Court of Cassation issued a decision in its ruling in Appeal No. 56 (2014) that there was a suspicion of unconstitutionality in the text of Article 16, Paragraph 1[25] of the Juvenile Reform Law No. 16 (1954),[26] and referred the matter to the Supreme Court in its constitutional capacity to decide on the constitutional issue. The Court of Cassation decided that the Juvenile Correction Law's inclusion of the impermissibility of cassation appeal in the Court of Appeal rulings related to the cases of delinquent children was its final ruling. It further found that this could constitute a constitutional violation of the provisions of the amended Palestinian Basic Law of 2003, as it is an effective constitutional document.

If it is consistent that the Court of Cassation's application of the constitutional defense by way of referral in an appeal submitted to it is considered a unique ruling in itself, then the contents of the ruling indicate the existence of judicial thought based on its spirit on a desire to devote the role of the judiciary to harmonizing legislation with the treaties it has had ratified recently.[27] This ruling was based on the provisions of the Convention on the Rights of the Child of 1989, which the State of Palestine ratified on 2 April 2014, as well as on the text of Article 10 of the aforementioned Palestinian Basic Law.

Although the aforementioned Court of Cassation ruling does not include anything explicitly indicating that it has a clear vision of the relationship between domestic legislation and international treaties, and even though the Court of Cassation used the constitutional appeal by way of referral for implementing the international treaties, we can say that the failure to enshrine the supremacy of the constitution does not prevent the Palestinian national judiciary from relying on the application of international treaties to resolve various disputes, and even allowing them to prevail over domestic laws in many provisions. This includes the ruling of the Palestinian Court of Appeal in Civil Appeal No. 220 (2008),[28] in which "adherence to the contradiction between the international agreement signed between

24 Al-Ghwanmeh, Op. cit., p. 172.

25 "Anyone who has the right to appeal the rulings of the courts of first instance may appeal any ruling of the Magistrate Court or the Court of First Instance in its capacity as a juvenile court to the Court of Appeal, and its ruling shall be final."

26 A. Al-Ashqar, *The Role of the Judiciary in Harmonizing Legislation with International Agreements*, Legal Agenda website,Beirut,dated3-30-2015.,Formoreonthisarticle,see:http://legal-agenda.com/article.php?id=1050&folder=&lang=ar. (Last visited: may, 5, 2024).

27 "The ruling stressed the need to consider the international standards for the rights of the child contained in the International Convention. This is indicated by the court's reference to "that immunizing the Court of Appeal rulings issued against children from appeal in cassation that has no basis, but rather destroys the child's right to the care and special attention granted to him/her by the Basic Law." Regional and international treaties make it logically and legally inconceivable that the rulings issued by the Court of Appeal against adults should be subject to cassation appeal while the child is deprived of this right. Rather, the child's right to veto is more necessary for the child than it is for the adult and depriving him/her of this right violates the provisions of the Basic Law, and thus the texts of the aforementioned law becomes mere idle talk or a set of sermons, instructions, and advice that can be set aside with texts of a lower degree." See more details at: Al-Ghwanmeh**,** Op. cit., p. 175.

28 Palestinian Court of Appeal, Civil Appeal No. 220 (2008), database of the Technical Office of the Palestinian Supreme Court, Ramallah (Oct.1,2024).

the Palestinian National Authority and the United Nations Refugee and Works Agency (UNRWA) is misplaced" because the immunity enjoyed by the UNRWA stems from international conventions according to the rules of international law, especially the International Convention on the Immunity and Privileges of the United Nations of 1946.

In the same context, the Palestinian Court of Appeal in Civil Appeal No. 17 (2009) gave priority to Article 105 of the United Nations Charter, which contradicts the Palestinian Basic Law, as well as what was stated in the ruling of the Jenin Court of First Instance in its legal capacity No. 542 (2015),[29] when it indicated "The aforementioned headquarters agreement, which was signed by the Palestinian National Authority, is an international agreement that stipulates immunity for the defendant, and since this agreement is binding on the Palestinian National Authority, it is the highest in application, as it relates to international law and has a higher legal rank than the laws applied within the areas of the Palestinian National Authority."

In another context, the amended Palestinian Basic Law of 2003 did not contain a text clarifying the mechanisms for ratifying international treaties as stated in the comparative constitutional documents, noting that the Palestinian Council of Ministers had issued Resolution No. 51 of 2004 regarding the signing of bilateral agreements, which prohibited the signing of any bilateral agreements by any official Palestinian body unless it is approved by the Council of Ministers.[30] Article 79 of the third amended version of the draft Constitution of the State of Palestine stipulated a specific mechanism for that,[31] and it has been customary for the Palestinian President to sign international treaties and conventions directly without submitting them to any legislative or executive body for approval, which creates many problems regarding the legality of their implementation. Since Palestinian Basic Law does not specify

29 This ruling was issued by the Jenin Court of First Instance in its capacity and was upheld pursuant to Ruling No. 1196 of 2016 issued by the Palestinian Court of Appeal in Ramallah.

30 The signing of bilateral agreements, The Palestinian Council of Ministers Resolution No. 51 of 2004 stated the following: Article 1 states that "It is prohibited to sign any bilateral international agreement by any official Palestinian body, unless it is approved by the Council of Ministers." Article 2 states "All bilateral international agreements shall be submitted to the Ministry of Planning to express its comments before submitting them to the Council of Ministers for approval." Article 3 states "All competent authorities, each within its jurisdiction, must implement the provisions of this decision, and it shall come into effect from the date of its issuance and shall be published in the Official Gazette." See: Signing bilateral agreements, Council of Ministers Resolution No. 51 of 2004, Official Gazette (Palestinian Gazette), A, 52, (January 2005) , p. 172.

31 This mechanism consists of the Council of Ministers approving the international conventions and treaties concluded by members of the government in accordance with the powers delegated to them, and for their validity, they must be ratified by the head of state and published in the Official Gazette. As for the conventions and treaties that burden the state treasury with expenses not included in the budget, or impose obligations on citizens or the state in violation of the laws in force, they also require the approval most of all members of the Legislative Council to enforce them. The Legislative Council discusses treaties that result in prejudice to the independence of the state or the integrity of its territories, in preparation for the government to put them to a general popular referendum. For its implementation, the approval of the majority of participants in this referendum is required. See, *draft of the Palestinian Constitution,* published on the website of the Palestinian Ministry of Foreign Affairs (March 26, 2003), at the following link: http://www.mofa.gov.ps/arabic/Palestine/constitution.php

whether the condition of publication is necessary for enforcement, this circumstance makes the mechanisms for integrating international treaties into the Palestinian domestic legal system a problematic issue in judicial application, in addition to the problem of lack of a constitutional stipulation of the status of international treaties in domestic law.

3.1 The Status of International Treaties in the Domestic Legal System in the Jurisprudence of the Constitutional Judiciary

For the first time through Constitutional Appeal No. 4 (2017), the Supreme Constitutional Court addressed the issue of the status of international treaties in the Palestinian domestic legal system. The ruling was based on a constitutional referral from the Jenin magistrate judge in support of Article 27, Paragraph 2 of the Constitutional Court Law, where the Constitutional Court found that international jurisprudence and judiciary have established a common understanding that international treaties express in essence, the will of states to express their sovereignty in signing and ratifying international treaties. The state's expression of this sovereignty indicates that it has implicitly accepted to give up part of its sovereignty in favor of the rule of public international law by expressing a common will among states to ratify these treaties in terms of the right of the international community to form a system of international law in which international rules, both conventional and customary, become part of domestic law. As a result, it has become untenable for states' adherence to their sovereignty to be an obstacle to respecting their legal obligations. "International treaties emanating primarily from the Charter of the United Nations and the human rights conventions that carry within some rights have become jus cogens." The Constitutional Court concluded that international agreements supersede domestic legislation so that the rules of these agreements acquire a higher force than domestic legislation in a way consistent with the Palestinian people's national, religious, and cultural identity.

In the context of commenting on the aforementioned court decision, one side of jurisprudence believed that it cannot be assumed that there is a place for international treaties within domestic legal systems without the presence of a constitutional text regulating them —especially in light of the presence of explicit texts in terms of the responsible party (the Legislative Council in the case of laws, and the head of the Palestinian National Authority in the case of decree law) regarding the enactment of legislation, which is considered in principle to be closer to "continental law" or "civil law" systems. However, in the absence of regulation of the status of the international treaty, the author can only conclude that those international treaties ratified by the President of the Authority cannot be relied upon before the Palestinian courts, and their application to disputes that take place in Palestine and are considered by the national courts cannot be claimed. In other words, the State of Palestine is violating its international obligations in that it does not do what is necessary to ensure the implementation of international treaties.[32]

The author believes that this ruling raises a very important issue related to a problem facing many constitutional systems; namely, the problem of the conflict between the universality of human rights

32 A. Khalil, *Comparative Constitutional Issues: Constitutional Code No. 9/2015* (n.p., 2015).

and national specificity. Even though the ruling the Palestinian Constitutional Court referred to has ruled that international treaties prevail over domestic legislation, which is a trend that is consistent with most comparative constitutional systems and what the jurisprudence of international law has settled on, it has placed restrictions on this transcendence, by stipulating that international treaties must be compatible with the national, religious, and cultural identity of the Palestinian people. It seems clear that the restrictions included in this caveat amount to a large extent to what was stated in the issue of the Moroccan Constitution of 2011, which stipulated the supremacy of international treaty law to be within the scope of the provisions of the Constitution, the laws of the Kingdom of Morocco, and its rooted national identity.

In addition, the author believes that these restrictions comprise the constitutional text, as well as the result of the Court's ruling, characterized by the lack of definitive significance in determining the rank of international treaties about domestic laws because the concept of national, religious, and cultural identity is considered a broad concept and is subject to many interpretations at the level of judicial application. One way to address this problem is to allow the state parties to make reservations on the texts of the treaty. However, "adherence to privacy in implementation of the philosophy of human rights and respect for the will of peoples and their culture must be interpreted narrowly in line to recognize this exception, and this exception must not be a means used by state governments to evade the application of international human rights treaties, and thus adherence to privacy is permissible from a logical standpoint based on respect for others."[33]

In this context, and with the possibility of this problem emerging at the level of judicial application, what is included in the ruling of the Constitutional Court may constitute an entry point for holding a Palestinian State responsible for repudiating the Convention it ratified and acceded to. This has been raised by international contractual committees as a repudiation of the state's obligations. The contractual obligations of Palestine, including what the Committee on the Elimination of Discrimination Against Women expressed in its concluding observations on the initial report of the State of Palestine regarding its concern about linking the superiority of the provisions of the (CEDAW) Convention to the extent of its compatibility with the national, religious and cultural identity of the Palestinian people."[34]

What is also striking about the referenced Constitutional Court ruling is that the Court ruled that international treaties are acts of sovereignty, when it indicated that "the apparent text of Article 30/2 of the amended Basic Law did not refer to international treaties, as it indicated the lack of legal immunity. Any administrative decision or action is subject to judicial oversight. Therefore, international treaties are not administrative decisions or actions but rather have been classified in the context of administrative law as acts of sovereignty that are beyond the oversight of the administrative judiciary. Therefore, the claim that UNRWA's work is unconstitutional from judicial oversight by the headquarters agreement

33 M. Fayeq, *Human Rights Between Particularity and Universality, book of the Arab Human Rights*, Center for Arab Unity Studies, Beirut (1999), p. 203.

34 Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Initial Report of the State of Palestine, UN document CEDAW/C/PSE/CO/1, (25 July 2018).

has no basis in the Basic Law."[35]

In essence, it seems that the Court is stating that international treaties are acts of sovereignty that go against the scope of the administrative judiciary's control and have no status in the matter of ruling and referral. The referral decision from the Jenin Magistrate Court dealt with the imposition of the headquarters agreement regarding the fortification of UNRWA institutions against the Palestinian citizen on suspicion of diminishing the right of the Palestinian citizen to litigate by the text of Article 30 of the Basic Law. It was envisaged that the Court would rule, as it concluded in the report, on the superiority of this agreement without deciding to consider international treaties as acts of sovereignty because acts of sovereignty involve clear violations of the principle of legality and clear away the concept of the state of law, and may lead to giving the executive authority absolute power to do whatever it wishes without supervision or accountability, thus violating public rights and freedoms.[36]

Also, the Palestinian Supreme Court of Justice had decided in its ruling No. 531 (2010) that "acts of sovereignty are by nature administrative acts and that the argument that some administrative decisions are acts of sovereignty aims to protect these decisions from judicial oversight because they are tainted with illegality, which has led to jurists considering them to be acts of sovereignty." Moreover, the Palestinian legislature has agreed with the conclusions of jurisprudence in this regard and stipulated in Article 30 of the Basic Law that it is prohibited to stipulate in the laws that any decision or administrative action is shielded from judicial oversight."[37]

After issuing the aforementioned Constitutional Court ruling, the Palestinian Constitutional Court once again raised the issue of the status of international treaties in the Palestinian domestic law system in its decision on 2017's Constitutional Interpretation No. 5 (Request No. 2 of Judicial Year 3).[38] The aforementioned interpretation decision is closely linked to its ruling No. 4 (2017) in Constitutional Appeal No. 4 (2017) in terms of the subject matter, as Constitutional Interpretation No. 5 (2017) was issued based on a letter by the Minister of Justice and upon a request from the Prime Minister on 10/19/2017 submitted by the Minister of Foreign Affairs and Expatriates to interpret Article 10 of the Amended Basic Law of 2003 based on Article 103 of the Basic Law, Article 24/2 and Article 30/1 of the Supreme Constitutional Court Law, and the aforementioned Article 10 of the Basic Law, which states: "1- Human rights and fundamental freedoms are binding and must be respected. 2- The Palestinian National Authority shall work without delay to accede to regional and international declarations, treaties and conventions that protect human rights." Thus, Article 10 is considered the only Article in the Basic Law that is suitable as an entry point for clarifying the position of the Basic

35 Palestinian Supreme Constitutional Court, Appeal No. 4 of 2017, Case No. (12) of Judicial Year (02), The Palestinian Gazette, (No. 138, Nov 29, 2017), p. 85.

36 A. Shatnawi, *Encyclopedia of Administrative Justice*, Dar Al-Thaqafa, Part One, (2011), p. 99.

37 Palestinian Supreme Court of Justice, Ruling No. 531/2010, database of the Technical Office of the Palestinian Supreme Court, Ramallah, reviewed on 20/1/2024.

38 Palestinian Supreme Constitutional Court, Constitutional Interpretation Decision No. (5 of 2017), Request No. (2) of Judicial Year 3, Interpretation, The Palestinian Gazette, No. (141), (dated Feb 1, 2024), pp. 87-97.

Law regarding the status of international human rights conventions and other treaties about Palestinian legislation.

What is remarkable about this interpretation is that the Supreme Constitutional Court has cited it in form and subject despite the issuance of the ruling in question earlier. This ruling affirmed the supremacy of international treaties over legislation, and even affirmed the supremacy of the headquarters agreement between the Palestinian Authority and UNRWA over Palestinian legislation. The matter is, it was expected that the Court would decide to reject the interpretation request because its subject had previously been decided in the judgment No. 4 (2017), Case No. 12 of Judicial Year 2 of the Supreme Constitutional Court.

The author believes that the aforementioned constitutional interpretation decision went beyond the contents of the previous constitutional ruling No. 4 (2017) referred to previously, as the constitutional interpretation reached an expanded conclusion that the Declaration of Independence document is considered an integral part of the constitutional system in Palestine, and even superior. Then comes the Palestinian Basic Law, and since the Supreme Constitutional Court in Palestine has declared the supremacy of international treaties and conventions over ordinary domestic legislation (laws and decrees), international treaties and conventions rank lower than the Basic Law, followed by the various laws in force in Palestine. The President of the state must ratify the treaties and international conventions, according to what was stated in the text of the interpretation decision, and the treaty or Convention in itself is not considered an applied law in Palestine. Rather, it must gain force by passing through the formal stages that must be available to issue a specific domestic law to be enforced.

The respect for human rights and fundamental freedoms and the foundations of obligation and commitment at the national level is achieved by integrating these various international treaties and conventions on human rights into ordinary legislation in the State of Palestine. This must be done in a manner that does not contradict the religious and cultural identity of the Palestinian people. It must be done based on respect for the principle that the constitutionality of any legislation attempting to implement the treaties and conventions of international human rights standards depends on consistency with the Basic Law. It is necessary to make a set of domestic legislative measures and procedures to facilitate the implementation of these basic rights and freedoms within the process of reviewing various relevant laws and legislation. In this way, we can aim to achieve better integration of many of the requirements of international treaties related to human rights that have been ratified by the President of the State of Palestine. This will take place through reviewing Palestine's legal systems, the compatibility of its domestic legislation with international mechanisms for human protection and dignity, and setting priorities in the field of compatibility.[39]

Moreover, the author finds that the Supreme Constitutional Court, in Constitutional Appeal No. 4 (2017), Case No. 12 of the 2nd Judicial Year, confirmed the superiority of the rules of international law

39 Palestinian Supreme Constitutional Court, Constitutional Interpretation Decision No. 5 of 2017, Request No. 2 of Judicial Year 3, Op. cit., p. 20.

over domestic legislation, even if these international rules have not been incorporated into domestic law, provided that the treaties are international standards compatible with the national, religious, and cultural identity of the Palestinian Arab people. This ruling also confirmed the non-obligation of incorporating international rules into domestic law to stipulate their supremacy, as the Court explicitly indicated that the inaction of the Basic Law means, according to what jurisprudence has established that specific mechanisms are not required to integrate the requirements of these international treaties into the domestic law system or to remove any contrary provisions.

This ruling raises many differing opinions, as one school of jurisprudence believes that although the state has the right to conduct the initial stages of forming an international treaty so that it becomes binding within the scope of international law, the actual implementation of the treaty in the domestic sphere requires legal action by the internal authorities of the state, that is, the publication of the treaty law by the competent internal authorities of the state ratifying the international treaty following the conditions established in this regard, so that it becomes effective and binding on the date of this procedure. Accordingly, the international treaty does not acquire a mandatory status and cannot be considered effective in the domestic legal system except after this legal action is carried out. Without it, the international treaty, and the provisions it contains within the framework of international rules remain irrelevant to domestic law.[40]

In contrast to the previous viewpoint, there is a group of scholars that believes that an international treaty, once ratified, becomes effective without the need to carry out internal procedures. They believe in what is called self-executing treaties, which do not require the issuance of domestic legislation. In their view, the international treaty does not even need the issuance of domestic legislation. To become effective because international law and domestic law are only two parts of one legal system, one domestic and the other international, and the latter has priority and superiority, then its rules are applied without the need to carry out internal procedures. This is not prevented by the requirement of some constitutional systems to publish international treaties in the Official Gazette, as publication in the Gazette is nothing but a physical act required by the legislature, as are the domestic laws that require this, so that everyone is informed of the provisions of these laws of the treaties.[41]

This jurisprudential disagreement was reflected and increased after the Supreme Constitutional Court issued its decision in the subsequent interpretation request on this ruling, referred to in Interpretation Request No. 5 (2017).[42] It has receded from this jurisprudence to confirm that the treaty or agreement is not in itself a law applied in Palestine, but rather it must gain strength by passing through the formal stages that must be met to issue a specific domestic law to enforce it. In other words, the agreement does not have the authority to enter into force unless it passes parliamentary approval and is published afterwards. This is not mentioned in any text in the Palestinian Basic Law, and in

40 Al-Shammari, Op. cit., p. 35.

41 Ibid.

42 For more details on this case, see the rule issued by the Court of Cassation held in Ramallah, available online at: https://maqam.najah.edu/judgments/6438.

essence, it contradicts what the Court ruled previously in Constitutional Appeal No. 4 (2017)[43] Case No. 12 in the 2nd Judicial Year of the Supreme Constitutional Court ("Constitutional"). It is unnecessary to incorporate international rules into domestic law to stipulate their supremacy and enforcement at the domestic level. Indeed, in this interpretation, the Court stipulated the necessity of taking a set of domestic legislative measures and procedures to facilitate the implementation of these fundamental rights and freedoms within the process of reviewing the various relevant laws. This should be done to achieve a better integration of many of the requirements of international treaties related to human rights that were ratified by the President of the State of Palestine. This should be done by reviewing the Palestinian legal system, the extent of compatibility of its domestic legislation with international mechanisms for human dignity and protection and setting priorities in the field of such compatibility. This means that there must be a process of receiving international rules to be entered into the framework of domestic laws. It also means that the Palestinian constitutional system has adopted the doctrine of dualism, contrary to what the Court ruled in the ruling under Commentary, which suggested that the constitutional system had adopted the monism system.

In this regard, some professional Palestinian views in the field of international and domestic law considered that the Court, in its decision, addressed the issue of the system adopted by Palestine regarding the integration of international treaties into the domestic legal system, and that there is no indication of either systems decisively available under the Basic Law. [44]

Regarding the requirement to publish a treaty for its validity in the Palestinian domestic legal system, as stated in the interpretation decision, some jurists believe that publishing a treaty in the Official Gazette does not in itself make it binding, as it is binding on the state even without publishing it, once it is joined or ratified. Publishing in the Official Gazette has another purpose related to informing the citizens of the law, which means that the treaties to which Palestine has acceded become effective and binding even before their publication.[45]

In the constitutional interpretation decision, the Court also attempted to differentiate between law-making treaties and contractual treaties, in the context of justifying its ruling and the necessity of publication to enforce a treaty. The distinction between legitimate treaties and contractual treaties is considered one of the most widespread and stable divisions in international jurisprudence, as traditional jurisprudence found in it an acceptable legal interpretation of the new phenomenon, which the international community has known since the early nineteenth century. This has been represented by the increasing recourse to collective international treaties, which establish mere international legal

43 For more details on this case, see the rule issued by the Court of Cassation held in Ramallah, available online at: https://maqam.najah.edu/judgments/4330.

44 Position paper on the 'Constitutional Court's Ruling Regarding the Status of International Agreements' in the Palestinian legal system, Birzeit Legal Studies Position Paper Series, Birzeit University, Faculty of Law and Public Administration, Constitutional Law Unit, December (2017), p. 4.

45 R. Tawam & A. Khalil, *Enforcement of International Agreements in Palestine: Legal Problems and Constitutional Solutions*, Birzeit Position Paper Series for Legal Studies, Birzeit University, Faculty of Law and Public Administration, Constitutional Law Unit. 2019, p. 5.

rules, compared to the traditional legal form of a bilateral treaty, which relates to the settlement of special situations for the parties to it, and creates mutual international obligations on it.

This distinction appealed to some jurists in that they found in it the technical means to highlight the legislative role of states in the international community. The legitimate treaty aims to create new, general and mere international legal rules, while parties to the treaty aim to create corresponding obligations that differ from one party to another. This is due to the unity of the subject; some of them do not create new principles or rules in international law, but rather constitute an expanded text for bilateral treaties, and are often collective or multilateral treaties. As for contractual conventions, they are those concluded between international law parties in a matter of their own, that is, between two states or a limited number of states. This type of Convention only binds those who sign it, and its effect does not include countries that are not signatories to it, as they are not a party to it, such as agreements of alliance, reconciliation, and demarcation of borders.[46]

In light of this understanding, the researcher believes that the Court's attempt to create this paradox to distinguish between the effect of legitimate and illegitimate treaties is a useless distinction in the context of the absence of any distinction between legitimate conventions and contractual conventions in the Palestinian Basic Law, which makes what the Court mentioned merely a theoretical analysis with no basis in terms of legislative impact.

Concluding Remarks

This study has elaborated a set of results and recommendations as follows:

Results:

- The Palestinian constitutional system has not resolved the issue of adopting either the monism or dualism theory. The constitutional legislature's inaction about clarifying the mechanism for integrating these treaties, with a reading of Article (10) thereof, can be interpreted as adopting a system of monism, as the absence of a requirement to publish or integrate the treaty into domestic law means that the theory of reception applied in the dualism theory does not exist.
- The Constitutional Court adopts a mix of both monism and dualism in its rulings. In addition, the Court has included, in its rulings regarding the status of international treaties, the problem of the conflict between the universality of human rights and national specificity. Although the aforementioned ruling of the Palestinian Constitutional Court found that international treaties prevail over domestic legislation, this viewpoint is consistent with most comparative constitutional systems and what the supremacy of international law has established. However, the court ruling placed restrictions on this supremacy, when it required that international conventions be compatible with the national, religious and cultural identity of the Palestinian people, which raised concerns in the CEDAW international contractual committee.
- The ordinary Palestinian judiciary tends to affirm the supremacy of the international treaties over

46 Abu Musameh, Op. cit., p. 111.

domestic law, although this tendency does not have a constitutional basis. In this context, the Palestinian Constitutional Court created conditions for entry into force of a treaty that was not stipulated in the Palestinian Basic Law when it ruled that international rules must be incorporated into domestic law due to the requirement that they be published and issued by the authority. Furthermore, the Constitutional Court contradicted what was stated in the Interpretation Request No. 5 (2017), as it has receded from jurisprudence to confirm that a treaty or Convention in itself is not considered a law applied in Palestine. Rather, it must gain effect by passing through the formal procedures to issue as a specific domestic law to be enforced. In other words, a treaty does not have the authority to be enforced unless it passes parliamentary approval and publication thereafter, which is not included in Appeal No. 4 (2017).

Recommendations:

- The necessity for the constitutional judiciary to take a decisive perspective towards the statute of international treaties through abolishing the contradiction within its rulings by issuing a new interpretational decision that adopts monism theory due to the absence of any restrictions within the Palestinian Basic Law.
- The importance for Palestinian judges to enhance, through their rulings, the adoption of the common orientation of enforcement of international treaties as they enjoy a priority over domestic law once the Palestinian authority joins these treaties.
- The study recommends amending the article (10) of the Palestinian Basic Law by the legislative council to state the supremacy of international agreements over the regular legislations within the Palestinian legal system.

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