Migration Letters

Volume: 21, No: S5 (2024), pp. 900-907

ISSN: 1741-8984 (Print) ISSN: 1741-8992 (Online)

www.migrationletters.com

International Treaties Before The Administrative Judiciary: A Comparative Study

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Abstract

This research focus on the administrative judge applies and interprets international treaties, where the opinions of administrative courts in Jordan, France and Algeria were extrapolated to clarify his position on this issue. It was concluded that the administrative judiciary in Jordan, represented by the former Supreme Court of Justice and the current administrative courts, did not grant itself the right to apply and interpret international treaties as an act of sovereignty, unlike the administrative judiciary in France and Algeria, which considered itself the holder of jurisdiction in the application and interpretation of these treaties. The study recommended that the Jordanian administrative judiciary should adopt a similar position to the Jordanian regular judiciary and the comparative administrative judiciary.

Keywords: *administrative judiciary, international treaties, interpretation, application, lawsuit.*

Introduction

The states used to be the only person of the public international law, and its subjects were limited, and there was no effective role for the national judge, but at the present time it includes other persons and new and multiple subjects, as international law develops with the development of its relations, it is no longer limited to regulating relations between states, but rather extended to include other subjects that enter into the core of the internal affairs of states, espe[1]cially human rights treaties, and since treaties were and still occupy the first place as a source of sources of public international law, the importance of determining the status of these treaties and how to apply and interpret them within the state party, especially before the judicial system, and undoubtedly the administrative judiciary is an integral part of the internal judicial system of the state.

Objectives of the study

The research aims to:

- Clarify the position of the Jordanian administrative judiciary and the comparative judiciary, and to reveal its role in the application and interpretation of international treaties.

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- Identify the points of difference in practical reality between the administrative judge in Jordan and the comparative countries regarding the appropriate solutions stipulated by the treaties and their application to the lawsuit brought before them.

Study Problem

International treaties have gained a significant status and widespread application in the domestic legal system of many countries, becoming part of their internal legislation. Therefore, the main problem of this research is whether the administrative judiciary has applied and interpreted international treaties in line with its judicial role, especially when one of the parties to the lawsuit relies on the texts of international treaties, putting the administrative judge in a position to resort to these treaties.

Study Methodology

The researchers followed a descriptive analytical comparative approach, describing the status of international treaties in the internal systems of some countries by analyzing the legal texts in their constitutions and analyzing the various judicial decisions issued by national courts, including administrative ones. They also analyzed and compared the judicial decisions of some countries regarding the application and interpretation of international treaties, focusing on the Jordanian judiciary and comparing it to the French and Algerian judiciaries.

Study Plan

The research was divided into two parts. The first part addressed the application of international treaties before the administrative judge, after clarifying the status of these treaties within the legal system of the state. The second part explained the position of the administrative judge on the interpretation of international treaties through judicial decisions. Finally, a conclusion was drawn, including the results and recommendations related to the research.

The First Requirement: The Authority of Administrative Judges in the Application of International Treaties

Before discussing the authority of administrative judges in the application of international treaties, it is necessary to clarify the status and position of these treaties in the domestic legal system of these countries. The Jordanian Constitution does not specifically address this issue. It only mentions the competent authority to conclude treaties in Article 33 of the Jordanian Constitution, which states: '1. The King declares war, concludes peace, and concludes treaties and agreements. 2. Treaties and agreements that entail financial burdens on the state treasury or affect the rights of the Jordanian public or private individuals shall not be effective unless approved by the Parliament. Under no circumstances may the secret conditions of a treaty or agreement contradict the public conditions'.

In the absence of an explicit and general provision in the Jordanian Constitution, court decisions have filled the gap for a certain period of time. The Court of Cassation, especially, has affirmed the application of international treaties and their superiority over ordinary law[2]. However, this deficiency was clearly addressed by the interpretative decision of the Constitutional Court of Jordan, Decision No. (1) dated May 3, 2020[3]. This decision has absolute binding force and authority that all authorities must comply with. The

[2] See decision number 4390 for the year 2019, distinguishing rights 8/7/2020, and decision number 2433 for the year 2006, distinguishing rights 3/12/2006, and decision number 768 for the year 1991, distinguishing rights 6/2/1992, among other decisions.

[3] Paragraph 2 of Article 59 of the Jordanian Constitution and Article 17 of the Constitutional Court Law No. 15 of 2012, published in the Official Gazette on p. 5119 issue 5161, dated 7/6/2012

Constitutional Court affirmed that treaties and agreements mentioned in Article 33 of the Constitution are acts of sovereignty concluded between states[4]. The Constitutional Court also stated the following: 'Firstly, it is not permissible to issue a law that contradicts the obligations imposed on the parties by a treaty that the Kingdom has ratified in accordance with the law. Secondly, it is not permissible to issue a law that includes the amendment or repeal of the provisions of such a treaty. Thirdly, international treaties have binding force on their parties, and states must respect them as long as they remain valid and effective, provided that these treaties were concluded, ratified, and fulfilled the prescribed procedures for their entry into force'.

Thus, this decision aligns with the approach adopted by the national judiciary, which considers international treaties superior to ordinary laws and approaching the level of legislation.

As for the French Constitution of 1958, Article 55 states: 'International agreements duly ratified or approved, and published, shall prevail over domestic laws, provided that the other party implements them.' The same direction was adopted by the Algerian Constitution of 1996, which states that treaties ratified by the President of the Republic, according to the conditions specified in the Constitution, have superiority over the law[5].

Based on the above, it is evident that the status of treaties in Jordan, France, and Algeria is similar. They have a higher rank than ordinary law but are inferior to the constitution. However, the question that arises here is whether the administrative judiciary has applied international treaties to decide cases before it, similar to other national courts.

According to the logical analysis of the matter and the decision of the Jordanian Constitutional Court, which considered administrative judiciary as part of the regular judiciary[6], and since the task of national courts, in all their forms, is to apply the law, and as international treaties have gradually gained prominence in domestic affairs of countries, regulating relations between the public administration and individuals, they have acquired a significant role and a close relationship with other branches of law, including administrative law, as it is a flexible and constantly evolving law[7], especially since many of its provisions cannot be fully regulated. It becomes clear that these treaties play an important role in the scope of administrative justice, as they may provide solutions to many administrative disputes[8]. Therefore, the administrative judge can rely on international treaties and apply them in the cases presented to him as a reference and a source of legitimacy, and on the other hand, the administrative judge enjoys wide discretionary powers because he is a creative judge who invents solutions and rules in the case before him[9].

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[4] Diala Al-Taani, Muhammad Maabrata, The concise in public international law, Second Edition, Dar Al-Thaqafa for Publishing and Distribution, Amman Jordan, pp. 73-80, 2023

[5] Tariq Juma Said, Mechanisms for localizing international treaties in national law, a comparative study between Jordanian legislation and Iraqi legislation, Master's thesis, Middle East University Amman Jordan, 2020, p. 34

[6] The decision of the Constitutional Court number 10 for the year 2013 published on the website of the Constitutional Court http://cco.gov.jo viewed on: 16/11/2023, at: 20:07pm

[7] Amina Rice, The International Treaty before the Administrative Judge, a research published in the Journal of Social Sciences, Issue 21, December 2015, p. 18

[8] Refer to decision number 677/994, distinguishing rights Journal of the Bar Association Issue 4-3, 1995, p. 817

[9] Decision of the Court of Cassation number 936/1993 dated 13/11/1993

However, do administrative judicial practices confirm this, or do they have a special tendency that does not align with other national courts, especially the Court of Cassation?

Looking at the decisions of the Jordanian Supreme Court (which has now been replaced by the Administrative Court), we see that this court did not apply international treaties. The court stated that it was not competent to do so. For example, the court stated that according to the 1927 Fugitive Offenders Act in force in the kingdom, the authority to issue an arrest warrant for a fugitive criminal, whether accused or convicted, was vested in the magistrates of reconciliation. It also made the decision issued by the magistrates of reconciliation in this regard subject to appeal before the Court of Appeal, in accordance with Articles 9 and 12 of the Act. Based on this, it can be concluded that the Supreme Court is not competent to consider appeals against the decisions of the Court of Appeal[10], which is the competent authority to consider such appeals, as stated in the referred provision. Furthermore, the same court ruled in another decision that "the administrative judiciary is not competent to consider appeals against the government's violation of treaty provisions against individuals or in the event of issuing a decision that exceeds the provisions of the treaty and goes beyond the jurisdiction of the administrative judiciary due to its relation to sovereign acts"[11].

On the other hand, we see that the French administrative judiciary is far more advanced. The French Council of State has issued numerous decisions to adjudicate administrative disputes based on international treaties. One of the most important examples is the case of "GISTI," issued on April 12, 2012, where the Council declared the illegality of a decree related to the housing rights of foreigners, considering that the provisions contained in International Labor Convention No. 97 of 1949 were sufficient for direct application, and that the decree did not comply with the provisions of the convention[12].

We find the same position in the decision of the Algerian Council of State No. 002111 of 2000, regarding a case where the Banking Committee of the Bank of Algeria refused to authorize the French lawyer (Joëlle Moussard), registered with the Paris Bar Association, on the grounds that she did not provide a license to practice defense activities in Algeria issued by the President of the Bar Association, in accordance with Article 6 of Law No. 91-04 of January 8, 1991, which regulates the legal profession. However, the defense counsel (Lionel Bank) insisted on applying Article 16 of the Judicial Protocol concluded between Algeria and France on August 28, 1962, which exempts French lawyers from providing a license to plead before Algerian judicial authorities, requiring only the choice of a lawyer's office. The French lawyer chose the office of Professor Ablawi, thus respecting all the procedures stipulated in the judicial protocol. Therefore, the Council of State invalidated the contested decision. Thus, while the Jordanian administrative judiciary does not apply international treaties, the French administrative judiciary has made significant progress in this regard. The practices of administrative courts may vary from one country to another, and it is important to consider the specific legal frameworks and judicial traditions of each jurisdiction[13].

[10] Supreme Court of Justice case number 30/70, published on the Qarark website https://qarark.com viewed on 10/11/2023 at: 14:22pm

[11] Decision of the Supreme Court of Justice of Jordan, number 51 for the year 1966, Qarark website.

[12] Refer to Sofiane Abdeli, The powers of the national judge in the matter of control over the application of international agreements, Journal of Jurisprudence and Law Morocco, Issue fifty-three March 2017, p. 61

[13] Amina Rice, The International Treaty before the Administrative Judge, previous reference, p. 189

From the previous discussion, it is clear that the situation in Jordan is quite different. When examining the administrative judicial rulings regarding the application of treaties, it is found that the Administrative Court and the former Supreme Court of Justice did not apply international treaties before them. The reason for this, in our belief, is the rarity of lawsuits filed by individuals relating to international treaties before the administrative judge because they are considered sovereign matters beyond the jurisdiction of the latter, and this matter is left to the executive authority. In this regard, we hope that our Jordanian legislator would amend the Administrative Judiciary Law No. 27 of 2014 and stand alongside comparative administrative justice by adding the phrase "The Administrative Court shall consider lawsuits related to the application of international treaties," recognizing the superiority of those treaties over domestic legislation. However, the French administrative judiciary has dealt with many, if not numerous, international lawsuits due to its constitutional independence from the executive authority. The same applies to Algeria, where treaties have been applied, but it is noteworthy that the administrative judge in Algeria has relied on treaty provisions to resolve the subject matter of the lawsuit based on the parties' arguments, not spontaneously by the judge himself. Therefore, we conclude that unlike the French and Algerian legislations, the Jordanian legislator has not applied international treaties before the Jordanian administrative judiciary, considering them as sovereign matters. Has the same approach been taken by other countries regarding the interpretation of treaties?

The Second Requirement: Interpretation of International Treaties before the Administrative Judge

Interpretation is in itself a mental process, and it refers to determining the meaning of a legal rule or the extent to which that rules corresponds to reality. In the case of treaty application, sometimes it is necessary to resort to interpretation. One of the treaty provisions may be ambiguous, contradictory, or deficient, and it is necessary to clarify the meaning of the provision and determine its scope in order to understand the legislator's intention[14]. The authority for interpretation can be either international or domestic, where one of the countries (which are a party to the treaty) entrusts its domestic authorities with the task of interpretation. Domestic regulations vary in this regard, but they can be divided into three approaches regarding granting the national judge the right to interpret treaties.

The first approach is that the national judge is not competent to interpret treaties, meaning that the national judge is not given the authority to interpret treaties as it falls outside their jurisdiction, based on the argument that treaty conclusion is a governmental act and an act of sovereignty issued by the executive authority, in accordance with the principle of separation of powers. When the judge encounters an ambiguous provision, it is incumbent upon them to suspend the proceedings and send a request to the executive authority for the interpretation of the provision since it is the one that concluded the treaty and, therefore, is better able to interpret the provision. This is the approach adopted by the Jordanian Court of Cassation, as we will explain later.

The second approach is the competence of national courts to interpret treaties. In this approach, the national judge has the right to interpret the treaties they apply, especially if these agreements have legal value within the domestic legal system. Just as the national judge interprets domestic laws, they have the right to interpret treaties, especially when the government or the executive authority requests the interpretation of treaty provisions, as is

[14] Badawi Sara, "The Scope of the Administrative Judge's Authority to Interpret International Treaties," Master's Thesis, University of Mohammed Khider, Algeria, 2013, p. 125
Dr. Mohamed Fouad Abdel Basset, "The Jurisdiction of the Administrative Judge to Interpret International Treaties," New University Press, 2007, p. 124
Jaloul Chitour, "Application and Interpretation of International Treaties in National Judiciary," Journal of Research and Studies, Issue 14, Year 9, 2012, pp. 140-141.

the case in the first approach. Adopting the first approach leads to prolonging the proceedings and thus delaying the resolution of the lawsuit[15].

The third approach is the distinction between types of treaties. According to this approach, if the treaty is related to the public interests of the state, the national judge is not allowed to interpret it. However, if the treaty is related to the private interests of individuals, the courts can interpret it[16].

Which of these legal approaches have the Jordanian courts followed?

The Jordanian Court of Cassation has interpreted the provisions of treaties[17], while the Jordanian Administrative Judiciary, represented by the former Supreme Court of Justice, took a different position. It did not grant itself the right to interpret international treaties, as it decided that the plaintiffs did not rely on the financial agreement concluded between the Hashemite Kingdom of Jordan and the United Kingdom in 1951 in their claims, so it cannot be said that the resolution of the lawsuit depends on the interpretation of the provisions of this agreement. This is an act of sovereignty that the Court of Cassation does not have the right to consider, according to Article 10(3) (a) of the Law on the Organization of the Judiciary[18].

However, as for the current Jordanian Administrative Court, there is no judicial precedent, indicating that it follows the same principle previously applied by the Supreme Court. As for the position of the comparative administrative judiciary in this regard, we find that the situation in Algeria lacks judicial practice. However, there is a decision from the chamber related to the Council of State dated 2000/5/8 stating: "French lawyers may assist and represent litigants before Algerian judicial authorities..." Consequently, the treaty cannot be applied without interpretation. Therefore, this is an indication that the administrative judge has taken it upon himself to interpret the treaty. This is clear evidence that he has granted himself the authority to interpret the treaty[19].

In France, the initial right to interpret international treaties was limited to the executive authority[20], meaning that the judge could issue a ruling rejecting administrative lawsuits related to the interpretation of the treaty. The situation continued as such until the Council of State took a new direction in its ruling of Nicolo in 1989, which involved interpreting the treaty in the event of a conflict between the treaty and domestic laws. It is also worth noting that the French Council of State has worked to highlight the idea of interpreting international treaties, with one of the most important being its ruling in the G.I.S.T.I case. The facts of the case revolve around the Association for the Support of Migrant Workers filing for the annulment of a decree issued by the Minister of Social

[15]American courts have adopted this approach, as seen in the work of Fathil al-Fatlawi, a specialist in international law, published by the Culture for Publishing and Distribution, Jordan, 2009, p. 90.

[16] Mohammed Mokhadem, Human Rights in the Jordanian Legal System and International Law, Irdin Publishing House, 2012, pp. 210-211.

[17] In its decision No. 1138/98 dated 200, the Customs Department was found to have levied a tax on these goods on an illegal basis, making this tax subject to Article (5) of the Syrian-Jordanian Commercial Exchange Agreement of 1975, and as long as the imported goods have a Syrian origin and are exempt from customs duties and other fees, the Customs Department's collection of additional taxes beyond those fees is based on an illegal principle. See also Discrimination Rights, Case No. 98/56, Fourth Year Journal of the Bar Association of Lawyers, p. 565.

[18] The Supreme Court, Case No. 5/69, Journal of the Bar Association, Issue 10, p. 17,865.

[19] Hanan Tawafuq, Maysaa Madi, The Role of the Administrative Judge in Interpreting International Treaties, Master's Thesis, University of May 8, 1945. Algeria, 2019, p. 46

[20] Mohamed Fouad Abdel Basset, "The Jurisdiction of the Administrative Judge to Interpret International Treaties", Dar Al-Jami'ah Al-Jadidah, 2007, Egypt.

Affairs and National Solidarity on March 14, 1986, which is related to the matters of the settlement, employment, and residence of Algerian citizens and their families in France. An international agreement was concluded between France and Algeria[21].

Conclusion

After studying the issue of international treaties before the administrative judge, it is generally evident to us that international treaties cannot be applied and interpreted by the administrative judge unless they are integrated into domestic legislation.

The following results and recommendations have been reached:

Results

1. International treaties hold an important position in the hierarchy of domestic legislation in the countries, enjoying a higher force than ordinary laws and a lower force than the constitution in Jordan, France, and Algeria, according to their constitutions and judicial provisions.
2. The Jordanian administrative judiciary, represented by the former Supreme Court, refrained from applying and interpreting international treaties in the cases presented before it, despite the other Jordanian regular courts applying and interpreting them in many of their decisions.
3. There is no judicial precedent for the current Jordanian Administrative Court regarding the application and interpretation of international treaties. In the event of no legal provision in the Jordanian judiciary addressing the issue brought before it, the administrative judge did not resort to these treaties, indicating its lack of jurisdiction to consider them as acts of sovereignty.
4. The comparative administrative judiciary, represented by France and Algeria, adopted a different position from the Jordanian administrative judiciary, as the treaties were applied and interpreted by the French Council of State and the Algerian Council of State.

Recommendations

1. We recommend that the Jordanian legislator amend Law No. 27 of 2014 concerning the Administrative Judiciary and add a provision outlining the jurisdiction of the administrative judiciary to consider lawsuits related to international treaties. This is because, as is known, the judge must apply national legal rules to the case presented before him. Therefore, it is preferable to apply international treaties in the absence of a legal provision.
2. We recommend that the Jordanian administrative judiciary reconsider the precedents of the former Supreme Court regarding the consideration of applying and interpreting international treaties as acts of sovereignty, especially if they regulate the rights of individuals on one hand, and because the majority of administrative law rules are not regulated and rely on the judge's interpretation on the other hand.

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