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The Status of International Law in Jordan

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Abstract:

International treaties and customary international law are the most important sources of international law. They have special legal force at the national level, and they are applicable in the legal systems and invocable in the courts of states. However, some states give international law, or certain types of international law like treaties, the status of higher law in their legal systems, while some states give international treaties legal force higher or equal to the Constitution itself. This article examines the status of international law in the Jordanian legal and judicial systems. It confirms that treaties and customary international law have the force of law and able to be invoked before the Jordanian courts. How international law is applied and how the Jordanian courts deal with arguments based on international law are examined in the article. The article argues that the application of international law, mainly international human rights treaties, in the Jordanian legal system can be directly effective, and international treaties and customary rules of international law can be invoked before the Jordanian courts.

Keywords: International law, treaty law, customary international law, Jordan

1. Introduction

International law regulates relationships between states. As a result of such legal relations, there must be a legal system governing these relations between states in order to develop and strengthen ties of their relations. They have found themselves affected by international developments and are bound by rules that have been derived from two main sources; international treaties and customary international law. Undoubtedly, international treaties are regulating legal life within the state due to their entry into many areas that were previously the preserve of the rules of domestic law. However, the legal impact of treaties on the national legal and judicial systems of states have resulted in legal and practical problems. Treaties and customary rules may encounter, in the process of producing their legal effects, a conflict with the rules of domestic laws and the application in national courts. This raises two questions: does international law have a supremacy in the state constitutional system over national laws; and does international law shall have an influence within the national judiciary.

In Jordan, international law was not ranked in the Jordanian legal system, except in article 33, clause 2 of Constitution of The Hashemite Kingdom of Jordan 1951 (hereinafter referred to as the Jordanian Constitution), which stipulated the approval of the National Assembly for the entry into force of the treaty that affects the public or private rights of Jordanians, as well as carrying the state treasury new expenses. In turn, the Jordanian judiciary took a clear position in the statement of the status of treaties in the Jordanian legal system. It does not follow the principle of judicial precedent, as the court can overturn what it has been ruled by another case, which may be confusing in the application of treaties in contradiction and disagreement with applicable domestic law. In addition, there is an absence of provisions governs the status of customary international law in both the legal and judicial systems in Jordan.

This article examines the status of international law Jordan. The article begins by reviewing the Jordanian legal and judicial systems. It then traces the position of international law in the Jordanian legal system. The article also reviews Jordanian case law and the application of international law in the Jordanian courts. Finally, the article highlights the application of customary international law in Jordan.

2. The Jordanian Legal and Judicial Systems

Jordan is a constitutional monarchy and its legal system is based on a combination of civil and Islamic laws. Article 1 of the Jordanian Constitution provides that "The Hashemite Kingdom of Jordan is an independent sovereign Arab State. It is indivisible and no part of it may be ceded. The Jordanian people is a part of the Arab Nation, and its ruling regime is parliamentary with a hereditary monarchy". Jordan's laws are derived from French legal codes, the Ottoman Civil Code 'Majalla', and Sharia law. Its constitution embraces the doctrine of separation of powers between parliament, the executive and the judiciary. Article 25 of the Jordanian Constitution states that "The Legislative Power shall be vested in the Parliament and the King. The Parliament shall consist of the Senate and the House of Representatives". Article 26 of the Constitution provides that "The Executive Power shall be vested in the King, and he shall exercise it through his Ministers in accordance with the provisions of this Constitution". The Jordanian judicial system is based on the constitutional principle of judicial independence. Article 27 of the Jordanian Constitution states that "The Judicial Power shall be

independent and exercised by the courts in their different types and levels. All judgments shall be issued in accordance with the law in the name of the King”.

According to Article 99 of the Jordanian Constitution, the judicial system consists of three types of courts: civil courts, religious courts, and special courts. First, civil courts have jurisdiction over civil and criminal cases. They are structured on three levels. The first level consists of the magistrate's courts and the courts of first instance. The second level contains the courts of appeal. The third level is the Court of Cassation—the Supreme Court and Jordan's highest court. Second, according to Article 104 of the Constitution, religious courts consist of the Sharia courts, the tribunals of other religious communities, and ecclesiastical courts, and have jurisdiction over the personal status of Jordan's populations. Third, special courts have specific jurisdictions, such as the supreme administrative court, the juvenile court, the grand criminal court, the state security court, the military courts, the police courts, and the municipal courts. In addition, Jordan established a constitutional court in 2012 after amendments to the Jordanian Constitution.

3. The Position of International Law in the Jordanian Legal System

The status of international law and the position of international treaties and customary international law in the Jordanian legal system are complex. There are only a few provisions in the Jordanian Constitution and the Jordanian Civil Code concerning implementing treaties in Jordanian domestic law, and the concluding of international treaties and agreements has been granted exclusively to the King. Article 33(1) of the Jordanian Constitution states that “The King declares war, concludes peace and ratifies treaties and agreements”. Guidance on the incorporation of international law into Jordanian law is limited to Article 33(2) of the Jordanian Constitution, which provides that “Treaties and agreements which entail any expenditures to the Treasury of the State or affect the public or private rights of Jordanians shall not be valid unless approved by the Parliament; and in no case shall the secret terms in a treaty or agreement be contrary to the overt terms”.

This provision is an exceptional requirement for treaties that involve financial commitments to the treasury or affect the rights of Jordanians. The word ‘affect’ stipulated in Article 33(2) has been translated from Arabic. It means that treaties and agreements that prejudice, infringe or impinge upon the rights of Jordanian must be approved by Parliament. Bouroubar (2012) indicates that the word ‘affect’ is meant to be the treaties that diminish the rights of the Jordanians. Nevertheless, even in these two situations, the Jordanian Constitution does not require the incorporation of treaties into domestic law in the form of legislation; the requirement is satisfied by the National Assembly's approval and does not guarantee enactment into legislation (Al-Okur, Al-Edwan and Baydoun, 2013).

Accordingly, as Al-Moussa (2009) indicates, once Jordan has ratified a treaty and it has been published in the official gazette, it automatically becomes part of domestic law and its provisions become binding. Despite the absence of a clear provision in the Jordanian Constitution on the publication of international treaties in the Official Gazette, previous academics indicate that publication is a requirement for treaties to become part of the Jordanian domestic law. Aljaghoub (2013) points out that the publication is according to the Jordanian legal system. Article 93(2) indicates publication as a requirement for laws to come into force. It provides that “A law shall come into force after its promulgation by the King and the lapse of thirty days from the date of its publication in the Official Gazette unless it is specifically provided in that law that it shall come into force on any other date”. This is based upon the argumentum a contrario of Article 33(2), and the notion that the Jordanian Constitution, in principle, applies treaties automatically (Al-Okur, Al-Edwan and Baydoun, 2013). Therefore, the process of ratification – or accession to and publication of treaties – is sufficient to incorporate treaties into Jordanian domestic law and to be invoked before national courts.

Most importantly, human rights treaties are exempt from the requirement for the National Assembly's approval because they do not entail expenditures on the treasury or prejudice the rights of Jordanians (Aljaghoub, 2013). Accordingly, human rights treaties are not classified as treaties that ‘affect the public or private rights of Jordanians’. These treaties are automatically applicable and there is no need for incorporation into national laws.

Nevertheless, the constitutional provision on the relationship between international law and domestic law is limited in two respects. First, it ignores the place of customary international law in the Jordanian domestic legal system. Second, it does not explicitly state the precedence of treaties over domestic laws or provide a clear mechanism for resolving any conflict between treaty provisions and domestic laws (Al-Okur, Al-Edwan and Baydoun, 2013).

According to Article 59 of the Jordanian Constitution, the Constitutional Court is competent to monitor the constitutionality of the applicable laws and regulations. The competence of reviewing the compatibility of treaties with domestic laws and the constitutionality of treaties are absent from the Constitution. There is no case law, after the establishment of the Constitutional Court in 2012, on the constitutionality of laws incorporating treaties. In its decision No. 755/2006 on 17 July 2006, the Court of Cassation stated that

The Convention on Extradition concluded between the government of the Hashemite Kingdom of Jordan and the United States government did not undergo its constitutional phases and was not ratified by the National Assembly [the Parliament] as conventions on extradition are considered conventions affecting the public and private rights of the Jordanians, and thus are not effective unless approved by the National Assembly [the Parliament] in compliance with article 33 of the Constitution and as decided by the Court of Cassation in many of its judgments.

Therefore, the Court decided that the treaty was inapplicable because it has not approved by the National Assembly. Nevertheless, it considered the Convention on Extradition as one of treaties that require approval and are not automatically applicable in the legal system. Article 59 of the Constitution states

(1) The Constitutional Court shall have the competence of oversight on the constitutionality of the applicable laws and regulations and its judgments shall be issued in the name of the King; its judgments shall be final and binding on all

authorities and on all; its judgments shall as well be effective immediately unless the judgment specifies another date for its effectiveness; the judgments of the Constitutional Court shall be published in the Official Gazette within fifteen days of the date of their issuance.

(2) The Constitutional Court shall have the right to interpret the provisions of the Constitution if such is requested there from by a decision issued by the Council of Ministers or by a decision taken by either House of the Parliament by majority; its decision shall be effective after its publication in the Official Gazette.

This makes the application of treaties within the Jordanian legal system a source of ambiguity. Olwan (2007) argued that the application of treaties, once ratified or acceded to and published in the official gazette, remains problematic in terms of legality and practice for three reasons. The GoJ indicated that '[i]nternational instruments become part of national law once they have been ratified and published in the official gazette' (Human Rights Council, 2013). First, there is a conspicuous absence of an explicit constitutional provision pertaining to the supremacy of international treaties over domestic law, and an absence of a clear provision on the automatic implementation of treaties. Second, treaties that have not been approved by the Parliament are not considered national laws because they are not issued by the legislative authority. Third, the ratification of these treaties is merely an expression of the will of the executive authority.

However, in contrast with the Constitution, Article 24 of the Jordanian Civil Code clearly determines the supremacy of treaties over domestic laws. It provides that 'the provisions of the preceding articles shall not apply if they conflict with a private law or an international treaty in force [applicable] in the Hashemite Kingdom of Jordan'. Although it was drafted in the context of conflict between domestic laws and private international law, Al-Okur, Al-Edwan and Baydoun argued that the provision of Article 24 indicates that international treaties are an integral part of national legislation and prevail over domestic laws where there is inconsistency. This interpretation has been adopted by the GoJ. In its reply to the Human Rights Committee, the GoJ indicated that: "[c]onventions ratified by Jordan form an integral part of and take precedence over its domestic legislation, pursuant to Article 24 of the Jordanian Civil Code, which states that existing (national) laws shall not apply should they be incompatible with the text of a special law or an international treaty in force in the Hashemite Kingdom of Jordan" (Human Rights Committee, 2010). Although the Constitution does not explicitly indicate the supremacy of international treaties, the GoJ made clear that: "[t]reaties that have been ratified by the Hashemite Kingdom of Jordan are an integral part of the country's legal order. According to the Jordanian Constitution, these instruments will take precedence over national laws in the case of a conflict between the two" (Human Rights Council, 2013).

4. Jordanian Case Law and the Application of International Law

Jordanian case law supports the position that international treaties take precedence over domestic laws. In its decision No. 818/2003 on 9 June 2003, the Court of Cassation pointed out that 'international treaties and conventions transcend local laws and prevail over them should they conflict, and that no domestic law shall be invoked against international conventions'. In one case, No 936/1993 in 13 November 1993, the Court of Cassation stated that 'the international conventions concluded by the State are superior to the national laws in force and they should be applied even if they are in contradiction with the provisions of these laws'. In another decision, the Court of Cassation asserted that: "Jurists and judges were unanimous in agreeing to the supremacy of international treaties concluded between States over those States' domestic laws; they also agreed on the fact that such treaties have precedence to be applied even if they are conflicting with the domestic law and that the implementation of international treaties and laws fall within the competence of the Judiciary without giving the litigating parties the opportunity to choose the treaty or law they want as this is relevant to public order", decision No 2353/2007 in 8 April 2007.

This position was confirmed in a recent case in which the Amman Magistrate's Court decided, in decision No 3555/2013 in 31 March 2014, not to deport a Syrian refugee. The Court relied on Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and justified its decision based on the insecurity and political instability in Syria. However, the Amman Court of Appeal held that the refugee must be extradited to the Syrian authorities, as they had requested him according to the Riyadh Arab Agreement for Judicial Cooperation of 1983. The Amman Magistrate's Court, in its decision No 14437/2014 in 7 December 2015, insisted on its decision not to return or extradite the refugee. The original decision was affirmed by both the Amman Court of Appeal in the second jurisdiction decision No 4667/2016 in 22 February 2016, and the Court of Cassation in its decision No 1302/2016 in 27 June 2016. This decision makes clear that international treaties prevail over regional agreements, and is another indication that the Jordanian judiciary has embraced the notion of the supremacy of international treaties over any other legislation or agreement.

Although there is no specific constitutional provision on the relationship between international treaties and domestic laws, case law has established that Jordan follows a monist approach. A recent case demonstrated that treaties are automatically applicable in the Jordanian legal system. In 2010, At-Tafilah Magistrate Court allowed a Jordanian woman to change her first name from 'Falha' (a traditional feminine name that is very uncommon) to 'Malak' (a feminine name which means 'Angela') (Committee on the Elimination of Racial Discrimination against Women, 2012). In its decision, the Court relied on Article 5 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and Article 23 of the International Covenant on Civil and Political Rights (ICCPR), as well as the Jordanian Constitution. The Court also ruled that the woman's father's decision in naming his daughter constituted a form of gender-based discrimination.

Although Jordan ratified CEDAW in 1992, and it was published in the official gazette in 2007, this case led to a debate over the application of an international treaty that has not been incorporated into Jordanian domestic legislation

and has not been approved by the National Assembly. Despite the fact that CEDAW has not been approved by the National Assembly, Al-Moussa (2009), Bydoon (2011), and Aljaghoub (2013) argued that CEDAW has become part of the Jordanian legal system as long as it has been ratified and published in the official gazette. Therefore, it is exempt from requiring the approval of the Parliament to enter into force. This is a positive stance with respect to the incorporation of international human rights treaties into domestic law.

Consequently, there is recognition of the supremacy of international treaties over domestic laws by the GoJ and Jordanian case law, despite the absence of a constitutional provision or specific legislation conferring international treaties a higher rank than domestic law. This means that Jordanians and all populations living in Jordan can claim the protection of international human rights treaties ratified by Jordan. It also reflects the state's tendency to the monist approach. Although human rights treaties require state parties to adopt domestic laws or take other measures necessary to give effect to their provisions, Jordan has not adopted laws through which the human rights of its populations are protected and respected. In its report to the Human Rights Committee in 30 March 2009, the Ministry of Foreign Affairs indicated that the ICCPR 'was published in the Official Gazette and has become part of Jordanian law'. The report pointed out that Jordan has acceded to the CAT and it has become part of Jordanian law. This affirms that human rights treaties are incorporated automatically into the Jordanian domestic legal system and jurisdiction is automatic and does not require enactment of national legislation.

5. Customary International Law in Jordan

In relation to customary international law, Jordan has acceded to several international instruments and agreements that make specific reference to the application of customary international law. For example, Article 15 of the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (AFS 2001) provides that: 'Nothing in this Convention shall prejudice the rights and obligations of any State under customary international law as reflected in the United Nations Convention on the Law of the Sea', which suggests Jordan's acceptance of the implementation of its customary obligations. However, there are no explicit provisions in the Jordanian Constitution related to the application or incorporation of customary international law or the doctrine of *jus cogens* (peremptory norms). In addition, a review of court judgments reveals no references to the application of customary international law domestically within the Jordanian legal system. This means that, while Jordan is theoretically bound by customary international law based on the monist approach, there is no practical invocation of the customary rules of international law before the Jordanian courts. Despite this lack of invocation in practice, there are a number of factors that support the idea that customary international law forms part of Jordanian national law and is applicable within the Jordanian legal system. First, the Jordanian Court of Cassation, in its decision No. 2353/2007 in 8 April 2007 and decision No. 820/2003 in 23 November 2003, has referred to terms such as 'public order' and 'the rule of healthy legal logic and reason', as human rights guarantees that reflect customary international law rules. In its decisions No. 2399/1999, the Court indicated that such rules 'are considered part of the public order in the State's domestic legal system'. Second, academic opinion considers customary international law as part of the domestic legal system in the same way as treaties ratified by Jordan (Al-Okur, Al-Edwan and Baydoun, 2013). This means that customary international law is automatically applicable in the Jordanian legal system, and in the case of conflict between customary international law rules and domestic law, priority is given to the former over the latter (Aljaghoub, 2013). In fact, Jordan has international obligations of a customary nature, such as the *pacta sunt servanda* rule, the principle of sovereign equality of states, and international rules governing diplomatic relations, war, and marine navigation (Olwan, 2007). These obligations have been accepted by Jordan, and are automatically applicable in the Jordanian legal system without the need to incorporate them in domestic legislation.

6. Conclusion

The Jordanian Constitution and other legislation do not explicitly mention the status of international law within the Jordanian legal system. According to the Constitution, international treaties are classified into two categories, depending on their subject. First, treaties that entail expenditures on the treasury or prejudice the rights of Jordanians require the approval of the Parliament. Second, treaties that do not entail such expenditures or prejudice the rights of Jordanians do not require the approval of the Parliament, and are implemented automatically into the Jordanian legal system. They are applicable before domestic courts once they have been ratified, or acceded to, and published in the official gazette. International treaties have a higher status than domestic laws, and Jordanian case law supports this. However, the incorporation of customary international law into the Jordanian legal system is uncertain. The Constitution contains no provisions regarding the status of customary international law, and the judiciary has not yet ruled on the position of customary international law.

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