

The Constitutional Framework Governing Treaty Concluding Authority in Iraq and Its Restrictions

<https://doi.org/10.23918/ilic10.49>

Dr. Badr Mohamed Taher Mustafa

Department of Law, Tishk International University, Kurdistan Region, Iraq

Badr.mohammed@tiu.edu.iq

Abstract

The procedures governing international treaties, negotiation, signature, and ratification—must be conducted by the competent authority in accordance with the rules established under both international law and domestic legal systems. Given that international treaties constitute an integral component of a state's foreign policy, the authority to conclude such treaties is vested at the international level in the executive branch of the state. However, in federal states, where authority is distributed among multiple internal entities, it becomes necessary to identify the specific body competent to conclude international treaties. This, in turn, requires an examination of the constitutional principles and legal restrictions applicable to federal systems, including the Republic of Iraq, and an assessment of how these principles affect the allocation and exercise of treaty-making authority.

Keywords: international treaties, competent authority, customary international law, constitution, restrictions and principles.

Introduction

First: Introducing the Subject of the Study:

The conclusion of international conventions is a legal act of a complex nature, as it requires the completion of certain legal procedures, and in order for the conclusion of international conventions to be considered a valid legal act according to the rules of international law, it must be issued by a legal entity with international legal personality, which has the capacity to perform legal acts.

There are a number of restrictions on the freedom of the competent authorities to conclude the treaty that must be adhered to and not exceeded, including those that are stipulated at the constitutions of the countries contain some principles, these principles in turn are binding on the competent authorities to conclude the treaty, and failure to abide by these restrictions may result in the unconstitutionality of the treaty Especially in light of the legal systems that give international treaties the value of ordinary law, as is the case in the internal legal system of the Republic of Iraq.

Second: The Importance of the Study:

There is a set of principles within the constitution, these principles are binding on all parties that must be adhered to, if they happen and are violated, they have certain effects, and the act that is the subject of the violation may become unconstitutional, or the constitution may be amended in accordance with the new provisions. These restrictions may relate to the basic principles of the State Constitution or to the public rights and freedoms guaranteed by the Constitution among its texts, because of the importance they have because they affect the rights and freedoms of citizens, based on that treaties subjects shall not include a violation of the principles contained in the Constitution.

Third: The Problem of the Study:

The process of concluding international treaties may raise some problems, whether at the international or domestic level, especially with regard to the competent authority to conclude international treaties, as the non-compliance of the entity concluding the treaty results in the invalidity of the treaty, and this is a problem that does not arise in simple states, unlike the federal state in which the power is distributed between the federal state and the regions. Therefore, the constitutional legislator sets certain restrictions in the domestic legal system that must be adhered to and not violated, as their violation entails the illegality of the international treaty, which in turn entails the responsibility of the state for breaches of its international obligations.

Fourth: Study Methodology:

In our study, we will rely on the analytical method in order to study and analyze the issues related to the subject of the study by analyzing some legal articles and decisions related to our topic, as well as we will adopt the comparative method by comparing the legal systems of other countries with Iraqi law.

Fifth: Study Structure:

In order to understand the subject of the study, this topic will be divided into two demands, the first of which is the competent authority to conclude international treaties in Iraq, and the second deals with the restrictions on the freedom to conclude international treaties in Iraq.

First Chapter: Competent Authority for the Conclusion of International Treaties in Iraq

The study of the competent authority for concluding international treaties in Iraq requires dividing this chapter into three consecutive sections, in the first section we will deal with the concept of the federal state because of its impact on the authority of the body that has the competence to conclude treaties in Iraq, and in the second section we will show Validity to conclude international treaties in The Federal State, While it will be Branch The third Dedicated to the validity of concluding international treaties in Iraq.

Section One: The Concept of a Federal State

The federal state is a type of composite state based on the quality of the state's power, because the powers in the federal state are divided and distributed by the constitution between a central government and regional governments, and the balance of power is tilted to different degrees in different federal states as a result of various factors, as it is tilted in some to the side of the central government, and in others to the side of the regional governments⁽¹⁾.

The method by which the federal state is created can be limited to one of the following two methods:

The first method is the joining of several independent states into one state while each of them retains a degree of autonomy: in the sense that the federal state establishes through the union of different regions that did not form a single state by a collective decision of them to form a federal state together to preserve the interests of all. The motive for this union may be the rapprochement of their peoples in terms of history, civilization and culture, or the feeling of the need for these countries to unite to repel the aggression of others against them, and this method is called union by integration⁽²⁾.

The second method: The federal state is created by transforming a simple state into a system of federal decentralization: The federal state arises from the disintegration of a simple state whose population suffers from social, political, and economic problems, so its people work to demand complete independence from the control of the federal government and self-determination without the interference of others, and then the state in question transforms its form from a simple, unified state to a composite federal state by dividing the country into states or regions through the adoption of the⁽³⁾ federal system Iraq is an example of this type of federal state, as its simple state system disintegrated in 2003 after external intervention and the federal system was approved by the 2005 constitution.

As for the components of the federal state, it is based on two basic rules to maintain this system, and these rules are⁽⁴⁾:

- **Rule One: The Rule of Participation in the Federal State:**

The constitutional organization of the federal state presupposes the existence of institutions that take care of the general interest of the state, and therefore we find that the legislative institution, as a general rule in federal states, adopts the two-chamber system to embody the rule of participation in this type of state, with one of the two chambers representing the opinion of all the inhabitants of the state to indicate the unity of the state, and the second council representing the regions on an equal footing.

For example, in the United States of America, the legislative branch consists of the Senate and the House of Representatives⁽⁵⁾, while in Iraq, the legislative power consists of two chambers⁽⁶⁾, namely:

⁽¹⁾ Shorash Hassan Omar, Characteristics of the Federal System, Arab Center for Publishing and Distribution, Cairo, 2016, p. 37.

⁽²⁾ Ibid., p. 39.

⁽³⁾ Ibrahim Abdel Aziz Shiha, Political Systems and Constitutional Law, Ma'arif Foundation, Alexandria, without the year of publication, p. 179.

⁽⁴⁾ Asaad Kazim and Haysh Al-Salihi, The Legal Organization of Concluding International Treaties at the Federal State, master's Thesis Submitted to the Faculty of Law, University of Babylon, 2013, p. 11.

⁽⁵⁾ Article 1/1 of the U.S. Constitution of 1978 states: "All legislative powers granted herein shall be vested in the Congress of the United States, consisting of the Senate and the House of Representatives."

⁽⁶⁾ Article (48) of the Iraqi Constitution of 2005 stipulates that: "The federal legislative authority shall consist of the House of Representatives and the Federation Council."

- 1- House of Representatives: It is the House in which seats are distributed according to the population of each state.
- 2- The Council of the Federation: In which the regions and governorates are represented on an equal footing.

The Iraqi constitution regulates the structure and powers of the House of Representatives through articles (49-64), but it has allocated a single article, namely Article Sixty-Five, to the Federal Council, which is considered one of the pillars of the federal state, and the constitutional legislator is considered to have overlooked the importance of the Federation Council, in addition to the observations that can be made on the aforementioned article, as the constitutional legislator vetoed himself between Article Forty-Eight and Article Sixty-Five, as it gave the Council of the Union as part of the legislative authority a personality independent of the House of Representatives under Article Forty-Eight (the Federal Legislative Authority shall consist of the House of Representatives and the Council of the Federation), but in Article Sixty-Five, the House of Representatives was given the power to form a constitutional entity parallel to it in terms of powers, as it stipulated: "A Legislative Council shall be established to be called the (Federal Council)..... in addition to the above, the article did not differentiate between political decentralization, according to which powers in the state are distributed between the regions and federal authorities, and it is the essence of the federal system and administrative decentralization.

Since the ⁽¹⁾Iraqi constitution was drafted and referendum in 2005, any constitutional amendment must involve the regions, so in the event of a total amendment or revision of the constitution, the contradictions and ambiguities that control it should be taken into account, especially in the field of the jurisdiction of the regions and federal authorities, especially with regard to foreign relations.

- **Rule Two: The Rule of Autonomy in the Federal State:**

In addition to the rule of participation in the federal State, the units of the federation enjoy the element of independence in their own constitutional organization. It is intended that the units that make up the federal federation each enjoy autonomy in which they are not subject to the control of the federal authority, and in this competence the federal units are distinguished from the decentralized bodies under the unified state⁽²⁾, the consequence of this independence is the enjoyment of the territories. In the federal state, it has independent powers in various fields such as legislation, administration, and the judiciary, and exercises them through its legislative, executive, and judicial⁽³⁾ constitutional bodies.

The federal state aims to reconcile two opposing factors, the first of which is unity, and the second is the factor of independence, and the success of the federal state is through the reconciliation of these two factors, i.e., between the public interests that relate to the entity of the federal state as a whole, and the local desires of its federal units, because the federal state does not rob its units of its internal sovereignty, but rather retains some of the manifestations of this sovereignty⁽⁴⁾.

Section Two: Jurisdiction to conclude international treaties in the federal state

The main feature of the federal state is the division of powers in internal affairs between the federal government and the provincial governments by the federal constitution. Foreign affairs are usually administered by the federal government alone, which appears to be the federal government⁽⁵⁾.

However, there are some federalisms that grant member states or federal states some international personality in certain matters, such as concluding treaties in the commercial or cultural fields with other states or with the federal jurisdictions of other countries, or even membership in some international organizations. In this case, the constitution should include a provision for the powers of member states or states in the international sphere. Examples of this are Article 38/3 of the German Constitution and Article 123 of the United Arab Emirates Constitution⁽⁶⁾. If these constitutions have granted the right to conclude

⁽¹⁾ Asaad Kazim Wahish, op. cit., p. 13.

⁽²⁾ Adel Al-Tabatabai, *The Federal System in the United Arab Emirates*, New Cairo Press, 1976, p. 118. Quoting from Hasan Omar, op. cit., p. 46.

⁽³⁾ Shorush Hassan, op. cit., p. 49.

⁽⁴⁾ Asaad Kazim Wahish, op. cit., p. 15.

⁽⁵⁾ See: Abdel Fattah Abdel Razzaq Mahmoud, *Declaring the State – An Original and Analytical Study in Public and Constitutional International Law*, Ph.D. Thesis Submitted to the Faculty of Law and Political Science at Salah Al-Din University – Erbil, 2007, p. 36.

⁽⁶⁾ For example, Article 32, paragraph 3, of the German Constitution of 1949, as amended, states:

(In so far as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government)

treaties with the states, this right is limited by two important restrictions: first, the right to conclude certain types of treaties, and second, the consent of the federal authority⁽¹⁾.

Accordingly, the constitutional legislators in the federal states, as the jurisprudence in this field, were divided into two groups, the first group believes that the power to conclude treaties should be given to the federal authority exclusively, and justifies this by the practical necessities associated with international dealing, while the second group believes that the internal independence of the states must be taken into account, and justifies that if the power to conclude treaties is given to the regions or states, it does not mean that this power destroys the building of the state, but on the contrary, it strengthens it. The basis of the federal state is participation in all fields⁽²⁾.

We, in turn, endorse the second view, which recognizes that the regions and constituent states of a federal system possess the authority to conclude international treaties. This position is supported by two principal reasons. The first is reflected in the Draft Vienna Convention on the Law of Treaties, which addresses this matter in paragraph (2) of Article (5), wherein it provides that:

(States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there are laid down).

Member States of the Federal Union shall have the capacity to conclude treaties if such capacity is provided for in the Federal Constitution and to the extent specified in the Constitution⁽³⁾

Thus, the International Law Committee of the General Assembly supported the idea of the competence of federal units or territories to conclude international treaties into the constitution that regulates the relationship between the Union and those Territories, despite the criticism directed against this text by the federal states, such as the United States of America, Canada, Brazil, and even Switzerland, which gave their cantons the right to conclude treaties. Second, the goal behind the emergence of the federal federal state, whether through union by grouping or union by transformation (or disintegration), is that its member states, regions or states seek to maintain or obtain the greatest amount of competencies and powers to preserve their right to participate in actual politics and to enjoy a great degree of autonomy that enables them to confront the idea of the arbitrary use of power against them. In contrast to the central governments that run the state internally and externally against the wishes of these components, and it is no secret that the transformations that took place in the form of the Iraqi state in both the 1950s and at the beginning of the new category were followed by the revolutions of these components to obtain their right to run the state internally and externally, we will highlight the possibility of the Kurdistan Region of Iraq in concluding international treaties in the following section.

Section Three: Jurisdiction to conclude international treaties in Iraq

Iraq has not enjoyed stability since its inception until 2003, and the best evidence of this from the legal point of view is the many changes in its constitutions within a short period of time, and this is due to the unwillingness of the Iraqi components to live under the system of a simple state, regardless of its royal or presidential form, and the reason behind this is their desire to participate in power internally and internationally. The best evidence of the use of foreign policy in general and treaties in particular is the 1975 Algiers Agreement between Iraq and Iran.

After the American occupation of Iraq in 2003 and the fall of the regime, the Transitional Government was formed⁽⁴⁾ and a law was drafted for it called the Iraqi State Administration Law, Article (25) in paragraph

(If the States have the power to enact legislation, they may conclude treaties with foreign States with the consent of the Federal Government)

Article (123) of the UAE Constitution 2013 stipulates: "With the exception of the text of Article (120) (Clause 1) regarding the exclusive jurisdiction of the Union in foreign affairs and international relations, the member emirates of the Union may conclude limited agreements of a local administrative nature with their neighboring countries and countries, provided that they do not conflict with the interests of the Union or with federal laws, provided that the Supreme Council of the Federation is notified in advance. This objection. The UAE may also retain or join OPEC and the Organization of Arab Petroleum Exporting States.

⁽¹⁾ See: Hassan Izbat Al-Obaidi, The Organization of Treaties in the Constitutions of States, master's Thesis Submitted to the Faculty of Law, University of Baghdad, 1988, p. 77.

⁽²⁾ See: Hassan Izbat al-Obaidi, op. cit., p. 64.

⁽³⁾ International Law Commission of United Nations, The Yearbook of the International Law Commission, Report of the International Law Commission covering the work of its seventeenth session, Document (A/6309/Rev.1), 4 May - 19 July 1966, p.11.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL6/605/05/pdf/NL660505.pdf?OpenElement>

⁽⁴⁾ Article (24/A) of the Law on State Administration for the Transitional Period stipulates that the bodies that make up the Transitional Government are: "The Transitional Government of Iraq, also referred to in this law as the Federal Government, shall

(a) of this law stipulates that the Transitional Government shall be exclusively responsible for the following affairs: (Drawing up foreign policy and diplomatic representation, negotiating, signing and concluding international treaties and agreements, and drawing up foreign economic policy and sovereign borrowing policies,). Accordingly, the competent authority for concluding treaties under this law is the Council of Ministers, after the approval of the Presidency Council⁽¹⁾, and as for the legal procedures related to the initiation of international treaties, they shall be governed by the Treaty Concluding Law No. (111) of 1979, because this law was not repealed during that transitional period, and this is stipulated in Article (26) of the Iraqi State Administration Law for the Transitional Period (2003).⁽²⁾

The Iraqi constitution issued in 2005 adopted the federal system of government, and with regard to treaties, it adopted a similar approach to the Iraqi State Administration Law with regard to the conclusion of treaties, as this constitution referred in the statement of the competencies of the federal authorities in Article (110), and the first paragraph of it referred to the first of their competencies, which is the formulation of the foreign policy of the Iraqi state, the negotiation of treaties and international agreements, and diplomatic representation⁽³⁾. The competent authority entrusted with the task of negotiating among the federal authorities is the executive authority represented by the Council of Ministers or the person authorized by the Council to do so⁽⁴⁾. Treaty Concluding Law No. (111) of 1979 was in force under the Constitution until the issuance of the Treaty Concluding Law No. (35) of 2015. As for the jurisdiction of the Kurdistan Region of Iraq to conclude international treaties, although the Iraqi Constitution is devoid of any explicit provision to give the regions the right to conclude international treaties, some constitutional jurists point out that the Kurdistan Region has this right, based on the phrase "development", which includes all the activities of the KRG. This phrase is mentioned in Article (121), paragraph (fourth) of the Iraqi Constitution of 2005, which stipulates: "Offices for regions and governorates shall be established in embassies and diplomatic missions to follow up on cultural, social and development affairs." In concluding international treaties, paragraphs three and four of Article (8) ⁽⁵⁾ of the draft constitution of the Kurdistan Region – Iraq, where he referred to the right of the region to conclude international treaties in matters that do not fall within the competence of the federal government, and it is recalled that this draft was voted on by an absolute majority of the number of members of the Kurdistan Region Parliament in 2009, although the constitution of the region remained a draft and did not enter into force, but it can be relied on as the right of a region to conclude treaties for two reasons, first: Some of those who participated in the writing of the Iraqi constitution were members of parliament at the time, and some of them participated through the vote of their party members in the parliament in this process, and this indicates that those who participated in the writing of the constitution were aware of the issue of the right of a region to conclude treaties, and secondly, that other Iraqi parties did not complain to the Federal Court about the unconstitutionality of this issue.

Second Chapter: Restrictions on the Freedom to Conclude International Treaties in Iraq

The Constitution of the Republic of Iraq of 2005 has set out among its texts the principles, provisions and basic elements that guarantee the construction of a federal, pluralistic and democratic system, which represent restrictions whose provisions may not be deviated from when concluding a particular international treaty, otherwise this would result in a violation of the provisions of the constitution as a result of unconstitutionality⁽⁶⁾.

consist of the National Assembly, the Presidency Council, the Council of Ministers, including the Prime Minister, and the Judiciary."

⁽¹⁾ Article (39/A) of the Iraqi State Administration Law stipulates that: "The Council of Ministers, with the approval of the Presidency Council, shall appoint representatives for the purpose of negotiating the conclusion of international treaties and agreements."

⁽²⁾ Article (26/a) of the Iraqi State Administration Law stipulates that: "The laws in force in Iraq on June 30, 2004, shall remain in force, unless this law provides otherwise and until the Iraqi Transitional Government repeales or amends them in accordance with this law."

⁽³⁾ Article (110/I) of the Iraqi Constitution of 2005 stipulates that: "The federal authorities shall have the following exclusive competencies: First, formulation of foreign policy, diplomatic representation, and negotiation of international treaties and agreements."

⁽⁴⁾ Article (80/VI) of the Iraqi Constitution of 2005 stipulates that: "The Al-Zawraa Council shall exercise the following powers: Sixth. Negotiation of international treaties and agreements..... or whoever authorizes him to do so).

⁽⁵⁾ Article (8) of the draft constitution of the Kurdistan Region of Iraq stipulates that: "Third: The Kurdistan Region has the right to conclude agreements with foreign countries or regions within foreign countries on matters that do not fall within the exclusive competencies of the federal authorities stipulated in Article (110) of the Federal Constitution.

⁽⁶⁾ Salwa Ahmad Maidan al-Mufraji, op. cit., p. 321.

Therefore, in this Chapter, we will deal with the restrictions on the freedom to conclude international treaties in Iraqi legislation in three sections: in the first section, we will deal with the most important principles and basic elements guaranteed by Iraqi legislation, in the second we will deal with the most important rights and freedoms, and in the third we will deal with the principle of Islamization of international treaties, i.e., the obligation to respect the principles of Islamic Sharia when concluding international treaties.

Section One: The basic principles and elements guaranteed by the Iraqi constitution must be respected

In this section, some of the basic principles and elements contained in the text of the Constitution of the Republic of Iraq of 2005 will be set out as a restriction on the freedom of the competent authorities to conclude international treaties, which must be respected and not prejudiced, including:

First: The Principle of Sovereignty:

The Constitution of the Republic of Iraq of 2005 stipulates in Article 1 that "the Republic of Iraq is a single, independent, and fully sovereign federal state, with a parliamentary democratic republic, and this constitution guarantees the unity of Iraq."

In this article, the constitutional legislator of the Constitution of the Republic of Iraq for the year 2005 has set out basic principles that it should be noted that the affirmative approach has been followed, as it has been emphasized through the text of the above article that the independence of the Republic of Iraq and its enjoyment of full sovereignty has been emphasized, as the Republic of Iraq is a fully sovereign federal state according to the aforementioned article Its constitutionality.

Since the principle of sovereignty is one of the basic principles stipulated in the 2005 Constitution, therefore the authorities of the State competent in the process of concluding international treaties must abide by this principle as a restriction on their freedom by concluding international treaties. A law that contradicts the provisions of the Constitution⁽¹⁾.

Since international treaties have given the value of ordinary law in the internal legal hierarchy of the Republic of Iraq⁽²⁾, and since the Constitution is the source of these laws in terms of their existence and legitimacy, every law promulgated must not contradict the foundations and provisions addressed in the Constitution.⁽³⁾

Second: The Principle of Judicial Independence:

Rights and freedoms are preserved and protected by the judiciary, and the reform of society is through the judiciary, and the application of legal texts is through the judiciary as well, as is the case with regard to the stability of conditions and transactions in any country, it is also through the judiciary, in contrast to the above, the judiciary must have the appearance that suits its mission, which is its independence, perhaps this principle represents the most important consequence of the principle of separation of powers, as this principle is of great importance as it constitutes one of the guarantees of the establishment of the legal state⁽⁴⁾.

Because of its importance, this principle was addressed in the Universal Declaration of Human Rights of 1948⁽⁵⁾, and the Constitution of the Republic of Iraq of 2005 referred to it by stipulating that "the judiciary is independent and has no authority over anyone other than the law." ⁽⁶⁾Since the judiciary is responsible for adjudicating disputes submitted to it under the law, whether these disputes are between individuals or between them and persons of public and private morality, through the judiciary Granting rights to their owners requires that the judiciary be independent and impartial, as the experiences of nations have shown

⁽¹⁾ Ibid.

⁽²⁾ Article (61/IV) of the Iraqi Constitution of 2005 stipulates that: "The House of Representatives shall have the competence to do the following: Fourth: The process of ratification of international treaties and agreements shall be regulated by a law enacted by a two-thirds majority of the members of the House of Representatives."

⁽³⁾ Hussein Jabbar Abed, Manifestations of the Principle of the Supremacy of the Constitution - A Study in the Constitution of Race for the Year 2005, Al-Muhaqqiq Al-Hilli Journal for Legal and Political Sciences, 2014, Issue One, Sixth Year, p. 332.

⁽⁴⁾ Chabab Barzouk, Constitutional Guarantees of Human Rights, master's Thesis, Faculty of Law, University of Oran, Algeria, 2011-2012, p. 100.

⁽⁵⁾ Article 10 of the Universal Declaration of Human Rights of 1948 states: "All individuals alike have the right to a fair and public trial before an independent, impartial tribunal that shall decide the rights and duties of individuals."

⁽⁶⁾ Article (19/First) of the Constitution of the Republic of Iraq for the year 2005.

that the most important dangers to human freedoms are the granting of the three legislative, executive and judicial powers in the state in the hands of a single authority⁽¹⁾.

The principle of the independence of the judiciary is a fundamental pillar of the principle of legitimacy in general. As emphasized at the Seventh and Eighth United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985 and in Cuba in 1990, the advanced principle (independence of the judiciary) means that the judiciary is free from any interference from the legislative and executive branches and that it is not subject to any other law. The United Nations General Assembly has asked Member States to include this principle in their constitutions, in implementation of the principles set out in the preamble of the 1985 resolution in Milan and has urged that this principle be respected by state institutions⁽³⁾.

Since the Constitution of the Republic of Iraq of 2005 has affirmed the independence of the judiciary, the State authorities must therefore abide by this principle when concluding international treaties, otherwise the international treaty will challenge the unconstitutionality as the advanced principle as a restriction on their freedom by concluding international treaties.

Third: The universal principles included in the Constitution:

The Constitution of the Republic of Iraq of 2005 contains in its first chapter the basic principles of international law, and it is natural that its provision here has given it constitutional value, and therefore the competent authorities for concluding international treaties must respect it and not prejudice it when concluding international treaties as a restriction on its freedom when exercising its jurisdiction. As for the principles of universality, the constitution states that "Iraq observes the principle of good neighborliness, is committed to non-interference in the internal affairs of other countries, seeks to resolve disputes by peaceful means, establishes its relations on the basis of common interests and reciprocity, and respects its international obligations."⁽⁴⁾

By analyzing the text, we can identify the principles that govern Iraq's relationship with the international environment as follows:

- 1- Observance of the principle of good neighborliness
- 2- Commitment not to interfere in the internal affairs of other countries
- 3- Peaceful Dispute Resolution
- 4- Establishing relations based on common interests and on the basis of reciprocity
- 5- Respect Iraq's international obligations

These international principles stipulated in the Iraqi constitution represent a restriction on the freedom of the competent authorities to conclude international treaties and must be respected. Stabbing unconstitutionality and can be challenged.

Section Two: International treaties must respect public rights and freedoms

Since The constitutions of many countries of the world have addressed rights and freedoms by stipulating them in the Constitution, the aim of this is to ensure the constitutional rules that occupy the highest rank in the legal hierarchy of these rights and freedoms, thus these rights and freedoms are a restriction on the freedom of the public authorities in the State when they exercise their competencies, as they are not allowed to be infringed or violated, as their stipulation in the core of the Constitution gave them constitutional protection, so if they happen to be violated or violated, The contrary treaty or legislation is subject to judgment of unconstitutionality by the competent authorities.⁽⁵⁾

The Constitution of the Republic of Iraq of 2005 was keen to stipulate rights and freedoms at the core of the Constitution, as stipulated in Chapter Two of the Articles (14 to 46), Therefore, these rights and freedoms addressed by the constitutional legislator are a restriction on the freedom of the competent authorities to conclude international treaties and must not be violated. The Iraqi constitutional legislator stressed that it is not permissible to enact a law that contradicts rights and freedoms by stating that (It is not permissible to enact a law that contradicts the fundamental rights and freedoms contained in this Constitution)⁽⁶⁾.

(1) Salwa Ahmad al-Mufraji, op. cit., p. 322.

(2) Ahmed Fathi Sorour, The Constitutional Protection of Rights and Freedoms, op. cit., pp. 643-644.

(3) Medhat Al-Mahmoud, The Judiciary in Iraq: A Review Study, 4th Edition, 2015, p. 36.

(4) Article (8) of the Constitution of the Republic of Iraq of 2005.

(5) Salwa Ahmad al-Mafraji, op. cit., pp. 330-331

(6) Article (2/I/C) of the Constitution of the Republic of Iraq for the year 2005.

The Iraqi constitutional legislator, in the chapter on rights and freedoms, has also stipulated the prohibition of the extradition of Iraqis to foreign bodies or authorities by stipulating that: "First, it is prohibited to extradite Iraqis to foreign bodies and authorities. Second: The right of political asylum to Iraq shall be regulated by law, and the political refugee may not be extradited to a foreign entity or forcibly returned to the country from which he fled, and third: The right of political asylum shall not be granted to a person accused of committing international or terrorist crimes, or any of the rights to the detriment of Iraq. ⁽¹⁾In other words, the Iraqi constitutional legislature has adopted in this text the absolute prohibition on all authorities in the country not to take any action. Any decision or issuance of any legislation that contradicts the provisions of the aforementioned article, including the process of concluding international treaties.

The Federal Supreme Court has affirmed this principle in its judgment issued on 21/4/2015, which includes the aforementioned principle through its statement that "the request for the extradition of the Iraqi convict by the Sharjah Misdemeanors Court in accordance with Article (40) of the Riyadh Convention of 1983 ratified by Law (110) of 1983 violates the Constitution of the Republic of Iraq for 2005 and thus the said article is considered invalid and unconstitutional⁽²⁾."

In addition to the other rights and freedoms enumerated by the Iraqi constitutional legislator in the Constitution of the Republic of Iraq of 2005, these rights and freedoms represent a restriction on the freedom of the competent authorities to conclude international treaties, which must be observed and not prejudiced.

It is worth mentioning that the constitutional legislator contradicted himself on the issue of protecting rights and freedoms, as is the case in many parts of the Constitution, as there is a contradiction between Article Two and Article Forty-Six, which the Constitutional legislator should have avoided, as it was stipulated in point (c) of paragraph one of Article Two that it is not permissible to enact a law that contradicts the rights and freedoms contained in the Constitution, but it has reopened the way for the restriction of these rights and freedoms in the article Forty-six by law, or on the basis of such limitation or restriction, that it shall not affect the essence of the right or freedom. It would have been better for the constitutional legislator not to mention this so as not to leave the opportunity for the state authorities including the one who have treaty making to infringe on these rights and freedoms on the basis of that article.

Section Three: International treaties must respect the principles of Islamic Sharia

One of the restrictions on the freedom to conclude international treaties included in some constitutions is the issue of the international treaty not contradicting the provisions and principles of Islamic law, and if the international treaty violates these principles and provisions, it is considered a defect that results in the unconstitutionality of the international treaty, which can be challenged before the competent authorities. Also, countries that have adopted the provisions and principles of Islamic Sharia and have considered the Islamic religion as the official religion of the state, their position and this situation is in line with international human rights standards that guarantee Freedom of Belief⁽³⁾.

It is worth mentioning that the Constitution of the Republic of Iraq of 2005 included texts that emphasized the principles of Islamic Sharia and its preservation as one of the sources of legislation, as can be seen by stipulating (first: Islam is the official religion of the state, and it is the main source of legislation. The ⁽⁴⁾Constitution also stipulates that the State shall be obliged to preserve, maintain and inviolably protect sacred religious places, and to ensure the free practice of rites there."⁽⁵⁾ In addition to other texts in which it has been emphasized that Islam is the official state religion and a primary source of legislation in Iraq,

⁽¹⁾ Article (21) of the Constitution of the Republic of Iraq for the year 2005.

⁽²⁾ Decision of the Federal Supreme Court of Iraq No. 16/Federal/2015 dated 21/4/2015.

⁽³⁾ Article 18 of the 1966 International Covenant on Civil and Political Rights (ICCPR) states: "1. Everyone has the right to freedom of thought, conscience and religion, including the freedom to profess a religion, the freedom to profess any religion or belief of his choice, and the freedom to manifest his religion or belief through worship, observance, practice and education, alone or in a group, in public or private. 2. No one shall be subjected to coercion which would infringe on his freedom to profess a religion, or his freedom to profess any religion or belief of his choice. 3. The freedom of a person to manifest his religion or belief may not be subject to such restrictions as may be imposed by law and which are necessary to protect public safety, public order, public health, public morals, or the fundamental rights and freedoms of others. 4. States Parties to the present Covenant undertake to respect the freedom of parents, or guardians, when present, to ensure the religious and moral upbringing of their children in accordance with their own convictions.

⁽⁴⁾ Article (2) of the Constitution of the Republic of Iraq for the year 2005.

⁽⁵⁾ Article (10) of the Constitution of the Republic of Iraq of 2005.

therefore, the competent authorities in the process of concluding international treaties must respect the principles and provisions stipulated in the Islamic Sharia and not violate them.

But the question that can be raised here is related to knowing what is meant by the constants and provisions of the Islamic Shari'ah that may not be violated when enacting a law? As long as treaties are by virtue of the law, because they have an equal value in the Iraqi Constitution, and this can be observed through the text of Article (61/IV), therefore it is not permissible to conclude a treaty or join it if it contradicts the provisions of Islam. In order to answer the question mentioned above, there is a difference of opinion among jurisprudence in answering the Question: Some of them believe that they are the rulings that are proven by a conclusive and conclusive text, or that are proven by presumptive texts, or on which consensus has been reached. Others believe that they are meant by rulings that are conclusive in terms of proof and definitive in signification only, because the consensus on a ruling in Iraq has only been held in rare cases⁽¹⁾.

But who is the competent authority in Iraq that has the competence to clarify the issue of violating or not violating the provisions of the Islamic Shari'a when enacting legislation or concluding international treaties? The Iraqi Constitution stipulates that the Federal Supreme Court shall have jurisdiction over the following: First: Monitoring the constitutionality of the laws and regulations in force. Second: Interpretation of the Provisions of the Constitution", through this text, the Federal Supreme Court is the body that is competent to determine whether or not the provisions of the Islamic Sharia have been violated, since the Court, based on the provisions of Article (92/II) of the Constitution of the Republic of Iraq of 2005, includes in its membership experts in Islamic jurisprudence, and therefore they have a role in the process of deciding whether any legislation or treaty violates the provisions of the Islamic Sharia, which has been given constitutional value in the core of the Constitution.

The authority competent to conclude international treaties is obliged to respect the provisions of the Constitution, as any treaty that contravenes constitutional norms is rendered unconstitutional and, consequently, unenforceable within the domestic legal order. Given that the Iraqi Constitution is classified as a rigid constitution, amending it to resolve conflicts with international obligations is impractical, thereby exposing any conflicting treaty to constitutional challenge. To address this issue, Iraq must adopt preventive measures during the negotiation and drafting stages and refrain from ratification or enter appropriate reservations if a conflict emerges after signature. However, where such a conflict arises after ratification, Iraq incurs international responsibility under the Vienna Convention on the Law of Treaties, since failure to implement an international treaty constitutes an internationally wrongful act. Accordingly, adherence to constitutional constraints at the preliminary stages of treaty-making remains the primary means of avoiding such conflicts.

In order to ensure the implementation of international obligations and not to be subjected to responsibility, at the international level, the rules of international law take precedence over domestic legal rules, this supremacy was confirmed by the Permanent Court of International Justice in its advisory opinion in 1925 in the case of the exchange of population between Turkey and Greece, where the Court considers that it is a given that states must be obliged to implement their international obligations, and in order to ensure this, they must make amendments to their legislation in order to implement this international obligation⁽²⁾.

Conclusion

First: Results:

1. International jurisprudence has not settled on the establishment of new legal rules that allow the territories - units - within the federal state to conclude international treaties, and it is stated that international treaties are related to the foreign policy of the federal state, so the federal government has the ability to conclude treaties. Regarding the competence of the regions to conclude international treaties, international jurisprudence and the constitutions of the states have not settled on a settled approach, all that the different federal states conclude is that some territories or provinces are allowed to conclude international treaties, even if these are agreements of a commercial or cultural nature.
2. With regard to the federal model of the Iraqi state, it is clear that according to the 2005 constitution, which defined the powers of the federal government and the regional governments, we find that the Iraqi constitution was not explicit and unequivocal in this matter, although the constitution referred within the exclusive competencies of the federal government to its authority to conclude international

⁽¹⁾ Salwa Ahmad al-Mufraji, op. cit., p. 330.

⁽²⁾ Ahmed Sarhal, The Law of International Relations, University Foundation for Studies and Publishing, Beirut, 1990, p. 37.

treaties and represent the diplomat. which is required to administer the regions within the jurisdiction of the regions.

3. These restrictions may be international or internal, because the subject of the study is related to the internal ones, the internal legal systems place restrictions on the freedom of the competent authorities to conclude international treaties that must be adhered to, and the non-conflict of the subject matter of the treaty that concludes them and these restrictions, the occurrence of conflict between them may result in certain consequences that may lead to the ruling of the unconstitutionality of the international treaty, especially in the case of The legal systems that give international treaties the value of ordinary law.

Second: Recommendations:

1. The constitutional legislator must specify the competent authority in the process of concluding international treaties precisely, and this body or bodies must adhere to its authority within the limits set by the constitution and laws in the process of concluding international treaties, and the subjects of the international treaty must be consistent with the constitutional legal rules within the country, especially under the federal system, especially those that give international treaties a lower value than the value of the constitution, such as Iraq, in order to be free from the problems that result from their violation of internal restrictions.
2. Therefore, we recommend that the Iraqi legislator adopt this type of control over legislation that is issued under the internal legal system and that is subsequent to the international treaty, which may include a violation of the provisions of the international treaties concluded by the Republic of Iraq, which inevitably leads to Failure to implement the treaty in the required manner, which would give rise to international responsibility, as well as this type of monitoring of international treaties before ratification.

References

1- Books:

1. Ibrahim Abdel Aziz Shiha, Political Systems and Constitutional Law, Ma'arif Foundation, Alexandria, without the year of publication.
2. Ihsan Hamid Al-Mufraji, Katran Zughir Nehmeh and Raad Naji Al-Jaddah, for the Public Theory in Constitutional Law and the Constitutional System in Iraq, The Law Library, Baghdad, 1989.
3. Ahmed Sarhal, The Law of International Relations, University Foundation for Studies and Publishing, Beirut, 1990.
4. Ahmed Fathi Sorour, The Constitutional Protection of Rights and Freedoms, 2nd Edition, Dar Al-Shorouk, Cairo, 2000.
5. Salwa Ahmed Maidan Al-Mufraji,
6. Shorash Hassan Omar, Characteristics of the Federal System, Arab Center for Publishing and Distribution, Cairo, 2016.
7. Adel Al-Tabatabai, The Federal System in the United Arab Emirates, New Cairo Press, 1976.
8. Medhat Al-Mahmoud, The Judiciary in Iraq: A Review Study, 4th Edition, 2015.

2- Theses and Dissertations:

1. Hassan Izbat Al-Obaidi, The Organization of Treaties in the Constitutions of States, master's Thesis Submitted to the Faculty of Law, University of Baghdad, 1988.
2. Chabab Barzouk, Constitutional Guarantees of Human Rights, master's Thesis, Faculty of Law, University of Oran, Algeria, 2011-2012.
3. Asaad Kazim and Haysh Al-Salihi, The Legal Organization of Concluding International Treaties in the Federal State, master's Thesis Submitted to the Faculty of Law, University of Babylon, 2013.
4. Abdel Fattah Abdel Razzaq Mahmoud, Declaring the State – An Original and Analytical Study in Public and Constitutional International Law, Ph.D. Thesis Submitted to the Faculty of Law and Political Science at Salah Al-Din University - Erbil, 2007.

3- Academic Journals Research:

1. Hussein Jabbar Abed, Manifestations of the Principle of the Supremacy of the Constitution - A Study in the Constitution of Race for the Year 2005, Al-Muhaqqiq Al-Hilli Journal for Legal and Political Sciences, 2014, First Issue, Sixth Year.
2. Hasina Sharon, The Position of the International Judiciary on the Conflict between Conventions and Internal Law, Al-Fikr Magazine, Faculty of Law and Political Science, Mohamed Khidir University, Biskara.

4- Laws and Court Provisions:

A- International Agreements:

1. The Universal Declaration of Human Rights of 1948.
2. The International Covenant on Civil and Political Rights of 1966.
3. Vienna Convention on the Law of Treaties of 1969.
4. The tripartite unity agreement between Egypt, Iraq and Syria.

B- Constitutions:

1. The United States Constitution of 1787.
2. Iraqi Statute of 1925.
3. The Constitution of Germany 1949.
4. Constitution of France 1958.
5. The Iraqi Constitution of 1958.
6. Iraqi Constitution 1964.
7. Iraqi Constitution 1968.
8. Iraqi Constitution 1970.
9. Draft constitution of the Kurdistan Region – Iraq 2007.
10. Draft Constitution of the Republic of Iraq for the year 1991.
11. The United Emiratis Constitution 1996.
12. The Law of State Administration for the Transitional Period 2004.
13. Iraqi Constitution 2005.

C- Laws:

1. Regulations for the Iraqi Administrative Authority, 1920.
2. Rules of Procedure of the Iraqi Ministry of Foreign Affairs No. (21) of 1933.
3. National Law of the Revolutionary Command Council No. (25) of 1963.
4. Revolutionary Command Council Law No. (61) of 1964.

D- Decisions of the Court and the Judgments of the International Commissions:

1. Decision of the Federal Supreme Court of Iraq No. 16/Federal/2015 dated 21/4/2015.
2. International Law Commission of United Nations, The Yearbook of the International Law Commission, Report of the International Law Commission covering the work of its seventeenth session, Document (A/6309/Rev.1), 4 May - 19 July 1966.

5- Websites:

Supreme Judicial Council website, website link: <https://sjc.iq/view.92/>