The authority of the national criminal judge in interpreting legal texts

سلطة القاضي الجزائي الوطني في تفسير النصوص القانونية

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Abstract:

In light of the development of crime and its transformation as a result of criminal globalization from a national and regional dimension to an international dimension that threatens the security of the entire international community, taking advantage of technological development and modern technology, which has become its preferred means of committing the most serious crimes to reach the extent of trafficking in persons, children, women, organs, weapons, money laundering, international terrorism ...

The need for comprehensive organization and international cooperation to confront these international crimes emerged, especially with the inability of states alone to combat them, which necessitated the conclusion of international treaties and conventions, which took a place within national legislation after their incorporation to become a direct source alongside national criminal legislation, but these international agreements were not the creation of the national legislator, who merely incorporated them without concluding or negotiating them, which led to issues in terms of their application by the criminal judge who has the authority to interpret penal texts related to national criminal legislation linked to the principle of criminal legality and individual rights and freedoms in accordance with a set of constraints . This is in contrast to the negative role of the same judge in the field of interpretation of international treaties whose texts contain general and broad provisions that are subject to several interpretations, despite the urgent need to interpret these treaties, given the ambiguity and vagueness of some of them when translated into Arabic, which requires their interpretation. The task of interpreting treaties is given to the entity that contributed to the conclusion of international agreements

key words: International crime, international treaties and conventions, interpretation of criminal legislation, interpretation of international conventions and treaties, entity vested with the authority of interpretation.

ملخص:

في ظل تطور الجريمة وتحولها نتيجة العولمة الإجرامية من الصبغة الوطنية إلى الصبغة الدولية التي تهدد أمن المجتمع الدولي بأسره مستغلة في ذلك التطور التكنولوجي والتقنية الحديثة، التي أصبحت وسيلتها المفضلة في ارتكاب أخطر الجرائم لتصل إلى حد الاتجار بالأشخاص، الأعضاء، الأسلحة، تبييض الأموال، الإرهاب الدولي ...إلخ

ظهرت الحاجة إلى تنظيم شامل وتعاون دولي لمواجهة هذه الجرائم الدولية خاصة مع عجز الدول بمفردها على مكافحتها، مما استلزم إبرام معاهدات واتفاقيات دولية والتي أخذت مكانة ضمن التشريع الوطني بعد إدماجها لتصبح مصدرا مباشرا إلى جانب التشريع الجنائي الوطني، غير أن هذه الاتفاقيات الدولية لم تكن من صنع المشرع الوطني الذي اكتفى بإدماجها دون إبرامها أو التفاوض فيها، الأمر الذي نتج عنه إشكالات من حيث تطبيقها من طرف القاضي الجزائي الذي يحظى بسلطة تفسير النصوص الجزائية المرتبطة بالتشريع الجنائي الوطني، وذلك مقابل دور سلبي لنفس القاضي في مجال تفسير المعاهدات الدولية، وقد منحت مهمة تفسير المعاهدات إلى الجهة التي ساهمت في إبرام الاتفاقيات الدولية.

الكلمات المفتاحية: الجريمة الدولية، المعاهدات والاتفاقيات الدولية، تفسير التشريع الجنائي، تفسير الاتفاقيات والمعاهدات الدولية، الجهة المستأثرة على سلطة التفسير.

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Introduction:

Globalization has been a significant transformation within the international community, influencing a multitude of domains, including economic, cultural, social, and political aspects. Moreover, it has even extended to the realm of national legislation, particularly in the domain of criminal legislation. This latter aspect has not been immune to the impact of globalization, due to the prevalence of high-tech and modern technology in committing crimes. Crime has evolved from a national or regional phenomenon to an international or transnational one. This has led to a situation where national legislation is unable to address the new

and novel types of international crimes. As a result, national texts have lost their importance and strength, and have proven to be vulnerable in finding solutions to meet this new challenge imposed by globalization. The principles of legality and territoriality have become increasingly inadequate in the face of the rapid advancement of modern technology, which has enabled the commission of the most serious crimes that transcend national borders. These crimes have become a global phenomenon, challenging the traditional boundaries of national jurisdiction.

In the face of the inability of states alone to confront these new crimes related to the phenomenon of globalization, they were left with no alternative but to pursue solidarity among themselves and to unify their security, judicial, and legal efforts to fight these crimes. This was embodied through the conclusion of international treaties and conventions as a legal mechanism to address international crimes. However, the implementation of the provisions of these conventions at the domestic level necessitates the harmonization and incorporation of the relevant conventions into national legislation. This is essential for the national criminal judge to be able to apply them. This is where the issue of the difficulty of automatic application of international conventions of a penal nature arises due to the specificity of criminal texts related to individual rights and freedoms and their subjection to the principle of criminal legality. This raises the issue of their application and interpretation, which requires great care in practice. In particular, the interpretation of international conventions whose provisions are often general and open to multiple interpretations may impede the implementation of their provisions due to differing interpretations of the same text. It is important to note that the criminal judge is prohibited from analogical and broad interpretation of national criminal texts. This raises the following question: what are the rules governing the authority of the criminal judge in interpreting national criminal texts? Does he have the same authority and jurisdiction in interpreting ratified international treaties and conventions?

In order to answer this question, the descriptive-analytical approach was adopted to identify the competent authority to interpret national penal texts and international conventions. This was done by analyzing the legal texts related to the interpretation process. The following two chapters will address this issue:

The first chapter of this study addresses the authority of the criminal judge in interpreting the provisions of the national criminal legislation. The second

chapter examines the competent authority in interpreting the provisions of international treaties and conventions.

Chapter one: The authority of the criminal judge in interpreting national criminal legislation

The principle of legislative unilateralism, which limits the field of criminalization and punishment to Parliament, is enshrined in various national constitutions[1]. This principle is applied in the issuance of criminal texts by the legislative authority. As a result, the legislative authority is empowered to determine the acts that constitute a crime and the penalty or security measures prescribed for them. Consequently, the criminal judge is obliged to apply the law to the crimes presented to him for adjudication as a protector of personal rights and freedoms, in accordance with the principle of separation of powers, which is one of the pillars of criminal legality. However, in practice, the criminal judge frequently encounters legal texts that are opaque and open to interpretation, necessitating his intervention to clarify them. The principle of legality precludes the criminal judge from expanding his interpretation. Consequently, it is of the utmost importance to determine the approach that the judge should adopt in the event of ambiguity or imprecision in the criminal law provisions to be applied, whether in terms of their formulation or translation. Furthermore, it is necessary to identify the controls that the judge must adhere to when interpreting ambiguous criminal texts.

The first requirement: The authority of the criminal judge in interpreting national criminal legislation.

Despite the admirable efforts of the judge in selecting the most appropriate and meaningful phrases in his formulation of legal texts, which are intended to be accessible and understandable to all parties involved, including the judges who will apply them, the practical reality often presents challenges in terms of application due to the ambiguity inherent in the texts, which requires a certain

[1] See Article 139/07 of the Constitution amended by Presidential Decree No. 20/442 of 15 Jumada El Oula , 1442 , corresponding to 30/12/2020, promulgating the constitutional amendment ratified in the referendum of November 1st, 2020, OJ No. 82, which states:
"Parliament legislates in the fields allocated to it by the Constitution, as well as in the following areas : ...07/ The general rules of the penal code and criminal procedures, in particular the definition of felonies and misdemeanours and the various penalties corresponding to them, comprehensive amnesty, extradition and the prison system..."

degree of interpretation[1]. The criminal judge's role is to interpret the law. Therefore, it is essential to define what is meant by interpretation and the methods that the criminal judge employs to alleviate ambiguity from cases presented to him.

First section: The concept of judicial interpretation.

Interpretation is a mental process employed by the judge to ascertain the true meaning of the legal text in accordance with the will of the legislator and the purpose for which the text was drafted. In other words, it is an intellectual and logical activity that examines the meanings of the penal rule to determine its content and its field of application to factual situations.

The judge employs interpretation to align the criminal text with the factual circumstances before him, with the objective of discerning the purpose of the legal rule. However, this type of interpretation is not binding, except in the instance where a judgment has been issued and is limited to the parties involved. In contrast, the decisions issued by the Supreme Court from the chambers assembled for the purpose of interpreting the text are binding on all courts and judicial councils[2].

The Second section: Interpretation Methods.

Two competing theories exist regarding the interpretation of the penal text. The first theory is subjective, focusing on the legislative will of the author, and second theory is objective, based on the teleological approach.

Firstly: Subjective theory.

The interpreter in this theory seeks to ascertain the legislator's personal will, which is the most restrictive form of interpretation. This approach is therefore known as narrow or literal interpretation because the interpreter adheres to the strict letter of the text. This method has been shown to confirm many well-known traditional rules, including the principle that "no diligence with the existence of the text", and that "when the law wants something, it declares it and when it does not, it is silent"[3].

The flaw in this theory is that it assumes perfection in the legal text and makes the law rigid, which is not true because the law evolves with the development of society. Consequently, the judge must adapt the penal rule to the changes in the society in which it is applied and in the era in which it is applied.

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[1] Alaa Zaki, The General Theory in the Interpretation of Criminal Law Rules (Scientific Method), Manshaat Al Maarif, Alexandria, 2013, p. 117.

[2] Abdelrahman Khalfi, General Criminal Law (a comparative study), Belkis Publishing House, Casablanca, Algeria, 2022, p. 164.

[3] Alaa Zaki, op.cit. p.105.

Secondly: Objective theory.

In this theory, law is accorded a high degree of importance regardless of its author. Once issued, the law is considered to be a separate entity from its source and is characterized by a special subjectivity. As one scholar has observed, "the text must be given all the flexibility it can within the limits of what the legislator wanted"[1].

In the event that the text is ambiguous, the will of the legislator must be presumed, according to the methodology employed by a legislator who is predominantly logical, whereby presumptions and legal fictions are utilized.

The principal disadvantage of this approach is that it places undue emphasis on the personality of the judge when interpreting legal texts. Despite the criticisms that have been leveled against this approach, it is the most widely adopted in most legal systems because it is consistent with developments in different societies and with the spirit of the law rather than the wording of the law[2].

The second requirement: Limitations restricting the judge's authority when interpreting.

The principle of legality in criminal law is a constitutional principle that protects individual rights and personal freedoms. It is enshrined in Article 43 of the Constitution, which states, "There shall be no conviction except in accordance with a law issued before committing the criminal act." This requires the existence of a legislative authority competent to criminalize and punish, which is also enshrined in Article 139 paragraph 07 of the Constitution as follows: "Parliament shall legislate in the fields allocated by the Constitution, as well as in the following areas: "Parliament shall legislate in the fields allocated to it by the Constitution, as well as in the following fields: ... The general rules of the penal code and penal procedures, especially the definition of felonies and misdemeanors and the various penalties corresponding to them, comprehensive amnesty, extradition and the prison system ..."

Giving the criminal judge the power to interpret criminal texts is a necessary matter, since he is the primary addressee of the text, in the context of respecting the principle of separation of powers (the power to legislate for the legislator and the power to apply and interpret the law for the judge), and the

[1] Mohamed Sami Al-Shawa, Explanation of the Penal Code (General Section), Menoufia University Press, 1996, p. 90.

[2] Abdel Rahman Khalfi, op. cit. p. 167.

judge is obliged to interpret the ambiguous and obscure criminal text, but given the importance and seriousness of the interpretation process in the criminal article on rights and freedoms, it was surrounded by a range of restrictions that the judge must adhere to, such as:

First section: Banning broad interpretation of criminal texts.

The law gives the judge the authority to interpret the criminal text in a narrow way, which cannot be extended to the point of creating a new legal rule. If the text to be applied is ambiguous due to a defect in its wording or translation, the judge must endeavor to eliminate this ambiguity and uncertainty, but without expanding it; he must only determine the will of the legislator when drafting the text by referring to the preparatory works, which emphasizes the positive role of the criminal judge, within the framework of the application of the objective theory of interpreting legal texts.

When the judge is obliged to interpret a text that implicitly contains other hypotheses intended by the legislator, and the judge reveals them, he does not create new rules, but stays within the limits of the text and the will of the legislator, that is certainly not rigid, but is determined by facts and social conditions that are constantly subject to change, all the more so since the law is a rule of social behavior that is designed for the future and not only for the present[1].

The Second section: Prohibition of analogy.

The general rule in the field of analogy in criminal matters is prohibition, but this rule is not without exceptions.

Firstly: The prohibition rule.

In order to protect the individual rights and freedoms guaranteed by the Constitution, the criminal judge, when applying the rules of criminal law, endeavors to determine the will of the legislator, which means that he must not resort to analogy if he is faced with a situation for which there is no criminal provision; he must not employ analogy out of respect for the principle of criminal legality enshrined in the Constitution[2].

Secondly: Exception: Analogy is permissible in matters other than criminalization and punishment texts.

It is well-established according to law and jurisprudence that analogy conflicts with the principle of criminal legality, which requires the judge to be

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[1] Ahmed Fathi Sorour, Al-Wasit in Penal Law (General Section), Dar Al-Nahda Al-Arabiya, Cairo, 2015, p.136

[2] Ramses Benham, The General Theory of Criminal Law, first edition, Al Maarif, Alexandria, 1997, p.151

careful to apply the criminal text in accordance with what the legislator intended and wanted, and he must refrain from applying the texts to the facts before him to decide them on the basis of the common cause and reason between them, as this falls into the category of creating new legal rules and not merely revealing the legislator's will[9].

Exceptionally, however, it is permissible to interpret by analogy what is in the interest of the accused, if the criminal text establishes a reason for permissibility or a contraindication to criminal liability. In this case, the judge is allowed to use the analogy, as it is here in favor of the accused, by moving the committed acts from the circle of criminalization and punishment to the circle of permissibility[1], and the proof of this is that the legislator has made the legitimate defense a general reason for permitting crimes, if there are objective circumstances related to the act of aggression on the one hand, and responding to it on the other.

In support of the above-mentioned controls restricting the judge's authority when interpreting penal texts, as well as the rules governing the interpretation of penal matters, given the specificity of criminal law related to individual rights and freedoms and subject to the principle of criminal legality, it is useful to enrich this study by presenting a practical case on the issue of mistakes in the interpretation of criminal texts, namely the decision issued on March 14th, 2000 by the Criminal Chamber of the Supreme Court under No. 238463[2] . The case related to the appellant (B.A.) who was brought before the Criminal Court and sentenced to three years imprisonment for the crime of " signing two checks in violation of the contract concluded on 23/07/1993 between the National Tobacco and Sulphur Company and the private company "Mike". The conviction and sentence was based on Article 423 paragraph 01 of the Penal Code, even though it does not criminalize or punish the act attributed to the appellant, but punishes whoever concludes, signs or reviews a contract, an agreement, a deal or an addendum ... etc.

The mistake lies in the erroneous translation of "avenant" in the French text into Arabic with the term "check" instead of the term "addendum", which is an obvious error of translation, as evidenced by the general framework of Article 423 of the Criminal Code, whose original meaning and general context are incompatible with signing checks. In its first formulation,

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[1] Maamoun Mohamed Salama, Penal Law, first edition, Salama for Publishing and Distribution, Cairo, 2017, p.54

[2] See the Judicial Journal of the Supreme Court, 2001, No. 01, p.309

under Decree 75/47, the Article 423 of the Criminal Code punishes anyone who "concludes a contract, agreement or deal" and, under Decree 66/180, it punishes anyone who concludes contracts or deals, which means that the appellant was referred to the Criminal Court and sentenced for a crime that does not exist in the Criminal Code, i.e. for an act that is not criminalized by law, including a violation of the rule (no crime and no punishment without a text), since he was sentenced for signing two checks in violation of the contract concluded on 23/07/1993, even though Article 423/1 of the Criminal Code[1] is applicable only if the contract was concluded in violation of "the legislation in force". Therefore, both the Criminal Court and the Indictment Chamber have confused a private contract concluded between a private company and the National Tobacco and Sulphur Company, which is a private law between the contractors, while the applicable legislation in Article 423 of the Penal Code is a general law applicable to all contractors, which confirms the violation of the provisions of criminal legality contained in the text of Article 1 of the Penal Code "No crime, punishment or security measure without a law", altogether, because the error includes not only the judges' interpretation of the term " check", but also the interpretation of the phrase "applicable legislation", which was violated in the case in question.

For this reason, there is no harm in returning to the referral decision, from which it is clear that the charge attributed to the appellant is "signing two checks in violation of the contract concluded between the two parties with the intention of prejudicing the interests of the National Tobacco and Sulphur Company, represented by them, an act provided for and punishable according to the same decision in accordance with the text of Article 423/1 of the Penal Code, which states: "Whoever works for the state shall be punished ....concludes a contract, signs or revises a contract, agreement, deal or a legal instrument in violation of the legislation in force, with the intention of jeopardizing the interests of the state, local groups or the body they represent", while the text of the article applied by the judges has two possible interpretations due to the difference between its Arabic text and its French text, This makes it imperative for the judge to interpret the text in order to select the most correct interpretation of the article between the two languages, especially with regard to the term "Avenant" contained in the French text, which corresponds to the term "check" in the Arabic text, a term that does not convey the meaning of the " Addendum" intended in the French

[1] Article 423/1 of the Penal Code was repealed by Law No. 88-26 of July 12, 1988.

text, which was enacted to criminalize the act of concluding contracts and agreements in a manner detrimental to the interests of the State in general by the said persons, in particular that, by referring to the historical evolution of Article 423 of the Penal Code, it proves with certainty that the term "Check" was introduced into the Arabic text by mistake and that the correct and accurate term is "Addendum", which is fully consistent with what is stated in the French text that was first written, as evidence that the original article, as first enacted by Ordinance No. 75/47 dated on 06/17/1975, mentions "concluding a contract, an agreement or a deal" and when the article was amended by the law No. 82/04 on 13/02/1982, the term "check" was wrongly leaked to the text of the Arabic article and it is far cry from the meaning of "Addendum", which is consistent with its predecessor. What validates this latter meaning is the Article 423/2[1] of the Criminal Code, which was added for the first time in the same law and whose wording is identical both in Arabic and in French in terms of translation , by using the term " Addendum ", which makes the term " check " in Article 423/1 of the Criminal Code misplaced, and the correct interpretation of this term as it appears in the French text is " Addendum ".

Moreover, the aforementioned Article penalizes the conclusion or revision of contracts, agreements and addendums in violation of the legislation in force, i.e. general legislation such as the Public Procurement Law, while the appellant was referred on the basis of the signing of two checks in violation of the contract concluded on 23.07.1993 between the National Tobacco and Sulphur Company and the private company "Mike", a private contract linking the two parties, the violation of which is not considered a punishable offense in the Penal Code, which in fact constitutes an error in the application of the law.

In this case, the judge adopted the literal interpretation of the text of the Article 423 of the Criminal Code and neglected the teleological interpretation of it. Accordingly, the error in the application of the law is due to the misinterpretation of the term "Avenant" as "Check" instead of "Addendum", as well as the misinterpretation of the phrase "applicable legislation" in determining the legislation that was violated.

After examining the various rules governing the authority of the national criminal judge in interpreting national criminal legal texts with respect to criminal disputes brought before him, we will now examine the

[1] Repealed by Law No. 01-09 of June 26, 2001.

rules regulating the interpretation of legal texts of a different nature, namely international conventions and treaties that he has to apply after their ratification and entry into force.

Chapter two: The authority competent to interpret the provisions of international treaties and agreements.

The criminal judge in the national criminal law enjoys the first place in the field of interpretation of criminal texts as the protector of individual rights and freedoms, but with the development of crime and the changes that have occurred in it due to modern technology and techniques used in its commission, crime transcended national borders , went international and constituted a threat to the international community, which required concerted efforts among states through the conclusion of international treaties and conventions that would confront this new type of serious crime. As a result, international conventions and treaties have become an indirect source of legislation in addition to national criminal law. Therefore, it is necessary to study the limitations of the authority of the national judge in the interpretation of ratified international conventions, and the place he enjoys in the field of interpretation of international conventions and, accordingly, to highlight the entity empowered to interpret.

The first requirement: The limitations of the authority of the criminal judge in interpreting international conventions.

Abiding by international treaties extends to the legislative, executive and judicial authorities of the State, and even more to individuals, who may invoke the provisions of international treaties before the national criminal justice system, which requires the application of the provisions of international treaties to cases brought before national courts. In practice, however, this application requires that the provisions of these treaties be clear and understandable in order to facilitate their application by the criminal judge, but the practical reality has proven otherwise, because international conventions and treaties are often broadly worded and subject to multiple interpretations, which entails the need to interpret them. Therefore, it is necessary to identify the rules that govern the process of interpreting international conventions and the issues that hinder the process of applying the provisions of international conventions to cases before the criminal judge, and this will be addressed through the following elements:

First section: Rules and methods for the implementation of the process of interpreting international agreements.

The interpretation of international agreements is subject to a range of rules, that we will currently address, then we are going to return to defining the different methods of interpreting international agreements.

Firstly: Rules governing the interpretation of international conventions.

As interpretation is a mental and intellectual process aimed at clarifying the meaning of an ambiguous text and making it applicable to the facts brought before the judge for adjudication, the interpreter is bound by a set of restrictions when interpreting international agreements that are ambiguous, obscure, or contradictory. This is done in order to ensure that the interpreter does not go outside the context of the text being interpreted. In order to define the rules to be followed by the national judge when interpreting, it is necessary to define the following:

A)- Interpretation pursuant to the principle of good faith.

This principle is national and international, moral and legal at the same time. It requires honesty and sincerity in what the parties are committed to when concluding the agreement .Given the importance of international agreements in organizing relations, this principle , that is based on a fundamental rule of good dealings with other parties, whether in the stages of concluding or implementing agreements , \has been strengthened , as the main objective of the interpretation authority is to reach the psychological state of the parties of the agreement in order to discover the true meaning of ambiguous texts and interpret them[1].

B)- Interpretation pursuant to the beneficial effect.

This implies that the agreement must be applied in accordance with the intentions of the parties in order to achieve the intended beneficial effect. This is known as the functional method of interpretation, which involves searching for any ambiguity within the agreement and interpreting it in a manner consistent with its objective.

[1] Abdelkader Bouarfa, The authority of the criminal judge in the application of international conventions, PHD thesis, Djillali Lyabes University, Sidi Bel Abbes, Algeria, 2009, p.88

In accordance with the aforementioned constraints imposed upon the national judge, it is imperative to limit the methods employed in the interpretation process to those deemed most crucial.

Secondly: Methods of interpretation.

The process of interpreting international conventions is governed by one of the following methods:

A)- Subjective method

It is based on researching the real or presumed intention of the parties to the agreement, which can be extracted through the use of a set of elements, namely the intentions of the parties, preparatory work such as negotiations, committee work, proposals and drafting projects that take place between the parties, minutes of their meetings, mutual memoranda, interpretative agreements, documents issued by the parties and the behavior of the parties when implementing the agreement, as well as through the historical, social, ideological and economic circumstances that surrounded the conclusion of the agreement, but reaching the common intention of the parties to the international agreement through this method is not agreed upon jurisprudentially and internationally due to its difficulties.

The analysis is based on considering the real or presumed intention of the parties of the agreement, which can be extracted through the use of a set of elements, such as : the intentions of the parties, preparatory work such as negotiations, committee work, proposals and drafting projects that take place between the parties, minutes of their meetings, mutual memoranda, interpretative agreements, documents issued by the parties and the behavior of the parties when implementing the agreement, as well as through the historical, social, ideological and economic circumstances that surrounded the conclusion of the agreement.

Nevertheless, the consensus among legal scholars and international organizations is that this method is not an effective means of achieving the common intention of the parties of an international agreement due to the inherent difficulties involved[1].

B)- Objective method

The interpretation of an agreement is contingent upon the subject matter of the said agreement, its nature, purpose; circumstances of conclusion and

[1] Ghassan Al-Jundi, The Law of International Treaties, Dar Wael for Printing and Publishing, first edition, Jordan, 1988, p.134

application, relevant international rules, and in the event of ambiguity, the agreement shall be interpreted in favor of the freedom and rights of individuals.

Second section: Omitting the role of the criminal judge from interpreting international agreements and the Minister of Foreign Affairs arrogating the competence.

With reference to the various successive national constitutions until the last constitutional amendment of 2020, we do not find any reference to the process of interpreting the rules contained in ratified international treaties and conventions in the event of their ambiguity, but more than that, where the role of the national criminal judge was absent from this process, thus; the executive authority has monopolized it, as it is responsible for interpreting the rules of international law, represented by the Minister of Foreign Affairs, as we can observe through the legal texts that define this competence, and this will be addressed as follows:

Firstly: Legal texts specifying the competence to interpret international agreements.

It has passed through several stages, starting with the first decree granting this competence to the Minister of Foreign Affairs, Decree No. 77/54[1], and ending with the text of Article 09, which makes interpretation a monopoly of the Minister of Foreign Affairs by granting to the Ministry of Foreign Affairs the competence to interpret international treaties, agreements, protocols and conventions. It also falls within its sole competence, after taking the opinion of the ministries concerned, to propose the approval of this interpretation to foreign governments, organizations and judicial bodies, and it has the right to present the interpretation of these texts before the national courts, according to this Decree, then Decree No. 79/249[2] issued on 01/12/1979 came with a similar text, and this Decree did not differ in its provisions except for replacing the word "interpretation" with the word "explanation", then came Decree No. 84/165, which reorganized the powers of the Minister of Foreign Affairs and defined the powers of the Deputy Minister in charge of cooperation, as Article 11 stipulates that the Minister of Foreign Affairs is competent to interpret international treaties, agreements, protocols and regulations, and defends, after consulting the relevant

[1] Decree No. 77/54 of 01/03/1977 defining the powers of the Minister of Foreign Affairs, Official Journal No. 28 of 26/04/1977.

[2] Decree No. 79/249 of 11/12/1979 defining the powers of the Minister of Foreign Affairs, Official Journal, No. 50.

ministries, the interpretation of the Algerian state before foreign governments and, if necessary, before international or national organizations or courts.

This text strengthened the previous competences of the Ministry of Foreign Affairs by adding international regulations as documents that fall within the competence of the Ministry of Foreign Affairs in terms of interpretation. It also replaced the term "support" with the term "defend", which is a successful amendment, because support means providing the reasons that prove and support this interpretation after consulting the concerned ministries, while the term "defend" indicates that the Ministry has the right to abandon it if it finds that the interpretation is flawed[1], then the Presidential Decree No. 90/359 was issued , supplementing and amending the previous decrees, in order to define the powers of the Minister of Foreign Affairs. Article 11 of this decree stipulates that the Minister of Foreign Affairs is the only competent authority in the interpretation of international treaties, excluding any positive role of the judge in this matter. This decree, unlike the previous ones, was issued in the form of a presidential decree, which gives it greater power in defining this competence of the Minister of Foreign Affairs.

Then came Presidential Decree No. 02/403 of 26/11/2002, Article 17 of which states: "The Minister of Foreign Affairs is responsible for interpreting treaties, conventions, agreements, protocols and international regulations to which Algeria is a party, and for supporting the interpretation of the Algerian state before foreign governments and, if necessary, before international organizations or courts, as well as before international judicial bodies." Next, Presidential Decree No. 17/262 of October 4, 2017, which includes the organization of the central administration of the Ministry of Foreign Affairs, assigns the authority to interpret international agreements to the Sub-Directorate of Bilateral and Multilateral Agreements and International Judicial Bodies, of which Algeria is a member, through Article 13 of the decree. The decree gives the directorate the mandate to participate in the negotiation of projects of bilateral and multilateral agreements and conventions, to give a legal opinion on the feasibility of signing or acceding to these agreements, to examine the ratification files of signed agreements and conventions before sending them to the General Secretariat of the Government, to ensure the official preparation of bilateral and multilateral

[1] Abdelkader Bouarfa, op.cit., p.209

treaties to which the Algerian State is a party, and to follow up on their ratification and publication[1].

Secondly: Reasons for granting the Minister of Foreign Affairs the power to interpret international treaties and conventions.

From the foregoing, it is clear to us that the legislator has decided to grant the power to interpret international treaties and agreements to the Minister of Foreign Affairs. The justification for granting the power to interpret international treaties to the executive power is that international treaties translate the will of two international parties without the judicial power, in order to avoid any diplomatic problems that may arise from granting the power of interpretation to the judicial power[2].

Giving judges the authority to interpret international treaties and agreements, and with several judicial bodies, makes the interpretations multiple and even contradictory, especially since the judiciary of the Supreme Court in establishing and standardizing judicial work takes time to stabilize and requires the filing of many cases, which could increase the responsibility of the state at the international level[3].

Through this discussion, we conclude that the authority of the criminal judge is absent in terms of interpreting international agreements and he is limited by the interpretations he receives from the Ministry of Foreign Affairs.

The second requirement: Difficulties encountered by judges when implementing international conventions.

With reference to the Algerian Constitution, which occupies the top of the legal pyramid in terms of binding force, we find in Article 154 that treaties ratified by the President of the Republic under the conditions established by the Constitution take precedence over the law. At the same time, in article 171, the Constitution directly addresses the judge and obliges him to apply ratified international treaties in the exercise of his function. This provision, introduced by the recent constitutional amendment, is an embodiment of the principle that ratified international agreements take precedence over national legislation, as it enshrines the principle of the effective application of international agreements by the national judge. In practice, however, the judge is often confronted with questions of

[1] Ibid., p.210
[2] See the Judicial Journal of the Supreme Court, 2022, No. 01, p.250
[3] Ibid., p.251

application of international treaties, some of which contain provisions that are ambiguous or contradictory to national legislation, or are incomplete and require interpretation. In this section, we will discuss the procedures to be followed by the judge in order to obtain the interpretation of the Minister of Foreign Affairs, as well as the issues related to the interpretation process, as follows:

First section: The procedures followed by the criminal judge to obtain an explanation from the Ministry of Foreign Affairs.

The legislator has decided to give the power of interpretation of international treaties to the Minister of Foreign Affairs, which puts the judge in a situation of confrontation with the Minister in order to obtain the interpretation and apply it to the cases before him. Does the judge himself raise the question of interpretation and what is the procedure for submitting the interpretation order to the Minister of Foreign Affairs?

Firstly: Regarding the question of raising the issue of interpretation by the judge.

With reference to the text of Article 171 of the Algerian Constitution, which obliges the judge to apply the ratified treaties in the exercise of his function, it is clear to us that the matter is mandatory for the judge and therefore he cannot raise on his own initiative the issue of interpretation of international treaties if they are in accordance with the rules of attribution applicable to the dispute before him, on the basis that this issue is a legal issue that the judge must apply the law and must diligently seek to materialize the applicable provisions, as it is subject to the control of the higher authority of both the Judicial Council and the Supreme Court, if it requires rectification as a legal issue, then the provisions of the international convention are properly applied. This meaning is emphasized by the Code of Civil and Administrative Procedure in article 358/7, which stipulates that "an appeal in cassation may only be based on one or more of the following aspects 7/ Violation of international treaties"[1]. The criminal judge may not invoke the inapplicability of an international treaty due to its ambiguity, justifying that the Minister of Foreign Affairs is the one who interprets it, which is interpreted as a denial of justice that entails disciplinary responsibility.

[1] See the full text of Article 358/7 of the Civil and Administrative Procedures Law

Secondly: Raising the issue of interpretation by the parties to the dispute.

The argument on the interpretation of an international convention or treaty is a preliminary issue that must be raised by the parties before any discussion on the merits, and here the judge is faced with two situations:

A)-Rejection of the plea: If the judge decides that the preliminary objection relating to the interpretation of the international treaty is unfounded, he joins it to the merits of the case and decides between the two in a single judgment, provided that he gives reasons for his judgment in both parts and gives the reasons that support the clarity of the provisions of the treaty or international convention.

B)-Acceptance of the plea: With reference to the Code of Civil and Administrative Procedure, we note that the legislator has never specified the legal procedures to be applied until the matter of interpretation of international conventions is submitted to the Minister of Foreign Affairs, so that the judge must resort to analogy to determine these procedures. In this regard, with reference to the provisions of Article 37 of the Nationality Act, in its fifth and sixth paragraphs, it is stipulated that if, in the case of a dispute, it is necessary to interpret the provisions of international conventions relating to nationality, the Public Prosecutor's Office shall request this interpretation from the Ministry of Foreign Affairs, and the courts shall be bound by this interpretation.

If the judge decides to follow the request of the parties and adopt the analogy of Article 37 of the Nationality Law, he shall, in accordance with the provisions of Article 201 of the Code of Civil and Administrative Procedure, order the party concerned with the interpretation to include the Public Prosecutor's Office as a party to the dispute and, in accordance with the provisions of Article 213 of the Code of Civil and Administrative Procedure, the judge shall issue an order to postpone the case in order to allow the Ministry of Foreign Affairs to provide the necessary interpretation.

The judge must state the facts of the case and the requests of the parties with reasons for his order, since this request is sensitive and must be serious.

The party requesting the interpretation shall, under penalty of forfeiture of the case, communicate the matter to the Public Prosecutor's Office by means of a simple petition, requesting that it be submitted to the Ministry of Foreign Affairs, which shall undertake the task of interpretation. In this context, the Public Prosecutor's Office requests this interpretation from the

Ministry of Foreign Affairs, respecting the hierarchy, by submitting the request to the Attorney General, who submits it to the Minister of Justice, who writes to his counterpart in the Ministry of Foreign Affairs.

If the Ministry of Foreign Affairs responds and provides the requested interpretation, in this case, the Public Prosecutor's Office, as a party of the dispute, after its inclusion in the dispute, reopens the case by petition and notifies the parties and order them to attend the hearing, and the court is bound by the interpretation provided by the Ministry of Foreign Affairs.

If the Ministry of Foreign Affairs does not respond, as there is no legal obligation for the Ministry of Foreign Affairs to provide the interpretation, and it can remain silent, in which case the party that submitted the request for interpretation must submit the case to the court again to decide it as it stands.

Second section: Problems hindering the implementation of international conventions.

The following are some of the most common problems that impede the implementation of international agreements: Ambiguity, vacuum, inconsistency and lack of legislation.

Firstly: Legislative ambiguity.

Which arises due to the recognition by national legislation of the right contained in the convention, but the legislative wording is ambiguous and does not correspond to the wording contained in the international convention, which leads to ambiguity in the interpretation of the international legal rule, which leads to ambiguity in the interpretation of the national legal rule from the perspective of international standards, this problem is addressed by applying the holistic interpretation of the international rule by adopting an interpretative approach based on respect for human rights and based on the opinions of the specialized committees emanating from these conventions.

Secondly: Legislative vacuum.

This vacuum is created when a certain right is regulated in an international convention ratified by the State, but the national legislation of that State is silent about it and does not regulate it in its domestic legislation. This does not mean that the national legislation denies or opposes it only but it does not regulate it, and this is corrected by the direct application of the

rules contained in the international convention as part of the national legislation[1].

Third: Legislative deficiency.

This means that the national legislation recognizes this right, but has not defined all the scenarios of its regulation within the texts of the national law, and this legislative deficiency is corrected by the direct application of the rules of the Convention as complementary rules to the national rules.

In order to illustrate the difficulties faced by the judge in applying the provisions of international conventions, we cite a case of application of a decision of the Supreme Court of Justice, Criminal Chamber, dated on February 22nd , 2000, No. 167921, in which a deficiency was noted in the text of Article 246 of the Health Code, which only provides for the confiscation of the means of transport in drug offenses, where it was stated in the reasons for the decision that, as to the aspect raised by the lawyer against the accused and derived from the lack of legal basis, claiming that the forged car and the seized sums of money were confiscated, without mentioning the legal texts, in particular

Article 246 of the Health Code, and therefore this is considered a lack of legal basis, and in this regard, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, approved in Vienna on December 29th, 1988, provides that each Party shall take such measures as may be necessary to enable the confiscation of the proceeds of the crimes referred to in Article 1, paragraph 3, in this case drug trafficking, the Convention was ratified by Presidential Decree No. 95/41 of January 28th, 1995.

Conclusion:

Through our study of the issue of interpreting provisions of criminal legislation and ratified international treaties and conventions, we found that the role of the criminal judge in this matter varies, especially given the specificity of criminal texts related to the principle of criminal legality on the one hand and the rights and freedoms guaranteed by the Constitution on the other hand, and that the criminal judge is considered the protector of these rights, as for his role at the internal level, he has the authority to interpret legal rules subject to certain constraints that the criminal judge must respect when deciding the cases brought before him. However, this positive role of the criminal judge at the level of national criminal law is transformed into a

[1] The Judicial Journal of the Supreme Court, op.cit., p.259

negative role when it comes to international treaties and conventions, thus, we find that the Algerian judge does not have the power of interpretation, which is vested in the executive authority represented by the Minister of Foreign Affairs, who monopolizes the role of interpretation.

We have reached a number of conclusions, including, in particular:

- Differences in the adopted rules and methods of interpretation between national legislation and international agreements.
- Omitting the national criminal judge from the field of interpretation of international treaties and conventions and assigning this power to the Minister of Foreign Affairs, and the negative impact on the judge's authority in applying the provisions of international conventions, given that he is tied to the request to respond to the interpretation expected from the Minister of Foreign Affairs. This threatens the rights of defendants or victims, since there is no legal text that obliges the Minister of Foreign Affairs to respond to the request for interpretation submitted by the judge.

Granting the authority to interpret international conventions to the Ministry of Foreign Affairs raises the most important practical issues for judges in the application of the provisions of international conventions, the provisions of which they are obliged to apply in the exercise of their duties pursuant to Article 171 of the Constitution.

In view of these findings, and given the necessity to respect the constitutional rights and freedoms of individuals in general, and the principle of criminal legality in particular, we recommend that the legislator intervene by requiring the Ministry of Foreign Affairs, in coordination with the Ministry of Justice, to create a department empowered to interpret the texts of ratified conventions and treaties sent by the judicial authorities, thus enabling the criminal judge to perform his duties without any liability.

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