



Deliberating the Constitutional Supremacy from the Legal and Judicial Perspective with Special Reference to the Palestinian Situation

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Abstract

Constitutional supremacy, the supremacy of the basic law, is considered as the system of government in which the freedom of the legislature of parliamentary supremacy relinquishes to the requirements of a constitution. This article examines the constitutional supremacy or the supremacy of the basic law from the legal and judicial perspective with particular reference to the Palestinian Situation. In addition, constitutions differentiate according to whether they are codified or not into written constitutions and unwritten constitutions. Besides, constitutions differ in terms of how they are amended into flexible and rigid constitutions. Palestinian Basic Law of 2003 is not explicitly provided with any legal provision or article in the Basic Law about the principle of constitutional supremacy or the supremacy of the basic law. However, some elements and legal provisions or articles could make the Basic Law supreme. Moreover, constitutional oversight to secure the supremacy of the Basic Law of 2003. To achieve the objectives of the article, doctrinal legal research methodology using a qualitative approach was adopted. This article concluded that the Palestinian Basic Law of 2003 has adopted the principle of the supremacy of the Basic Law of 2003 over ordinary laws and subsidiaries within the state of Palestine. This is considered an application of the principle of the rule of law stipulated in the Basic Law of 2003. The article emphasises the need to explicitly mention the principle of constitutional supremacy or the supremacy of the basic law by amending the Basic Law of 2003.

I. Introduction

Constitutional law fundamentally regulates the system of government in countries and defines the scope of powers and activities of public authorities. Hence, those

powers and activities shall be restricted by constitutional rules, because violating them undoubtedly means denial of the basis for the existence of the constitutional law. Accordingly, the constitution transcends rulers and laws, and even obliges them to respect its rules everywhere within the country (Avbelj, 2011).

Constitutional jurisprudence unanimously acknowledges the principle of the supremacy of the constitution and the supremacy of its provisions over all legal rules in force in the country. It transcends, and prevails over all other laws within the country, whether the constitution is written or not (Chikhladze & Friesen, 2022).

In addition, the supremacy of the constitution means that the constitution is the supreme law of the country, and no other law is above it. This transcendence has become an accepted principle, whether or not the constitutions stipulate it (Agresto, 2016).

The importance of the research highlights that the principle of the supremacy of the constitution is the reference for all legislation and laws, and is one of the legal characteristics of the country. It is one of the main foundations on which the legal system of the country rests, and it works to confirm the principle of legality in the country and expands its scope (Ahmad, 2017).

In Palestine, the Supreme Constitutional Court has assumed oversight over the constitutionality of laws. This has led to achieving the supremacy of the rules of the Basic Law of 2003 over all other legal rules, whether ordinary laws or subsidiaries. Besides, the Supreme Constitutional Court rules that “...., the application of constitutional oversight leads to the achievement of the principle of supremacy of the Basic Law of 2003. Therefore, the principle of supremacy of the Basic Law had strengthened the principle of constitutional legality ...” (Ruling of the Supreme Constitutional Court, 2009).

Hence, the ordinary or subsidiary rules shall not be violated by the rules contained in the Basic Law, to ensure the application of the supremacy of the Basic Law and to prevent public authorities from violating constitutional restrictions and the limits of their jurisdiction (Ruling of the Supreme Constitutional Court, 2009).

For example, 1. Case No. 19/2021, the Supreme Constitutional Court on 01-31-2022, about the challenge to the unconstitutionality of the decision by Law No. (9) for the year 2017, regarding the early retirement of the Palestinian security forces, and the unconstitutionality of decisions referring to forced retirement. This is for violating Article No. (9) of the Basic Law of 2003 and its amendments, as it constitutes a forced retirement. (Ruling of the Supreme Constitutional Court, 2022). 2. Case No. 11/2021, the Supreme Constitutional Court on 01-03-2022, about the challenge to the unconstitutionality of the President’s decision to retry the convicts before the State Security Court formed under Resolution No. 49 of 1995 and who are sentenced to death before the ordinary courts. This is for violating Article 30 of the amended Basic Law of 2003 and its amendments. (Ruling of the Supreme Constitutional Court, 2022).

The objectives of the research are to know the concept of the constitution, and discusses the types of constitutions in general and the supremacy of the Basic Law of

2003, then constitutional oversight to secure the supremacy of the Basic Law (Chan, 2007).

II. Constitutional Supremacy

This article discusses the types of constitutions, the concept of constitutional supremacy, and the constitutional oversight to secure the supremacy of the Palestinian Basic Law of 2003.

A. Types of Constitutions

Constitutions differentiate according to whether they are codified or not to written constitutions and unwritten constitutions. In addition, constitutions differ in terms of how they are amended into flexible and rigid constitutions, as follows:

1. Written and Unwritten Constitutions

Written Constitution

Written constitution means those that include written provisions. Therefore, the written constitution comes into existence in the form of a written document, or by several written documents, which is meant that it is presented either in one written legislation, or several written legislations (Shigong, 2010).

On this basis, the first and main source of a written constitution is legislation, but here the legislator does not consider the legislative authority that sets ordinary laws. But rather the constitutional legislator, which is the constituent authority that sets the country's constitution. Therefore, the constituent authority is considered the highest inside the country, and it limits the functions of the other Legislative, Executive, and Judicial authorities through the constitutional rules that it sets. (Grey, 1988).

The constitutional history of the state of Palestine indicates that all of its successive constitutions, which were applied within the state of Palestine were written, despite the different systems governing it, and the legal culture prevailing in it from time to time. For example, the Ottoman state issued its written constitution in 1876, represented by the Ottoman Basic Law, as well as Britain, whose constitution is customary. But its administration mandated over Palestine has put a written constitution, which is the Palestine Constitution Decree of 1922.

The same applies to the Egyptian administration in the Gaza Strip, as it issued Basic Law in 1955. But in the West Bank applied the written constitution that is issued in 1952. The situation was not change after the return of the Palestinian National Authority, as its Basic Law was issued in 2002 in the form of a written document (Shabir, 2016).

Unwritten Constitution

Unwritten constitution means those provisions and rules are not stipulated in constitutional legislation. But rather, its provisions and rules arise through custom, as a result of traditions that have been stabilized with time by the ruling authorities, and have become binding on them (Shigong, 2010).

On this basis, the custom is the main source for constitutions that are not written. Therefore, these constitutions could not exist in the form of a document, and there is no specific date for them (Sherry, 1987).

Unwritten or customary constitutions prevailed in the countries of the world before the emergence of writing or codification of constitutions in the eighteenth century. However, all countries of the world today have abandoned these constitutions and adopted the idea of writing or codification, except for Britain, which still has an unwritten customary constitution until now (Sachs, 2013).

2. Rigid and Flexible Constitutions

Rigid Constitution

Rigid constitution means that could not be amended or repealed in the same manner that is followed in the matter of amending or repealing ordinary laws, rather, they require complex procedures.

In addition, rigid constitution is a constitution that has stability as a result of the special procedures that are followed when they are amended or repealed, and are unlike those followed for ordinary laws. So, the constitution is considered rigid whenever the procedures for amending it are longer and more complicated. A rigid constitution can't be easily amended (Elhasia, 2020).

The Palestinian Basic Law of 2003 is considered one of the rigid constitutions, as its amendment requires the approval of a two-thirds majority of the members of the Legislative Council (Basic Law of 2003, Article 120). Moreover, it is a stricter procedure than what is followed concerning ordinary laws, as they are approved and amended by an absolute majority, which means a majority of the members of the Legislative Council (Bylaw of the Legislative Council of 2003, Article 69).

Flexible Constitution

Flexible constitutions mean those that provisions and rules could be modified or repealed by the same procedures by which ordinary laws are amended, or constitutions that could be amended or repealed by the same procedures followed in the matter of ordinary laws. That is, the Parliament, just as it can amend or repeal ordinary laws, it has the power to amend or repeal flexible constitutions, so there is no difference between them in terms of amendment or repeal, as the procedures are the same in both of them (Grimm, 2012).

Perhaps the most prominent example of a flexible constitution is the British constitution, whereby Parliament can amend it in the same procedures that exist in ordinary laws, or through the use of the ordinary legislative process, without talking about the existence of special or distinct amendment procedures, which is called parliamentary supremacy (Shukr, 2010).

B. The Concept of Constitutional Supremacy

Constitutional supremacy is a doctrine whereby the constitution is the supreme law in the state and all the state organs including Parliament, Executive authority, and the Judiciary are bound by the constitution. The concept of constitutional supremacy confers to the highest authority in a legal system on the constitution. The principle of constitutional supremacy also concerns the institutional structure of the organs of the state (Limbach, 2001).

In addition, constitutional supremacy is considered a system of government in which the freedom of the legislature of parliamentary supremacy relinquishes to the requirements of a constitution. Besides, the constitution binds all governments, both federal and provincial, including the Executive branch (Kumm, 2005).

Constitutional supremacy is its quality, which positioned it on top of all state institutions, making it not just legal but also a political reality (Neo & Lee, 2008). Moreover, many elements make the constitution supreme. First, the explicit legal provisions about the principle of constitutional supremacy. According to Malaysia, the concept of constitutional supremacy is explicitly provided by Articles 4(1) which states that: "This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the constitution shall, to that extent of the inconsistency be void" (Hamid, 2012).

In addition, the constitution refers only to laws made after Merdeka Day which states that the Malaysian Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is unpredictable with the constitution shall, to that extent of the discrepancy be void".

On the other hand, Article 162(6) of the Malaysian Constitution refers to the laws made before Merdeka Day. According to the case of *Datuk Seri Samy Vellu v Nadarajah* (2001), the different approach taken by Article 4(1) and 162(6) of the Federal Constitution is in the former, any post-Merdeka law which is inconsistent with the constitution shall be declared void to the extent of the inconsistency while in the latter, any pre-Merdeka law which is inconsistent with the constitution shall be continued with the necessary modifications to render it consistent with the constitution.

Second, rule of law. Rule of law is a legal principle that suggests that no one is above the law and governmental decisions must be made only by applying known legal and moral principles (Tamanaha, 2012). It is meant to prevent dictatorship

and to protect the rights of the people. Besides, rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are publicly promulgated and equally enforced (Cass,2003).

Third, separation of powers. Separation of powers is a doctrine of constitutional law under which the three branches of government, Legislative, Executive, and Judicial are kept separate and each branch has separate powers, and generally, each branch is not allowed to exercise the powers of the other branches. Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances (Mojapelo, 2013).

Fourth, restrictions on amending the constitution. A constitution can't be easily amended. constitutions mean those that could not be amended or repealed in the same manner that is followed in the matter of amending or repealing ordinary laws, but rather, they require long and complex procedures (Elhasia, 2020).

Fifth, fundamental liberties. Fundamental liberties are rights and freedoms that they have as human beings. Some fundamental liberties are set out in the constitution. Because these rights and freedoms are set out in the constitution, they are said to be 'guaranteed' and cannot be taken away from us unless the constitution itself allows it. As used in the constitution, liberty means freedom from arbitrary and unreasonable restraint upon an individual (Fernando & Rajagopal, 2017).

III. The Concept of The Supremacy of The Palestinian Basic Law of 2003

Firstly, there is no explicit legal provision or element into the Basic Law of 2003 about the principle of constitutional supremacy. However, there are some elements and articles that could make the Basic Law of 2003 supreme. The first, rule of law. According to Basic Law of 2003, the concept of rule of law is explicitly provided by Article 6 which states that "The principle of the rule of law shall be the basis of government in Palestine. All governmental powers, agencies, institutions, and individuals shall be subject to the law" (Palestinian Basic Law of 2003, Article 6).

Secondly, separation of powers. According to Basic Law of 2003, the concept of separation of powers is provided by Article 2 which provides that "The people are the source of power, which shall be exercised through the Legislative, Executive, and Judicial authorities, based upon the principle of separation of powers and in the manner outlined in this Basic Law" (Palestinian Basic Law of 2003, Article 2).

Thirdly, restrictions on amending the Basic Law of 2003. According to the Basic Law of 2003, Article 120 states that "The provisions of this Basic Law may not be amended except by a majority vote of at least two-thirds of the members of the Legislative Council." (Palestinian Basic Law of 2003, Article 120).

In addition, Article 69 of the Bylaw of the Legislative Council of 2003 stipulates that “Draft laws or laws shall be amended and approved by an absolute majority unless otherwise stipulated.” (Bylaw of the Legislative Council of 2003, Article 69).

It is noted that the amendment of the Basic Law requires the approval of a two-thirds majority of the members of the Legislative Council, and it is a stricter procedure than what is followed concerning ordinary laws, as they are amended and approved by an absolute majority, which means a majority (half + one) of the members of the Legislative Council (Palestinian Basic Law of 2003, Article 9,10 and 11).

Fourthly, fundamental liberties. According to Basic Law of 2003, the concept of fundamental liberties is openly provided by Article 9 which specifies that “Palestinians shall be equal before the law and the Judiciary, without distinction based upon race, sex, colour, religion, political views, or disability.” (Palestinian Basic Law of 2003, Article 9).

Article 10 states that “Basic human rights and liberties shall be protected and respected. The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights.” (Palestinian Basic Law of 2003, Article 10). Article 11 provides that “Personal freedom is a natural right, shall be guaranteed, and may not be violated.” (Palestinian Basic Law of 2003, Article 11).

As the researcher mentioned earlier, there is no explicit legal provision or elements into the Basic Law of 2003 about the principle of constitutional supremacy. However, from previous these elements and provisions could be seen that the Basic Law of 2003 is supreme.

IV. Constitutional Oversight to Secure The Supremacy of The Basic Law of 2003

As a result of the supremacy of the Basic Law, public authorities are obliged to respect its rules by not violating them (El-Ghali, 2012). This is also required a tool to ensure that respect is achieved, thus the constitutional oversight has emerged over the constitutionality of laws (Abdel-Wahab, 1999).

In addition, the constitutional oversight over the constitutionality of laws means checking that the ordinary laws and subsidiaries are not in violation of the Basic Law. Therefore, if they do that, they shall not be promulgated, and their application is prevented if promulgated (Drinóczi & Bień-Kacała, 2020).

In Palestine, the constitutional oversight, represented by the Supreme Constitutional Court, is responsible for oversight of the constitutionality of ordinary laws and subsidiaries alike, which is meant that both the Legislative Council and Executive authority are subject to this oversight.

Moreover, the decisions that have the power of law issued by the President of the Executive authority are subject to constitutional oversight as well. Therefore, it is not allowed for the ordinary courts or the Supreme Court of Justice as an administrative

court to address this task because it is a jurisdiction of the Supreme Constitutional Court (Palestinian Basic Law of 2003, Article 103).

Article 103 of the Palestinian Basic Law of 2003, which states that “ 1. A Supreme Constitutional Court shall be established by law to consider: (a) The constitutionality of laws, regulations, and other enacted rules. (b) The interpretation of the Basic Law and legislation. (c) Settlement of jurisdictional disputes which might arise between judicial entities and administrative entities having judicial jurisdiction. 2. The law shall specify the way the Supreme Constitutional Court is formed and structured, the operating procedures it will follow and the effects resulting from its rulings.”

It should be noted that constitutional oversight over laws and subsidiaries is only in countries that have rigid constitutions because the constitution is supreme over ordinary laws and subsidiaries, and when amending the constitution extraordinary and strict procedures are followed (Al-Sharqawi, 2007). However, there is no such oversight for flexible constitutions because the constitutions are at the same level as ordinary laws, whereby the legislature has the power to amend or repeal these constitutions (Drinóczy & Bień-Kacała, 2020).

In Palestine, the Supreme Constitutional Court has assumed oversight over the constitutionality of laws. This has led to achieve the supremacy of the rules of the Basic Law over all other legal rules, whether ordinary laws and subsidiaries. Besides, the Supreme Constitutional Court rules that “...., the application of constitutional oversight leads to the achievement of the principle of supremacy of the Basic Law of 2003. Therefore, the principle of supremacy of the Basic Law had strengthened of the principle of constitutional legality ...” (Ruling of the Supreme Constitutional Court, 2009).

Hence, the ordinary or subsidiary rules shall not be violated by the rules contained in the Basic Law, to ensure the application of the supremacy of the Basic Law and to prevent public authorities from violating constitutional restrictions and the limits of their jurisdiction (Ruling of the Supreme Constitutional Court, 2009).

Furthermore, the Supreme Constitutional Court ruled that “...., it is learned from the provisions of the Basic Law of 2003 that the court has the power to oversight the constitutionality of laws and regulations in an absolute way, and therefore the oversight includes laws issued by the Legislative Council and decisions by law issued by the President of the state in accordance with Article 43 of the Basic Law and that decisions that have the force of law that is not immune from the court’s oversight of its constitutionality, even if its promulgation is in light of the necessity that cannot afford delay, according to what jurisprudence settled, the application of this oversight leads to the realization of the principle of supremacy of the basic law, whose rules are superior and prevail over all legal rules in the state, whether legislation, regulations or decisions. Likewise, the strengthening of the principle of constitutional legality ...”.

The authors in this point highlight the legal problems mentioned earlier in the introduction and that the Supreme Constitutional Court has assumed oversight over the

constitutionality of laws. This has led to achieve the supremacy of the rules of the Basic Law over all other legal rules, whether ordinary laws or subsidiaries.

Therefore, this oversight leads to the realization of the principle of supremacy of the basic law, whose rules are superior and prevail over all legal rules in the state, whether legislation, ordinary laws, subsidiaries, or decisions. Similarly, the strengthening of the principle of constitutional legality.

V. Conclusion

It is clear from the foregoing that the Palestinian Basic Law of 2003 has adopted the principle of the supremacy of the Basic Law of 2003 over ordinary laws, subsidiaries within the state of Palestine. This is considered an application of the principle of the rule of law stipulated in the Basic Law of 2003 and is confirmed by the Supreme Constitutional Court in Palestine. Moreover, the governing system in Palestine is a representative democratic system, based on the principle of separation of powers as the Basic Law of 2003 expressly confirmed in Articles 2 and 6.

The authors reached the most important results, the most important of which is that the principle of the supremacy of the constitution or the basic law is superior to all legal rules in the state. The principle of the supremacy of the constitution is a manifestation of the principle of legality. Adopting the principle of the supremacy of the constitution over the constitutionality of laws would preserve and protect the principle of the supremacy of the constitution. Therefore, the authors recommended that governments that are not subject to adherence to constitutional rules shall abide by the principle of the supremacy of the constitution. The authors emphasise the need to explicitly mention the principle of constitutional supremacy or the supremacy of the basic law by adding a new provision to the Basic Law of 2003.

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