

## Assess the Seriousness of the Subargument of the Unconstitutionality of Laws

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### Abstract

*The process of assessing the seriousness of the sub-argument of unconstitutionality is a logical and detailed mental process the examination of the seriousness of the sub-payment by the trial judge is not without difficulty as it is subject to legal conditions and controls that require it to produce a logical result; the existence of the payment depends on the result of the discretionary process as it has a presence and a lack of if the payment is serious, it shall be referred to the Constitutional Court for completion of the proceedings. If the payment is not serious, the payment shall be null and void.*

**Keywords:** *Seriousness, Appreciation, Trial judge, Standard.*

### 1. Introduction

The system of postconstitutional subpayment for its importance may also be very risky in the fear of over-initiating constitutional proceedings without serious justification or sufficient and convincing reasons. It is therefore necessary to inform this instrument of certain limitations and controls to ensure that they are used in an acceptable and correct manner in such a way that the competent Constitutional Court does not have the difficulty of hearing non-serious cases, thereby impeding them from carrying out their work as required. If the trial judge argues that a statutory text or regulation is unconstitutional, the constitutional order shall not be referred directly to the competent Constitutional Court, but he must first make sure that the necessary conditions of payment are in place. The first of these conditions is that the defence should be serious, the trial judge assessing the seriousness of the sub-argument of unconstitutionality in accordance with the authority conferred upon him, and that's what we will discuss in this research, which will be divided into two requirements, the first requirement is devoted to examining the role of the trial court in assessing the seriousness of the sub-push of the unconstitutionality of laws.

### 2. Role of the Trial Court in Assessing the Seriousness of the Subsidiary Argument of Unconstitutionality.

Subject Court is the primary angle of referral of constitutional proceedings to the competent court (Supreme Constitutional Court, Federal Supreme Court), which examines the law applicable to the dispute before it and decides whether or not there is a constitutional defect (Zaki, 2004, p. 345 et), before elaborating on the trial judge's authority and role in assessing the seriousness of the defence, we must indicate what is

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meant by the assessment of the seriousness, which means that the trial judge verifies in accordance with his discretion that the payment before him is not intended to aggravate or prolong the dispute (Salman, 2015, p. 187). The assessment of the seriousness of the objection to the law or the text in question falls within the discretion of the trial court (Abdelbaset, 2002, p. 426 et); which initiates the preliminary assessment of the content of this payment and examines the integrity of its foundations if the merits court neglects the defence and fails to say its word on its seriousness and proceeds with the substantive dispute, this demonstrates her denial of seriousness, with which her extradition is at the same time a prerequisite for the Constitutional Court's communication, if the trial court does not adjudicate on the seriousness of the unconstitutional plea before it, the decision not to accept it is necessary (Mohammed, 2007, p.94).

Jurisprudence has been divided into two aspects regarding the impact of the dispute on the foreseeable proceedings s constitutional case, whether the effect was a formal or substantive breach of the substantive case, based on the fact that both are considered to be contrary to the provisions of the Constitution, hence the inclusion of formal infractions within constitutional control is essential (Ramadan, 1998, 352); Rather, the examination of formal matters relating to the law and its promulgation is at the heart of constitutional control (Khalaf, 2011, p. 73). While another aspect of the jurisprudence considers that the trial court may not refer appeals relating to a formal disadvantage of the law, on the grounds that the Constitutional Court assumes constitutional control when legislation is objectively flawed by the Constitution rather than formally, this is because if the formalities provided for in the Constitution are not met, the trial judge must therefore not apply it (Abdelwahab, 1990, p. 385). Through the extrapolation of past opinions, we tend to weigh a view that takes formal and objective irregularities closer to reality and more to constitutional stability.

As to the quality and seriousness of the legislation that the trial court is competent to examine because of its constitutional defect as a result of a defence by a litigant, some jurisprudence considers that the trial judge examines and refers constitutional proceedings concerning all constitutionally flawed laws, whether the original laws of the legislature or the subsidiary legislation of the executive branch (Khalaf, 2011, p. 76). Others consider that the jurisdiction of the trial court is limited to the examination of appeals concerning laws issued by the legislature. The administrative regulations issued by the executive branch are outside the framework of the examination of the trial court and may not be referred to the competent court, because from the point of view of jurisprudence and the administrative judiciary, these decisions are administrative decisions and therefore subject to the control of legality, revocation and compensation. Thus, control of this type of regulation is legitimate and not constitutional, and the trial court may not therefore refer it to the Constitutional Court and it was constitutionally flawed (Poet, 2005, p. 804).

Perhaps the question that comes to mind here is whether the trial court's decision on the refusal of payment is (final and categorical), and how far can this decision be appealed? The Egyptian legislator argued that the trial court's decision to assess the seriousness of the defence was not final and could be appealed to the higher court. That is, if the plea is made before an ordinary court, the appeal against its decision of lack of seriousness to the Court of Appeal or cassation, if the defence is in the field of administrative justice, the appeal shall be before the Supreme Administrative Court or the Administrative Court. In turn, these courts also uphold the decision of the trial court, thereby rendering the judgement of non-seriousness final and categorical; it reverses the judgement of lack of seriousness and therefore makes a serious claim and refers the matter to the Supreme Constitutional Court (Syed, 2009, p. 385). Article 29 (2) of the Supreme Constitutional Court Act No. 48 of 1979 stipulates that the period of time within which the appellant can bring proceedings before the Constitutional Court shall not exceed three months from the date of the trial court's judgement on the merits.

Article (58) of the UAE Federal Supreme Court Act No. (10) of 1973 stipulates that: "... If the court rejects the plea, the refusal must be justified, and the persons concerned must appeal against it together with the judgement rendered on the merits of the case before the court competent to hear the appeal against that judgement where the appeal is permissible". It is clear from the above text that the UAE legislator has authorized an appeal against the decision to reject the payment issued by the trial court with the judgement rendered on the merits of the case whenever there are grounds for appeal.

This is confirmed by the Iraqi legislature in article 18/5 of the Rules of Procedure of the Federal Supreme Court No. (1) of 2022, which stipulates that: "The decision of the trial court to dismiss the case or not to rule on it shall be subject to appeal to the Federal Supreme Court within seven days from the date of its rejection or the expiration of the period specified in section III of this article." Thus, the Iraqi legislature in the Rules of Procedure of the Federal Supreme Court has avoided the legislative deficiency of article 4 of the old Rules of Procedure of 2005, which is free of limiting the time within which the appellant may review the Federal Court. This is a good course calculated by the new system.

Is it possible for the Court to reverse its previous assessment of the seriousness of the case and to continue pursuing and adjudicating the case? It is clear from the research that once the trial court has assessed the sub-payment and examined its seriousness and rendered its decision thereon, it must abide by its jurisprudence pending the Constitutional Court's ruling on the constitutional question. With the exception of cases where the interest in the constitutional action is precluded or the opponent leaves his or her substantive claim, as well as in the case of the claimant's abandonment of his or her defence (Mansour, 2007, p. 99).

### **3. Criterion of seriousness of subsidiary objection to unconstitution.**

Having demonstrated the role of the trial court in assessing the seriousness of the sub-argument of unconstitutionality before it, and by so doing having discretion in assessing whether or not the case is serious, If the trial court is satisfied that the subsidiary objection is not serious or the purpose of the appeal is to delay the proceedings only then the court can not respond to the appellant's argument of unconstitutionality, before going into the details and criteria of this authority, we must indicate what discretion is defined as "a subjective state of mind emanating from the conscience and reasoning of a pure judge, by which he reveals the truth by assessing and judging the evidence presented in the proceedings". In other words, the freedom left to a judge by law, in order to choose what he sees as the most fair set of options at the evidentiary level, the court must understand the importance of this authority, its gravity and its right home in the form of justice as a mandate and responsibility, which must be used to optimize the legal use to achieve the lawmaker's goal (Dammad, 2017). The judge's discretion has several characteristics, inter alia, that it is a legal authority based on a legal text, binding on the judge and may not be derogated from on the grounds that there is no legal provision or the text is ambiguous (Husseini, 2013).

Through this, we are questioned whether the granting of discretion to the trial court in assessing the seriousness of the argument of unconstitutionality is in breach of the principle of the specific specialization of constitutional oversight? The jurisprudence has disagreed in answering this question. Part of the jurisprudence criticized this power given to the judge in assessing the seriousness of the sub-payment while the legislator did not set a decisive criterion for whether or not the payment was serious, making the trial judge controlling the constitutional question's access to the competent constitutional court, and thus the participation of the trial judge in the work of the constitutional judge is in violation of the principle of the specialization of constitutional oversight, which makes the constitutional court the sole competent body to adjudicate on constitutional matters; in

addition, it restricts individuals' right of recourse to that court, and in order to avoid this, some have proposed the introduction of automatic referral of the Constitutional Court with a view to reducing the abuse of the unconstitutional plea and eliminating the phenomenon of malicious defences (Badawi, 1971, p. 160).

Another aspect of the jurisprudence held that the judge's work and examination of the seriousness of the argument of unconstitutionality was not an interference in the adjudication of the subject of constitutionality, nor was it a breach of the specialization of constitutional oversight or a narrowing of its scope, since the task of the trial judge was limited to ascertaining the seriousness of the submission (Al-Mutairi, 2008, p. 327).

In turn, we support the latter's view and stress the importance of the requirement of a serious argument of unconstitutionality in order to prevent the Court from being overwhelmed by malicious arguments aimed at impeding it from performing its functions properly, and in order to ensure the prompt disposition of the cases before it. Among the practical steps that the trial judge must take within his discretion are the following:

A. To explain the uncertainty of the unconstitutional aspect: the trial judge must know as soon as there is doubt in the text before him that it is contrary to the provisions of the Constitution, the argument here is serious with conditions and other factors; in the event that the constitutionality and unconstitutionality are equal before him, neither is likely to prevail, the trial judge must weigh unconstitutionality, as suspicion is interpreted in her favour even if the original legislation is to be accompanied by the presumption of constitutionality.

B. Clear and accurate proof of subsidiary payment in the transcript of the hearing: if the argument of unconstitutionality has been made orally, the trial judge must ensure that the defence is clearly evidenced in the transcript of the hearing; the text in question should indicate in full the details of the payment in paragraph and number, although it is amended to indicate the number of the amendment with the Amendment Act so that the payment is not anonymous (Salman, 2015, p. 215). There have been several doctrinal attempts to determine the criterion for assessing the seriousness of the invocation of unconstitutionality. In this regard, the jurisprudence has been divided into several directions between an enlarged and narrowed power of the trial judge to assess the seriousness of the invocation of unconstitutionality and each particular perception of the criterion on which that authority is founded. Therefore, most jurisprudence for the purpose of establishing the grounds for the courts' assessment of the seriousness of the argument of unconstitutionality tended to consider the imperative of the unconstitutional text for adjudicating the original case as the basis for the seriousness of the defence, In addition to another basis linked to the compatibility of the text in question with the provisions of the Constitution, some jurisprudence has argued that the meaning of the seriousness required by the legislature is devoted to two fundamental issues. First, that the determination of the constitutional question should be a product, i.e. that the unconstitutional law is related to the subject of the dispute, second: that the law's compatibility with the Constitution may vary in views (Poet, 2005, p. 580). In our view, the advanced jurisprudence has merged the interest clause in the defence of unconstitutionality with the seriousness of the payment and I consider it to be one of the elements necessary to assess the seriousness of the payment, so we, too, do not subscribe to this view.

As a result, two jurisprudential trends have emerged to assess the seriousness of the payment, the first: The idea of expanding the trial judge's authority on the conduct of the preliminary evaluation of the seriousness, this trend was based on his idea of drawing the seriousness of the defence on the Court's reliance on the apparent examination of the contested text, is it taken in this direction that the judge's basket was overextended to appreciate the seriousness of the push because he relied on the weighting of unconstitutionality as a criterion for assessing seriousness, as a result, the trial judge

exceeds the limits of his jurisdiction and interferes in the jurisdiction of the Constitutional Court (Annan, 2021, pp. 338 et).

As for the second direction: his view was the opposite of the previous one, Taking into account the idea of narrowing the trial judge's authority to conduct a preliminary assessment of seriousness, they went on to say that one officer should be relied upon to appreciate the seriousness of the defence and this officer related to the existence of doubt about the constitutionality of the texts motivated by their unconstitutionality, although not prejudiced by the jurisdiction of the Constitutional Court, the term "doubt" about the constitutionality of the text is broad and flexible, which may lead to its misuse, the judge assessing the seriousness of the defence is the same as the trial judge, who assesses whether the text's constitutionality is in doubt (Rajab, 2008, p. 58 et).

The foregoing shows us the inability of jurisprudence to establish a decisive criterion for regulating the authority of the trial judge to assess the seriousness of the sub-payment, so we have to show some jurisprudence and practice on the criterion of assessing the seriousness of the argument of unconstitutionality, Consequently, the criterion for assessing the seriousness of subsidiary payments is based on two key elements: the preliminary assessment of constitutional challenges and the lack of depth on the constitutional issue (YIF, 2021, p. 115 et). However, these two elements adopted as a criterion for estimating the seriousness of the subpayment appear to be correlated and complementary to each other (Rajab, 2008, p. 119).

From the foregoing, it is clear to us that the terms initial evaluation and lack of depth, although they are more clear than the term doubt about the constitutionality of the text, however, they do not resolve the issue of the seriousness estimation criterion because the trial judge can still apply his own understanding of these two terms when evaluating the seriousness of the sub-push. In summary of the above, the issue of defining a decisive criterion for assessing the seriousness of the payment is still the subject of jurisprudential and judicial disputes, Therefore, we hope that the legislator will strive, through jurisprudential and judicial studies and interpretations, to resolve the controversy and explicitly provide for a decisive criterion to assess the seriousness of the payment.

#### **4. Conclusion**

First: Results:

1. By assessing the seriousness of the subsidiary argument of unconstitutionality, the trial judge shall, in accordance with his discretion, ascertain that the defence before him is not intended to aggravate or prolong the dispute. The assessment of the seriousness of the defence directed at the law or the text in question shall include the scope of the discretion of the trial court, which shall conduct a preliminary assessment of the content of the defence and examination of its grounds.
2. Acceptance of the invocation of unconstitutionality should provide a set of legal conditions, the most important of which is that the payee has a legitimate interest in its payment. "legal, personal, listing and status", as well as requiring a judiciary independent of the executive and legislative branches in order to achieve the principle of the rule of law, and that the argument of unconstitutionality be a serious one in the sense that it is a product of the substantive proceedings, and not a vexatious one aimed at disrupting the course of the original proceedings.
3. It is the trial court that has the power to examine the individual's appeal in terms of its seriousness. If it is established that the defence is serious, it shall refer the case to the Federal Supreme Court or suspend it until the petitioner initiates the constitutional action; if the payment is not serious, it may decide to refuse the payment and proceed

with the original proceedings. Appeal to the Federal Supreme Court within seven days of its dismissal or the expiration of the prescribed period.

4. The trial judge's discretion to assess the seriousness of the defence was limited to a narrow scope, which required him to draw seriousness based on data concerning the connection of the contested text to the original claim and to have doubts about the constitutionality. and that this doubt be interpreted in favour of unconstitutionality in addition to merely a prima facie search for seriousness without delving into the constitutionality of the text or not; Taking into account the jurisprudence set forth therein, and the absence of the officer or the specific criterion of authority of the trial judge in assessing the seriousness of the defence opens up the possibility of interpreting the use of such authority from one judge to another.

Second: Recommendations:

1. We recommend that the Federal Supreme Court include in its rules of procedure a provision setting out the requirements of the seriousness of the invocation of unconstitutionality, that the payment be effective in adjudicating the merits of the case, that the question of the constitutionality of the law be questioned, and that the Federal Supreme Court establish a critical criterion for assessing the seriousness of the payment by the trial judge in order in order to avoid divergent jurisprudence.

2. We recommend that the Federal Supreme Court amend the term of appeal contained in article 18/V of the Rules of Procedure of the Federal Supreme Court No. 1 of 2022, with a view to completing the description of the word to clarify further its meaning and to expressly demonstrate this in the text and make the phrase "the decision of the trial court to dismiss the case or not to rule on it subject to discriminatory appeal to the Federal Supreme Court Court...".

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