

# Advocating the Unconstitutionality of Laws and Regulations Before the Regular Judiciary

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## Abstract

It should be noted that this study will deal with research and analysis is one of the most important legal issues is to push the unconstitutionality of laws and regulations before the regular judiciary as this study aims to determine the concept of pushing unconstitutional and procedures and controls to exercise this right to pay. Legislation varied between countries in regulating the methods of judicial control over the constitutionality of laws and regulations, where part of the legislation went to limit this control through the original case, which may be exercised either by specific authorities in the state only or by allowing individuals to bring this case directly before the court In addition to the original lawsuit, the lawsuit was taken by one of the litigants in connection with a case before the Court of First Instance, while others turned to a direct approach to censorship of unconstitutionality either by addressing the Constitutional Court with suspicion. L Direct exercise of this control or direct response by the court of first instance. The Jordanian legislator, through the constitutional amendment and after the establishment of a constitutional court competent to control the constitutionality of laws and regulations under the law of the Constitutional Court, has specified ways to initiate the constitutional lawsuit, which is either through the original lawsuit and initiated by specific authorities in the state without allowing individuals to initiate, or be through payment By one of the litigants in connection with a lawsuit either the judiciary.

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## 1. Introduction

Constitutional rules occupy a higher status than any legal order. This supremacy of constitutional rules needs mechanisms to ensure its implementation and control over non-violation, through regulating the constitutionality of laws and Orders in order to ensure that the legal rule or legal system does not violate the higher constitutional norms, which in turn constitutes an inevitable consequence of the supremacy and rigidity of the Constitution. Legislation passed in contravention of the Constitution is considered unconstitutional and therefore no law should be passed contrary to the provision of the Constitution.<sup>(1)</sup>

In this context, some constitutions have adopted abolition control as original and some have adopted abstinence control. A number of them have formed a competent council that exercises political control over the issuance of the law, as in France, and some of them have established a constitutional court to look into the conformity of laws issued with the Constitution in case of challenging the objection to unconstitutionality, as in Jordan and Egypt.

Control is either in the form of political control prior to the issuance of the law or the judicial control after its issuance. As for judicial control, we find that Jordanian legislation, in the exercise of this control over the constitutionality of laws and orders before 2012, was exercised by the regular courts of various types and degrees through the refrain control, which has been characterized by the fact that the verdict has a relative authenticity, the scope of its application is limited to the facts of the case in which it has been issued. Although the Jordanian Constitution of 1952, prior to the last amendment, has not contained any explicit provision on the control of the constitutionality of laws and orders, it has contained a set of legal rules related to the organization of the judiciary, which was considered the constitutional basis that gave the Jordanian courts the right to exercise control over the constitutionality of laws and orders. Article (27) of the Jordanian Constitution stipulates that the judiciary is independent and shall be administered by the courts of all kinds and degrees. Also, article (97) of the Constitution stipulates that judges are independent and have no authority over them except in law.

## 2. What is the Objection to Unconstitutionality of Laws and Orders

One of the established legal principles of jurisprudence and justice is that conventions rank above the rest laws and orders in force in accordance with the legislative hierarchy and pyramid. As they constitute fundamental laws in the country, their respect requires that the legislator shall observe the principle of the supremacy of the Constitution while enacting laws, orders in conformity with the provisions and rules of the constitutional text,

<sup>1</sup>. Dr. Ali Rasheed Abu Hujaila, Control of the Constitutionality over Laws in Jordan, first edition, 2004, page 8

and ensure that it does not violate them<sup>(1)</sup>.

Thus, the idea of verification of the constitutionality of orders derives its importance from the fact that it enshrines the principle of the supremacy of the Constitution, which requires that its provisions and principles should be guaranteed and respected in all legislation below it, as the highest law ranked among the legal rules in the State<sup>(2)</sup>. Constitutional rules are the real guarantor of the rights and fundamental freedoms of individuals, which makes it necessary to preserve them, and to control all legal rules that contradict, contravene and are inferior to them<sup>(3)</sup>.

Judicial control over the constitutionality of orders is a legal control, which is carried out by a judge whose task is to examine the extent to which this law or order conforms to the provisions of the Constitution, taking into account the supreme law of the State, and whether the authority empowered to enact the law or order has complied with the limits established by the Constitution or has overtaken and left them<sup>(4)</sup>.

### 3. The Concept of the Objection to Unconstitutionality of Laws and Orders

The scope of constitutional control in Jordan extends to existing laws and orders. Law and order are common in that they contain general and abstract legal rules that are equally applicable to all; however, both differ in terms of issuance. The law is issued by the legislature while the order by the executive power. If the law is issued in contravention of the provisions of the Constitution, or if the order includes anything contrary to its principles and provisions, the Constitutional Court shall extend its control over such legal rules and shall determine them as unconstitutional<sup>(5)</sup>.

In the event that the law or the order is contrary to the Constitution, the Constitutional Court Act in Articles 9 and 11 specifies exclusively the means of initiating the constitutional proceedings, including the argument in the regular courts.

Indirect objection, as a means of triggering constitutional control, is the means by which the legislator has granted the right to parties to a case that is pending by objection to unconstitutionality. The law has given litigants the right to argue that any provision in the law or in the applicable order is unconstitutional in a case pending before a court or body with jurisdiction. In this way of controlling the constitutionality of laws and orders, it is necessary to go through one or multiple judicial stages before the appeal reaches the Constitutional Court. The objection to unconstitutionality has been therefore called indirect appeal, in order to distinguish it from direct appeal practiced by political bodies directly to the Constitutional Court<sup>(6)</sup>.

Article (11) of the Constitutional Court Law stipulates that (A. Any party to a case pending before the courts of all kinds and degrees shall be entitled to argue the unconstitutionality of any law or order applicable to the subject matter of the case ...).

The Jordanian Constitutional Court, in a judgment, has the meaning and significance of objection to unconstitutionality in a decision, stating that: (The jurisdiction of the Court in appeals and objections to unconstitutionality is limited to exercising the right of control over the constitutionality of laws and orders in force, as this control aims to safeguard the Constitution and protect it from violating its provisions as it is the supreme basic law that establishes the rules and principles upon which the order of government and the protection of rights and freedoms are based, there is no room for arguing before the court about the necessity of weighing a law or a decision of interpretation that has the force of law over another law that contradicts it, as it is for the ordinary judiciary to hear a case in which a particular dispute arises. The competence of the Constitutional Court to control the constitutionality of laws and orders shall be entrusted with the provision of the law or order that are contrary to a constitutional text or principle, and shall not exceed this to adjudicate in cases of conflict between legislations that have the same legal status or legislations, some of which are more likely to be superior to others)<sup>(7)</sup>.

### 4. Conditions of Objection to Unconstitutionality of Laws and Orders

The conditions for submitting an objection to unconstitutionality are that the law or order that is appealed by its unconstitutionality must be applicable to the dispute before the trial court, so that the dispute cannot be

<sup>1</sup>. Nawar Bedair, Judicial Control over the Constitutionality of Laws, (2017), Research published in Birzeit Legal Studies Series, Comparative Encyclopedia of Arab Constitutional Law, Faculty of Law and Public Administration, Birzeit University, Beirut, p. 4.

<sup>2</sup>. Dr. Faisal Shatnawi, Dr. Salim Hatamleh, Judicial Control over the Constitutionality of Laws and Orders before the Constitutional Court of Jordan, (2013), research published in the Journal of Sharia and Law Studies, University of Jordan, Vol. 40, No. 2, p. 617.

<sup>3</sup>. Ramzi Al-Shaer, The General Theory of Constitutional Law, 5th Edition, 2005, Dar Al-Nahda Al-Arabiya, Cairo, p. 624.

<sup>4</sup>. Zaid Ahmad Al-Kilani, Challenging the Constitutionality of Laws and Orders, Comparative Study, Master Thesis, An-Najah National University, (2012) Nablus, Palestine, p. 12.

<sup>5</sup>. Dr. Laith Kamal Nasraween, Constitutional Court Control over Laws and Orders in Jordan, (2016), research published in the Journal of Sharia and Law Studies, University of Jordan, Volume 43, No. 3, p. 2003.

<sup>6</sup>. Dr. Laith Kamal Nasraween, Constitutional Court Control over Laws and Orders in Jordan, op. Cit., P. 2003.

<sup>7</sup>. Decision of the Jordanian Constitutional Court No. 5/2014, dated 22/1/2015, Kastan Publications

adjudicated without demonstrating the constitutionality of that provision<sup>(1)</sup>. An appeal submitted on objection to unconstitutionality of a provision that is not applicable to the dispute is considered a form of non-seriousness that requires the rejection of the request before it is referred to the Constitutional Court<sup>(2)</sup>.

In this regard, the Jordanian Constitutional Court ruled that paragraphs A and C / 1 of Article 11 of the Constitutional Court Act stated that the legislator had stipulated that in respect of the unconstitutionality of any law, order or article therein, it should be applicable to the subject matter of the original case through which the objection to unconstitutionality has been raised. This legal requirement must be adhered to and must be available in the unconstitutionality argument through an original case on the grounds that, as it is known in the definition of the condition, there is no condition except by it<sup>(3)</sup>.

In order to accept the objection to unconstitutionality, there must be an interest for the appellant, since the objection to unconstitutionality is not accepted without the abused right holder or the legal status; the appellant must have the status of a litigant in the substantive case, in order to be competent in the constitutional case<sup>(4)</sup>.

In order to accept the payment, there must be a link between the interest in the constitutional case and the interest in the substantive case, so that the ruling in the constitutional case would affect the final applications in the original case. The Egyptian Constitutional Court has defined the interest to accept the constitutional case in many of its judgments. It ruled in case No.: 10 of 13 judicial years as: The direct personal interest which in order to be fulfilled, it is not enough that the challenged legislative text should be contrary to the Constitution, but that it, by applying it to the plaintiff, must directly harm him<sup>(5)</sup>.

Verification of the existence of the interest by the trial court does not mean that the Constitutional Court shall be deprived of its right to verify it. The Constitutional Court has the right to verify for itself the availability of an interest requirement in the objection to unconstitutionality. If the Constitutional Court is not satisfied with the requirement of interest, it shall have a response to the objection to unconstitutionality, in contravention of the opinion of the trial court on the fulfillment of the interest requirement<sup>6</sup>. In its judgment in case No. 1 of 2014, the Jordanian Constitutional Court has extended its control over the availability of the requirement of interest after the Court of Cassation has decided to refer the objection to unconstitutionality to it for the availability of the conditions of referral such as interest, and the seriousness of the appeal filed. So, it has ruled to dismiss the appeal of objection to unconstitutionality in form for lack of interest. This is also what the Egyptian Supreme Constitutional Court ruled in case No. 146 of 26 Constitutional Juridical year, saying that the examination of the requirement of interest before the trial judge does not restrict the Constitutional Court as both the substantive and the constitutional cases are independent of each other and do not unite in their acceptance terms according to law<sup>(7)</sup>.

## 5. The nature of Objection to Unconstitutionality before the Regular Judiciary

The revocation control has taken the form of the establishment of a Constitutional Court whose task is to control the constitutionality of the laws and orders in force and to interpret the provisions of the Constitution. A new chapter has been added to the Jordanian Constitution, as amended in 2011, which is the fifth chapter devoted to the establishment of the Constitutional Court. The Constitutional Legislator's choice of Chapter V of the Constitution to incorporate provisions on the establishment of the Constitutional Court was not accidental. It wanted from this position to separate the fourth chapter devoted to the executive power and the sixth chapter devoted to the legislative power, in order to emphasize the status of the Constitutional Court among the three authorities in the state. The Constitutional Legislator has also established a chapter on the Constitutional Court, which did not include its provisions in Chapter VII of the judicial power to ensure that the Constitutional Court is not part of the judicial power, and does not apply to the general provisions that apply to other judicial courts in Jordan which are concerned with appointing judges, following up all their functional affairs, and ending their relationship with the judicial facility<sup>(8)</sup>.

We find that the text of Article XV of the Constitutional Court Law has rendered the ruling of the Constitutional Court final and binding on all authorities, and in terms of its effectiveness, it is considered to have direct effect unless the verdict sets another date for its enforcement. If the text decides that the original law or order is unconstitutional, it shall be deemed null and void for violating the Constitution in accordance with the

<sup>1</sup>. Dr. Faisal Shatnawi, Dr. Salim Hatamleh, Judicial Control over the Constitutionality of Laws and Orders before the Constitutional Court of Jordan, *op.cit.*, P. 624.

<sup>2</sup>. Dr. Sabah Mousa Al-Momani, Control of the Constitutionality of Laws in Jordan, Analytical Comparative Study in the Light of the Constitutional Amendments of 2011, Ph.D. Dissertation, International Islamic Science University, (2013) Amman, Jordan, p. 38.

<sup>3</sup>. Decision of the Jordanian Constitutional Court No. 1/2014 dated 15/5/2014, Kastass Publications

<sup>4</sup>. Nawar Bedair, Judicial Control over the Constitutionality of Laws, *op.cit.*, P. 9.

<sup>5</sup>. Dr. Adel Al-Tabtabaei, Kuwait Constitutional Court, Scientific Publishing Council, (2005) Kuwait University, Kuwait, p. 427.

<sup>6</sup>. Mohamed Salah El-Sayed, Constitutional Court in Egypt in the Light of the Law and Judgments of the Supreme Constitutional Court, 3rd edition, Dar Al-Nahda Al-Arabiya, Cairo, p. 91.

<sup>7</sup>. Constitutional Court Decision No. 1/2014 dated 15/5/2014, publications of Kastass.

<sup>8</sup>. Dr. Laith Kamal Nasraween, Constitutional Court Control over Laws and Orders, *Ibid.*, P. 1999.

judgment issued from the date of the judgment, but if the decision issued specifies another date for its enforceability, then it shall be considered invalid from the date specified in the judgment.

The same article stipulates that if the text of unconstitutionality *res judicata* imposes a penalty, the execution of the judgment based on this text must be suspended and its penal effects terminated.

Therefore, the objection, although its direct aim is not to apply the law or the order contrary to the Constitution to the pending case, the ruling of the Constitutional Court is aimed at abolishing it. Originally, judicial judgments are revealing, not originating, and therefore judgments issued by the Constitutional Court, regardless of the manner in which the case is brought before it, reveal the case of unconstitutionality. The effect of the unconstitutional judgment issued under a case that has been transmitted on the basis of an objection that is not limited to the litigants in the case for which the objection has been filed, goes to all due to the repeal of the unconstitutional law or order<sup>(1)</sup>.

As to whether it is a sub-objection of the case raised or not, we find that many of the jurisprudence of the Jordanian Court of Cassation has considered that the objection to unconstitutionality is not one of the sub-objections of the substantive case, which does not require a special power of attorney, and that the objection to unconstitutionality is nothing more than an indirect appeal or an indirect original claim through the substantive case for the purpose of annulling the laws, orders or articles that are challenged as unconstitutional. Whereas the "objection to unconstitutionality" is, in fact, an indirect challenge to the unconstitutionality (an original, indirect case) through the substantive case for the purposes of invalidating the provisions alleged to be unconstitutional, and the (objection to unconstitutionality) has an entity independent of the substantive case in terms of the subject, purpose, and competent authority (the Constitutional Court) to consider and adjudicate<sup>(2)</sup>.

## 6. Procedures of Objection to Unconstitutionality before the Trial Court

Indirect objection, i.e., the objection to unconstitutionality of the case, as previously stated in the first section, is to grant the litigants the right to object to the unconstitutionality of any provision in the law or the order applicable to a case pending before a court or tribunal with jurisdiction. In this way of controlling the constitutionality of laws and orders, it is necessary to go through one or multiple judicial stages before the appeal reaches the Constitutional Court<sup>(3)</sup>. The objection to unconstitutionality has been therefore called indirect appeal, in order to distinguish it from direct appeal practiced by political bodies directly to the Constitutional Court<sup>(4)</sup>.

The Jordanian legislator has decided this right of objection for litigants under the law of the Constitutional Court; we find that the Egyptian law has taken the indirect method of challenging the unconstitutionality, where Article (29) of the Egyptian Supreme Constitutional Court law allows the litigants during the hearing of a case before a court or judicial bodies to argue that a law or order is unconstitutional. If the court or tribunal considers that the objection is serious, it will adjourn the hearing of the case and set to who has raised the objection a deadline of three months for the case to be brought before the Supreme Constitutional Court. As for the procedures to be followed for the purposes of the practice of indirect objection to unconstitutionality in Jordan, we find that the law of the Constitutional Court has required the existence of a case pending before the trial court regardless of the degree or type of this court, and whether it is a Magistrate's Court or a Court of First Instance and whether the case is civil or criminal; the text is absolute and can be raised before the regular or special courts.

Then, one of the parties to the dispute raises the issue of the unconstitutionality of the law or order applicable to the case by way of objection before this court which is hearing the dispute by means of a written pleading. The court hearing the case, if it finds that the objection is serious, should refer it to the Court of Cassation as the highest judicial body in Jordan for the purpose of deciding whether to refer it to the Constitutional Court<sup>(5)</sup>.

The legislator has also given the trial court the discretion in assessing the seriousness of the objection and consequently refers the objection to unconstitutionality to the Court of Cassation for the purpose of deciding whether to refer the objection to the Constitutional Court. Article (13 / C / 3) of the Constitutional Court Law deals with how the Court of Cassation convenes for the purpose of determining the referral order. The Court of Cassation shall convene with a body of at least three members, and shall render its decision within thirty days from the date of receipt of the case from the court hearing the case. If the trial court agrees to refer to the Constitutional Court, it shall inform the parties to the dispute.

## 7. The Role of the Trial Court in Controlling the Constitutionality of Laws and Orders

The role of the trial court hearing the case which one of its parties submitted the argument that the law or order is

<sup>1</sup>. Dr. Mohammed Abdullatif, *Procedures of Constitutional Judiciary*, Dar Al-Nahda Al-Arabiya, 1989, p. 261,262

<sup>2</sup>. See *Discrimination of Rights No. 2375/2015* dated 25/6/2015, *Discrimination of Rights No. 2590/2014* dated 11/5/2016 Kastar Publications.

<sup>3</sup>. Dr. Zaid Ahmad Kilani, *Challenging the Constitutionality of Laws*, op.cit., P. 57.

<sup>4</sup>. Dr. Laith Kamal Nasraween, *Constitutional Court Control over Laws and orders in Jordan*, op. Cit., P. 2003.

<sup>5</sup>. Dr. Ali Khattar Shatnawi, (2013), *The Jordanian Constitutional Order*, Ibid., P. 136.

unconstitutional and includes the formal and substantive conditions required and stipulated by the law in the provisions of Article 11 of the Constitutional Court Law, is reflected in the exercise of the delegated authority in verifying, first, the availability of capacity and interest in the objection provider. The prevailing view is that the interest is the benefit to the plaintiff from the judgment issued in his favor regarding his requests or defenses, considering that the interest in this sense is the control to ensure the seriousness of objection and not deviate from the purpose set by law and because it is a means of protecting rights, it is therefore the duty of the trial court to verify the availability of interest<sup>(1)</sup>.

The role of the trial court does not stop at this point, but the clarity and effectiveness of the trial court show in activating the control of the constitutionality of laws and orders in assessing the seriousness of the objection raised, because there is no clear definition of this seriousness, which entails referring the case to the Court of Cassation to be referred to the Constitutional Court; there are also no specific controls on which the Court will assess the seriousness of the objection. The Jordanian legislator merely stipulated that objection to constitutionality should be serious and this makes research in this seriousness one of the necessary things in the scope of our study.

Jurisprudence differed in determining what is meant by seriousness in this regard; part of the jurisprudence went to consider that seriousness is not aimed at merely prolonging the pending case, and if the judge finds that this objection leads to prolong the dispute, he does not consider this objection and decides that it is not serious and excluded<sup>(2)</sup>.

After the trial court verifies the availability of seriousness, it decides to suspend the proceedings of the pending case and refer the objection to the Court of Cassation. In this regard, the referral decision issued by the trial court must be caused, the seriousness of the objection must be stated, and the reasons for the court's conviction of its seriousness must be shown. If the decision of the trial judge is without these conditions and reasons, this is a reason by the Court of Cassation for lack of seriousness of objection, and thus the Court of Cassation of Jordan has ruled: "The appellant of unconstitutionality must clearly specify the scope of the objection; and which Supports his claim that the law is applicable to the case and has directed his violation to the Constitution and that the court hearing the case, after it becomes clear that the objection to unconstitutionality is serious, should stop considering the case and refer the case to the Court of Cassation for the purpose of deciding whether to refer it to the Constitutional Court. In reference to the decision of the Tax Appeal Court mentioned earlier, it turns out that it was free of causation and did not mention the requirements of the aforementioned article, and was free of the statement of seriousness and the conviction of the court to do so. Since our court has jurisdiction to refer or reject an appeal to the Constitutional Court, our Court considers that the conditions for referring the appeal to the Constitutional Court are not met.

## 8. Conclusion

The establishment of the Constitutional Court is a qualitative addition in the Jordanian judicial order to achieve the principle of the supremacy of the Constitution. It should be said that the Jordanian constitutional judiciary is a judiciary that extends from the time of the Emirate because of the existence of a special body to interpret the Constitution and laws.

When the latest constitutional amendments were issued in 2011, the Jordanian legislator tended to emphasize the political balance between the authorities and issued the Constitutional Court Law No. 15 of 2012 establishing the Jordanian Constitutional Court.

Thus, one of the most important fruits of the 2011 constitutional amendments has been that Jordan established an independent constitutional judiciary, the Constitutional Court, to control the constitutionality of laws and orders in force and interpret the provisions of the constitution.

After the control of the constitutionality of laws and orders in Jordan has been exercised by political bodies represented by the Higher Council for the Interpretation of the Constitution and the Office for the Interpretation of Laws indirectly, and by judicial courts of various grades and types frequently through the abstinence control, an independent judiciary has emerged in Jordan under the Constitution, exercising the revocation control in the face of any legal provision proving to be unconstitutional, so that an unconstitutional verdict shall have erga against all authorities.

Through this shift in the nature of control over the constitutionality of the orders, the Jordanian constitution has created a real guarantee for the protection of public rights and freedoms, through the constitutional case, which is either through the original case or indirect objection in relation to an existing case.

Through this study, we dealt with the issue of objection to unconstitutionality before the regular judiciary, its conditions and controls in addition to the role of the trial court.

<sup>1</sup>.Awad al-Zu'bi, op.cit., P. 444.

<sup>2</sup>. Dr. Ali El-Baz, Control of the Constitutionality of Laws in Egypt, the Egyptian University House, Alexandria, 1978, p. 556.



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