Admissibility conditions of a constitutional action and its restrictions on the exercise of judicial review in the Egyptian legal system

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Abstract

Constitutional action, like any other action, must satisfy certain conditions, and while there are common and general conditions applicable to all types of actions, there are special conditions that are only relevant to constitutional action due to its special nature. Therefore, this paper covers the admissibility conditions of constitutional action in the Egyptian legal system. It also endeavours to study the limitations and restrictions on the exercise of the judicial review over the constitutionality of laws. This paper highlights on the principle of presumption of constitutionality of laws through Egyptian legal system.

Keywords: Actuality of plea, Admissibility condition, Capacity and standing, Condition of interest and the principle of presumption of constitutionality, Constitutional action

INTRODUCTION

Conditions of Capacity and Standing in the Egyptian System

What is meant by capacity as a condition for the suit is positively attributed to the party having the right in the suit and negatively attributed against whom the right is claimed. Thus it is a differentiation of the personal aspect of the right in the suit, and therefore requires the presence of a strong connection between the parties to the suit and its subject (Muhammad ‘Abd al-Salam Mukhlis. (1981). Nadhariyyat al-maslahah fi da’wa al-ilgh”, Cairo: Jami’at ‘Ayn Shams. at 250).

Some writers refer to the condition of “standing” as direct personal interest, but in reality there appears some distinction between personal interest and capacity within the meaning furnished earlier. The suit could bring the person filing it a personal interest and yet his capacity for filing the suit could be negated. Thus the wife who, within the lifetime of her husband, requests the nullification of a disposition which has been carried out by her husband, might have a personal interest in such nullification but has no capacity for filing the suit because she is not the holder of the right that is requested to be protected. This is because the rights of a wife against the property of her husband do not arise until after his death (Nabil, 1981).

There is a connection between capacity and interest in a constitutional suit that appears from the method of filing it, since the plea of unconstitutionality of legislation goes through two stages. The first stage takes place before the substantive court and the petitioner makes his plea of unconstitutionality in this stage. In the second stage the petitioner would be given a deadline for filing his suit and if this deadline expires without a filing of the suit, then the petition would be considered as non-existing. This capacity can be observed in the judgment of the Supreme Constitutional Court delivered on the 7th of July 1977, which allowed the inheritors to replace their testator in the plea of unconstitutionality of Law No. 150.
of 1964 for removing the custodianship over the property of some persons (Muhammad, 1981).

What the Supreme Constitutional Court meant by capacity here is the legal basis necessary for connecting the court with the suit and which can be achieved by raising the plea of unconstitutionality before the substantive court first, then by the permission issued by the substantive court for filing the constitutional suit. Then it can be said that the capacity in the constitutional suit is related to the soundness of the procedures that the law requires for filing the suit. The interest in the constitutional suit is related to the interest in the substantive suit, which means that the ruling delivered in the second suit should have an effect on the ruling in the first (Ibid, at 261).

In spite of all that some writers and legal jurists as well have commented on the judgment of the constitutional court in the case above with regards to capacity; whether it is an independent condition, or a mere condition for the validity of the suit procedures, or whether it is the direct personal interest, the present researcher is more inclined to the opinion that capacity is a condition for accepting or allowing the suit in the scope of normal suits, and a fortiori should be a condition for accepting a constitutional suit. Moreover, if this condition is absent from the petition submitted to the constitutional court then this court would rule against accepting the suit because of the absence of the condition. Thus it is an independent condition even though there is a strong connection between it and the condition of interest.

The Supreme Constitutional Court has passed a number of rulings about the condition of capacity, especially the one passed in its session on the 7th of December 1991 where it stressed that the attorney filing the constitutional suit should submit to the court, before the end of the court proceedings, his warrant of attorney issued by the petitioner. This is so the court can verify his capacity in the suit and whether it gives him the right to file the suit on behalf of the petitioner. If it appears from the petition and from other supplied documents that the attorney does not prove his power of attorney or agency given by the petitioner from the time of filing of the suit and until the end of the proceedings, then the court should dismiss the suit (Case No. 4, Year 10, session of 28 January, 1998).

Nevertheless, the legal representation is similar to the capacity in that they are both related to the two parties of the litigation, i.e., they are related to both the plaintiff/petitioner and the defendant. Hence if the suit was filed by a minor, he should be represented by his guardian, and if the suit was filed against a minor, then its procedures should be directed against his guardian as well.

Condition of Actuality of Plea

There must be an actual dispute between the litigants to the dispute, the plaintiff and the defendant. Thus, if there were no actual dispute or litigation, then the action would not be valid and may not be accepted.

Condition of Actuality of Plea in the Egyptian System

It is a condition for allowing the plea of unconstitutionality that it should be actual. What is meant by actual plea, as it appears from judicial rulings, is that it be connected to the subject of dispute, that a contravention of the constitution has occurred, and there should be an interest to the party in the suit. If these conditions exist in the plea, then the court must postpone the hearing of the case, and set a date for hearing before the Supreme Constitutional Court (Muhammad ‘Abd al-Salim Mukhlis: Nadariyyat al-Maslahah fi Da’w’ al-Ilgha’. Cairo: (1981), at 250. See also Abu al-Majd, Ahmad Kamal. (1960). Al-raqabah ’ala dusturiyyat al-qawanin fi al-wilayit al-mutahfidah al-amrikiyyah wa al-iqlim al-Misri. Cairo: Dar al-Nahdah al-‘Arabiyyah. at 228.) The Supreme Administrative Court in its session held at the 16th of May 1978 ruled that: “Courts may not adjudicate the plea of unconstitutionality of laws, even if by way of abstaining from implementing laws the constitutionality of which is challenged. This is because such abstinence involves a decision of unconstitutionality in contravention of the rules of the constitution and the law, the control over the
constitutionality of which is the responsibility of the High Court (Muhammad ‘Abd al-Salim Mukhils: Nadariyyat al-Maslahah fi Da’w’ al-Ilhga, at 255.)”

Conditions of plea are applied as follows

1. The plea must be connected to the subject of dispute. An example of this is the decision of the High Administrative Court session held on the 16th of March 1974 which stated that whatever was the view of allowing the challenge of the mentioned rulings (Section 49 of Law No. 61 of 1971) in the implementation of the State Council Law No. 47 of 1972, it is decided that the dispute before this court is not connected to the rules of the mentioned law with regards to the situations of challenge before the said Administrative Court. The challenged decision was delivered in the session held on 28th of May 1972, with its report filed on the 26th of June 1972. This is before the rules of Law No. 47 of 1972 had become effective. Therefore, the challenged decision would be subjected to the rules of the State Council Law No. 55 of 1959, and the legislator in Law No. 61 of 1971 (which is later Law No. 55 of 1959). This specifically excluded the mentioned rulings, as stated in Section 49, from the control of the High Administrative Court in accordance with Section 15 of Law No. 55 of 1959. In addition to that, the law has described these rulings as being final and incapable of being challenged or appealed as is the case of rulings of dismissal of employees of the second class and above (Case No 943, eighteenth judicial year, Rulings of High Administrative Court, Cairo, (1977), at 208.).

The writers do not agree with the abovementioned decision of the High Administrative Court as it involves the deprivation of the parties from their right of challenge before the High Administrative Court. This considers the rulings as being final which is not in accordance with the rules of justice and the principle of litigation that is guaranteed for all people and involves all levels of litigation in the State.

2. The plea must evoke the contravention suspicion of the constitution rules, as the condition for the actuality of the plea requires that there must be suspicion of unconstitutionality. And regarding this, the Civil Court of Cassation decided in its session on April 1, st 1976 that there is no merit in challenging the unconstitutionality of Section 88/2 of Law No. 43 of 1965 concerning the judicial authority, since the constitution was promulgated on a date later than that of the challenged decision (Muhammad ‘Abd al-Salim Mukhils: Nadariyyat al-Maslahah fi Da’w’ al-Ilhga, at 253. See also Adel Omar Sharif. (2000.).

But it is observed that the Supreme Constitutional Court in its session on the 7 May 1977 decided that: “It became established in this court that the laws and regulations promulgated before the promulgation of the constitution remain valid until they become cancelled or repealed or amended, without being purified from any defects and without being given immunity against challenge of unconstitutionality, and in this regard it is on the same standing as the laws promulgated under the auspices of the current constitution (Ibid.).”

What must be noticed here is that there is a discrepancy or dissimilarity between the two aforementioned decisions, as the Court of Cassation has contradicted the Supreme Constitutional Court in not allowing the challenge of Section 88/2 of Law No. 43 of 1965 with regards to the judicial authority. It is noticed that the Supreme Constitutional Court in its decision has allowed the validity of those laws even after the coming into effect of the new constitution, but permitting the challenge of their unconstitutionality as with any other law or regulation promulgated under the auspices of the new constitution.

The question that arises here is: may the court, before which there is a plea of unconstitutionality of a law required to be implemented in the suit before it, refuse such a plea if it found it not an actual plea, or should the court pause the hearing of the original case anyway, even if it was apparent to it that the plea was not actual and apparently invalid?

The importance of this question comes from the fact that the misuse of the plea of unconstitutionality of law may disrupt the hearing of cases before the judiciary. Thus the party, who wishes to delay the hearing of the case filed against him, has to claim that the law, meant to be implemented in the case, is unconstitutional. Then the court would have to put the hearing of the case on hold until the Supreme Constitutional Court makes a decision regarding that plea, even if there was an apparent invalidity of the plea or that it was not an actual plea.

The court that looks into the original case may decide to refuse the plea if it finds it to be not actual and invalid. Yet if it finds that there is a basis for its actuality then it must pause the hearing of the case until the Supreme Constitutional Court has decided the case constitutional (Shiha, Ibrahim ‘Abd al-‘Aziz. (1982). Al-qanun al-dusturi: Dirisah muqaranah. Beirut: al-Dar al-Jami‘iyah, at 8.)

Condition of Interest

Interest is the origin of the action and its main pillar. Thus some jurists have expressed that by stating that where the interest is absent there would be no action, and that the interest is the cause or source of the action. Some also considered interest as the only condition for accepting the suit, while the other conditions stated by jurists are merely forms of interest.

Condition of Interest in Egyptian System

The existence of a direct personal interest of the plai-

A constitutional action, therefore, is only admissible if initiated by a person who suffers damage from the application of the challenged provision, whether this damage has actually occurred or is imminent.

The damage, in all cases, must be distinct from the mere contravention by the challenged text to the Constitution. It must have its own independent elements that can be defined, grasped and countered by means of judicial settlement, and must stem from the challenged text. If the latter has not been applied to the petitioner, or if the petitioner is not governed by its provisions or has benefited from its content, or if the rights he/she claims have not been breached as a result of that particular text, then he/she has no standing in challenging it (‘Dupret Baudouin: (The Primary of the Law and the Constitution Their Consistency and Compliance with International Law the Egyptian Experience), Yearbook of Islamic Law, Vol 10, (2003-2004), at 12-14. See also Baudouin Dupret and others: Legal Pluralism in the Arab World, at 325.).

Possible or Probable Interest

The principle in normal suits is that it is a condition for accepting the suit that the person filing it should have a certain and immediate interest. Thus, there is no significance to a probable interest in normal suits under the Procedures Law except as a precaution for repelling an impending harm or for ascertaining a right, the proof of which is feared of being lost. However, the situation is different with regards to constitutional suits, as the constitutional judiciary is satisfied with the mere presence of probable interest for accepting the suit (Case No.131, Year 6 session of 6 May (1978), Majdi Mitwalli, Mabidi’ al-Qada’ al-Misri, at 51.). The reason for expanding such an exception is that a constitutional suit is considered as being within judiciary in kind, which aims at protecting constitutional legitimacy. Another reason is that the period allowed for filing a constitutional suit is short and it is feared that if the petitioner waited until his interest becomes immediate and certain, the time period would lapse without him being able to file the suit (Jumayi, ‘ Abd al-Basit. (1966). Sharh qanun al-ija’at al-madaniyyah. Cairo: Dar al-Fikr al-‘Arabi, at 249.)

Limitations and Restrictions on the Exercise of Judicial Review and Its Scope

There are several restrictions on the exercise of judicial control. Courts may strike down unconstitutional laws only when cases are brought to them. Therefore, in this article, the writers will provide analytical discussion on the scope of judicial review in Egyptian legal system, addressing the fact that the constitutional suit must be justiciable (capable of being settled). In other words, the suit filed before the constitutional court must not be classified as an act of sovereignty, a state of emergency or an exceptional circumstance, as these are considered restrictions to the filing of a constitutional suit. The study will also address an important rule in the examination of the constitutionality of laws, which is the rule of presumption of constitutionality that states that the principal rule with regards to laws and legislations promulgated by the legislative authority is that they are constitutional unless proven otherwise.

Justicability and jurisdiction

In principle, the judicial authority should be the only competent authority to settle all types of disputes that arise within any community, and should be totally in control of the law in the state, while no other authority should share this competence for the reasons explained in the following paragraphs (‘Abd al-Mun‘im ‘Abd al-‘Adim Jirah: Mabadi’ al-Murafa’at, (1981), at 130. See also, Haqqi Isma’il Barbuti: Al-Raqabah ‘AlaA’mal al-Sultah al-Qa’imah ‘AlaHalat al-Tawari’: DirasahMuqaranah. Ph.D. dissertation. Cairo: Jami‘at ‘Ayn Shams, (1981), at 414).

After the disappearance of the private justice system and deprivation of individuals’ ability to vindicate their rights by themselves, the state should secure the means for litigation for individuals in order to enable them to settle their disputes before the judiciary.

Litigation is considered as the legitimate legal method for protecting and safeguarding rights. Thus, to deprive a person of his right of litigation in respect of a certain right leads to the divestment of this right of its substance and wasting any practical value it may have (‘Abd al-Mun‘im ‘Abd al-‘Adim Jirah: Mabadi’ al-Murafa’at), at 131).

The principle of separation of powers also requires that every authority be independent in assuming its natural functions, and that it does not interfere with the functions of the other authorities (Ibid. See also ‘Abd al-Wahid al-Sayyid ʿAtiyah: NadhariyyatA’ A’mal al-Siyada ha al-Majalayn al-Iqtsadiwa al-Mali. Cairo: Dar al-Nahdah al-‘Arabiyyah, (1993), at 21-30.)

Many constitutions have been keen to provide for the right of litigation as being one of the principal and natural rights of an individual, without restricting this right or disparaging it.
The exclusion of any type of dispute from the jurisdiction of the judiciary, to be settled by other non-judicial parties, leads to the individuals’ deprivation of the guarantees specified for litigation before the courts, and which aim at the utmost soundness of the function of the judiciary (Haqqi Isma’il Barbuti: Al-Raqabah ‘Ala’A’mal al-Qa’imah ‘Ala’Halat al-Tawari‘: Dirasah Muqaranah, at 414).

For these and other reasons, it is noticed that the jurisdiction of the judiciary, in hearing disputes that arise within a community, must be an absolute and general jurisdiction.

In order to affirm the above, Article 68 of the 1971 constitution has provided that "litigation is an inviolable and guaranteed right for all people, and every citizen has the right to resort to his natural judge, and the state ensures the closeness of the judiciary to the litigants as well as the rapidity in settling disputes."

This Article prohibits any legislation from providing for the fortification of any administrative act or decision against the control of the judiciary. Therefore, according to the Article, the right of litigation is considered as a constitutional right that no legislation may restrict by any means that do not comply with the constitutional text or its spirit (Sami Jamal al-Din. (1982). Lawa‘ih al-dharurah wa dhamanat al-raqabah al-qada‘iyyah. Alexandria: Munsha‘at Dar al-Ma‘arif, at 341.)

Nevertheless, every rule has an exception. Therefore, this rule is not absolute, and the legislator has restricted the jurisdiction of the judiciary with regards to looking into some issues that have been given some immunity and may not be subject to judicial control over the constitutionality of legislation. Thus, if a constitutional suit was filed before the Supreme Constitutional Court for the purpose of looking into one of these issues, then the court must refuse to accept the suit as being outside its jurisdiction. When the court refuses such a constitutional suit, the reason would be the absence of one of its conditions and that the issue must be capable of being settled (Abd al-Fattah Sayir Dayir. (n.d.). Nadhariyyat al-siyadah: Dirasah muqaranah fi al-qanunayn al-Misri wa al-Faransi. Cairo: Matba‘at Jami‘at al-Qahirah, at 78-84).

Regarding the acts of sovereignty or the political questions which are closely interrelated with the sovereignty of the state both internally and externally, the acts are comprehensive by their nature, and have profound political considerations which justify giving the legislative or executive branches full discretionary power in order to realise the security and well-being of the country.

As a result, this category of political questions or acts of sovereignty may not be subjected to judicial control, neither on its constitutionality nor on its legality. In addition, the judiciary does not have the necessary information about the acts or questions in order to control them. Furthermore, it is not appropriate to discuss these political questions or acts of sovereignty publicly in court sessions (Nathan J. Brown: the Rule of law in the Arab World, (London: Cambridge University Press, (1997), at, 107-108).

**Acts of Sovereignty and Political Matters**

Acts of sovereignty are distinguished from normal administrative acts through the political attributes and the political considerations they carry. Such acts of sovereignty emanate from the executive authority in its capacity as a ruling authority, and within this authority’s power to realise the interests of the political group, observe the constitution, supervise its relationship with other states and ensure its security, both internally and externally.


2) Acts related to international relations and diplomatic activities.

3) Some acts which the executive authority undertakes for the purpose of maintaining internal security and public order.

4) Matters related to territorial sovereignty.

5) Some measures taken by the government or the executive authority against foreigners especially during a state of war.


Thus, there is an obvious and clear difference between normal administrative acts, which the administrative authority carries on within its capacity as an administration authority that assumes the supervision of everyday interests of the public and public utilities, and other political or governmental acts.

**State of Emergency and the Stance of the Constitutional Judiciary**

The rulings of the judiciary in Egypt have settled on the
decision to declare a state of emergency as an act of sovereignty as well. Such rulings were among those delivered by the administrative judiciary and the Supreme Court which was established by virtue of Law No. 81 of 1969. This is explained as follows (Haqqi Isma’il Barbuti: Al-Raqabah ‘Ala’al-Sultah al-Qa’imah ‘AlaHalat al-Tawari‘: Dirasah Muqaranah at 626-633. See also Zakariyya Muhammad ‘Abd al-Hamid Mahfud: Halat al-Tawari‘: Dirasah Muqaranah. Alexandria: Jami’at Iskandariyyah, (1966), at 214):

1. The decisions of the administrative judiciary in Egypt have settled on the decision to declare a state of emergency as an act of sovereignty, and in many of their rulings, both the Administrative Judiciary Court and the Supreme Administrative Court have stated that “even though the decree for declaring martial laws is indisputably an act of sovereignty, the measures undertaken or meant to be undertaken by the party in charge of carrying out the martial order in execution of this order, whether these were individual or regulatory measures, are merely administrative decisions that must be made within the ambit of the law and must be subject to the control of the judiciary (Haqqi Isma’il Barbuti: Al-Raqabah ‘Ala’al-Sultah al-Qa’imah ‘AlaHalat al-Tawari‘: Dirasah Muqaranah, at 628)."

When the Administrative Judiciary Court and the Supreme Administrative Court made this decision, they used the criterion or test of the nature of the act in distinguishing between acts of sovereignty and other administrative acts, as previously stated, when discussing acts of sovereignty.

2. The Supreme Court of Egypt, established by Law No. 81 of 1969, settled on the decision to declare a state of emergency as an act of sovereignty, and in its decision on the 5th of February 1977, declared that “a state of emergency is a state which the constitution has allowed to be declared whenever its reasons came to be realised, and the most important of these reasons is when the nation is exposed to a danger that threatens its safety and security, the outbreak of war or the threat of its eruption, or the disturbance of the security. Such declarations would then be made for facing such circumstances by taking exceptional measures specified by the State of Emergency Law for preserving the safety and security of the nation. And when the decision of the President of the Republic to declare a state of emergency was pronounced on the 5th of June 1967, the day on which the war between Egypt and Syria against Israel broke out, this situation comes under the reasons that justify the declaration of a state of emergency to face the dangers of war, by taking exceptional measures that guarantee the protection and safety of the nation, by virtue of Article 1 of the State of Emergency Law No. 162 of 1958. As such, the challenged decision would be considered as an act of sovereignty, and is not within the jurisdiction of the Supreme Court (Case No. 22, Year 6, session of 5 February (1977), Majdi Mitwalli, Mabadi‘ al-Qada‘ al-Misri, 1996, at 503).”

**Principle of Presumption of Constitutionality**

Where the presumption of constitutionality can be validly drawn, a heavy burden is cast upon the party attacking it to produce evidence to disestablish that presumption (A. K. brohi: Fundamental Law of Pakistan, Din Muhammad Press, Mcleod Road, Karachi, Pakistan, (1985), at 360).

The practical implication of this principle is that a court cannot strike down a statute, even if it recognizes that the statute is obviously poorly drafted, irrational, or arises from legislators’ corrupt motives, unless the flaw in the statute rises to the level of a clear constitutional violation. The principle of presumption of constitutionality of laws was developed by the American Supreme Court, in the sense that it should declare a Congressional act unconstitutional only when its invalidity is clear and undoubtedly demonstrated. This article will cover this principle through Egyptian legal system.

**Principle of Presumption of Constitutionality in Egypt**


The reason for the judiciary to bind itself with these restrictions is the critical nature of its function, which is the control over the constitutionality of laws. Hence, when the judiciary decides the unconstitutionality of a certain law, it would actually be provoking the lawmaker’s sensitivity, where the lawmaker is considered the party that reflects the public, represented by the promulgation of laws. From here the importance of the subjective restrictions arises and is considered a presumption of constitutionality in favour of laws (Ibid. See also, Marzah, Isma’il. (1982). Al-qanun al-dusturi: Dirasah muqaranah. Libya: Manshurat al-Jami‘ah al-Libiyyah, at 459).

The unavoidable question here is: has the constitutional judiciary in Egypt restricted the constitutional presumption in the field of judicial control over the constitutionality of laws? In principle, all laws promulgated by the lawmaker should be in harmony and agreement with the constitution and whoever claims otherwise is bound to prove the unconstitutionality of the law. This is because the law encompasses a presumption of constitutionality and the judiciary should not desist from this presumption and decide the unconstitutionality of a certain law unless such unconstitutionality is undoubtedly apparent (Muhammad ‘Abd al-Rahim ‘Anbar: Al-Mabadi‘ al-Qanuniyyah Qarraratha al-
The Egyptian judiciary has adopted this restriction and this is deduced from Section 15 of the Judicial Authority Law No. 43 of 1965 that states "if there was a plea, in a case before a court, that creates a dispute within the jurisdiction of another judicial body, the court must, if it sees the need to look into the case itself, put the case on hold and give the party against whom the plea was raised a deadline for seeking a final decision from the body that has the jurisdiction. But if the court finds such action unnecessary it may neglect the plea and decide on the subject of the case (Ibrahim ‘Abd al-'Aziz Shiha: Al-Qanun al-Dusturi: Dirasah Muqaranah, (1971), at 29).

This means that the court must look into the necessity of deciding this plea and if no such necessity is found then the court would neglect it and decide on the subject of the case before it.

It is also apparent that the Egyptian legislator provided for the condition of actuality of the plea, especially after the establishment of the Supreme Court in 1969, when the condition of actuality of the plea was provided for in Section 1 of the Procedures and Charges Law of the Court. The judge was given the authority to assess the actuality of the plea of unconstitutionality raised before him for the purpose of limiting the need to look into the constitutionality of laws, unless where necessary for deciding the dispute before the court.

CONCLUSION

This article has examined the conditions of the constitutional suit in the Egyptian legal system, where they deal with the conditions of interest, capacity and the actuality of plea, as these conditions are general and applicable to all suits. Regarding the theory of acts of sovereignty that exclude some acts of sovereignty from the jurisdiction of all courts of the state, it was noted that the theory of acts of sovereignty is still applied in the Egyptian legal system. In relation to the theory of exceptional circumstances, it was noted that if there appeared exceptional circumstances, then the administrative authority has the right to adopt the necessary procedures for facing such exceptional circumstances, even if they contravene the text of the law. The Egyptian constitution has regulated this theory. With regard to the principle of the presumption of constitutional validity of the laws, this has been applied through the decisions of the Supreme Constitutional Court of Egypt. In this instance, the court should declare the unconstitutionality of law only when the latter’s invalidity is clear and undoubtedly demonstrated.

REFERENCES


Case No 943, eighteenth judicial year, Rulings of High Administrative Court, Cairo, (1977).


