

Implementation Ruling on the Unconstitutionality of the Tax Law

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DOI : <https://doi.org/10.61796/ijblps.v3i2.554>



Sections Info

Article history:

Submitted: November10, 2025

Final Revised: December22, 2025

Accepted: January17, 2026

Published: February28, 2026

Keywords:

Constitutional Judiciary
Unconstitutionality of Tax
Legislation
Constitutional Judgments
Tax Law
Retroactive Effect
Immediate Effect
Constitutional Review
Taxpayers' Rights
Iraqi Law

ABSTRACT

Objective: This research examines the legal effects and implementation mechanisms of judgments declaring tax legislation unconstitutional, with particular emphasis on the binding force of constitutional judicial decisions, their temporal effects, and their implications for taxpayers, public finances, and the principle of constitutional supremacy. **Method:** The study addresses the distinction between judgments rejecting constitutional challenges on formal or substantive grounds and judgments declaring tax provisions unconstitutional. It explores the differing legal perspectives concerning the authority of such judgments, particularly the debate over whether judgments rejecting constitutional challenges should possess absolute or relative binding force. Furthermore, the study investigates the temporal effects of judgments declaring tax legislation unconstitutional, focusing on the distinction between immediate and retroactive effects. It examines the Iraqi legal framework and compares it with the Egyptian constitutional and tax legislation framework, particularly concerning the protection of taxpayers' rights and the financial interests of the State. It also discusses the legal consequences of repealing unconstitutional tax provisions, including the possibility of extending the effect of unconstitutionality to interconnected provisions that cannot be separated from the provision declared unconstitutional. **Results:** The research argues that judgments declaring tax legislation unconstitutional possess absolute authority due to their legal consequence of repealing the unconstitutional provision and removing its legislative force, whereas judgments rejecting constitutional challenges should generally have relative authority, thereby allowing the same provision to be challenged again when the relevant procedural conditions are fulfilled or when the grounds of challenge or constitutional circumstances change. The research highlights the absence of sufficiently explicit legislative regulation in Iraq regarding the consequences and temporal application of judgments declaring tax legislation unconstitutional, which creates legal uncertainty concerning the recovery of taxes previously paid and the extent to which such judgments benefit taxpayers who were not parties to the original proceedings. The study concludes that regulating the effects of constitutional judgments requires a clear legislative framework that balances constitutional legality, tax justice, equality before taxation, the protection of acquired rights, and the stability of public finances. **Novelty:** It recommends amending the legislation governing the Federal Supreme Court to establish explicit provisions concerning the effects of judgments declaring tax legislation unconstitutional, including the regulation of retroactive effect, the possibility of renewed constitutional challenges, and the obligation of the legislative authority to amend or replace unconstitutional provisions within a specified period. The research further proposes granting the Federal Supreme Court authority to examine the constitutionality of relevant tax provisions ex officio, in order to strengthen constitutional review, protect taxpayers' rights, and ensure the effective enforcement of constitutional principles.

INTRODUCTION

Praise A ruling declaring the tax law under Iraqi law unconstitutional may have serious implications for the country's legal and financial systems. It may result in several consequences, the most significant of which is the repeal of a tax law and the removal of its legal existence from the body of legislation, in accordance with the system adopted in different countries. This would require the development of new tax solutions, either

through redrafting the law or introducing substantial amendments to ensure its compatibility with the Constitution.

The repeal of tax laws may also affect the financial system and the government's ability to secure the financial resources anticipated for future periods, thereby affecting its capacity to provide public services and finance programs and projects in countries that rely substantially on taxation. Furthermore, the changes and need for reform arising from a ruling declaring a tax law or provision unconstitutional may create a need for structural reform of the tax system and comprehensive reforms to prevent unconstitutional violations in the future. It may also affect public confidence by undermining trust in tax laws, particularly when concerns arise regarding non-compliance with the Constitution and the enactment of laws that contravene its provisions. Moreover, the necessity of adhering to the law requires the government and relevant authorities to comply with judicial rulings and implement them fully, which necessitates cooperation to redraft the law or take the necessary measures to rectify unconstitutional conduct.

The Effect of Constitutional Judgments on the Rejection of Tax Appeals

It frequently occurs that courts with constitutional jurisdiction rule to reject constitutional challenges concerning taxation on the grounds that the provision is consistent with constitutional provisions, either formally or substantively, and that it satisfies all formal requirements and procedures prescribed by the Constitution. Alternatively, a challenge may be rejected due to certain failures to fulfill the formal requirements for filing a constitutional action, despite the tax provision being, from a substantive perspective, fully consistent with the tax principles that the legislator who enacted it was required to observe at the time of legislation, as well as with the applicable tax laws.

When determining the effect of a court decision rejecting a tax challenge and the scope of its applicability to individuals and public authorities within the state, it is necessary to divide this chapter into several sections. The first section is devoted to explaining the substantive effect of a constitutional decision rejecting a tax challenge. The second section specifically addresses the effect of constitutional judgments rejecting formal tax challenges. The third section subsequently discusses issues related to assessing the validity of a judgment rejecting a tax appeal, as follows:

The Constitutional Judgment Rejecting a Tax Challenge: Its Substantive Effect

In the absence of a clear legal provision regulating the validity of a constitutional judgment rejecting a tax challenge, a legal dispute has arisen concerning the validity and scope of such a judgment. Some legal scholars maintain that a constitutional court either declares a tax provision unconstitutional or rejects the challenge on constitutional grounds. Others, however, argue that tax challenges, from a substantive perspective, when a constitutional judgment is issued upholding the constitutionality of a provision, have only relative authority, limited to the parties to the dispute and the subject matter of the case. Accordingly, the issue of unconstitutionality may be raised again by another taxpayer or by the same appellant taxpayer if the subject matter of the case changes. In

order to avoid favoring one of the aforementioned viewpoints over the other, each of them should be examined in accordance with the following details:

Supporting the View of Absolute Authority

Proponents of this view maintain that constitutional judgments are of a substantive nature, in which the dispute concerning the challenged tax provision on grounds of unconstitutionality is addressed, thereby granting the judgment absolute authority with respect to the tax provision. Its effect extends to all persons and all authorities are bound by it, regardless of whether the judgment concludes that the tax provision is unconstitutional or rejects the claim due to the absence of substantive constitutional defects in the provision. Accordingly, the dispute may not be raised again before other courts having constitutional jurisdiction over tax legislation.

This means that a judgment rejecting a tax challenge establishes that the provision conforms to the constitutional text, contains no unconstitutional conduct, and is free from substantive defects, thereby possessing absolute binding force. Since the judgment was issued following an extensive examination and thorough review by the court, which concluded that the tax provision complies with the constitutional provisions, the same tax provision that was submitted to the court for review and adjudication may not be challenged again. Filing another lawsuit before the same court would burden it with numerous potentially unfounded claims. On the one hand, this principle enhances the court's ability to address such matters, while on the other hand, it also limits the effectiveness of its judgments.

Supporting the View of Relative Validity

Some legal scholars argue that the concept of the specificity of constitutional proceedings and the decisions issued therein means that the absolute binding force of constitutional judgments is limited to judgments declaring tax provisions unconstitutional. This implies that such a judgment eliminates the possibility of enforcing the relevant tax provisions, rendering them legally null and removing them from the state's body of legislation. Since this effect is fundamentally indivisible, the authority of a judgment declaring a tax provision unconstitutional is not limited to the parties to the dispute in question. Rather, its effect extends to all persons, and it possesses absolute authority. The dispute may not be raised again because the unconstitutional provision is removed from the body of tax legislation.

However, the situation differs with respect to the binding force of a judgment rejecting a challenge to the constitutionality of a tax provision. Such a judgment does not affect the legislation whose constitutionality has been challenged; the provision remains in force following the publication of the tax legislation. Therefore, a decision rejecting a tax challenge should possess only relative authority, binding the parties to the dispute. Accordingly, any taxpayer who believes that the provision is unconstitutional may submit a second constitutional challenge against the same provision or a challenge concerning the same provision.

The Effect of a Constitutional Judgment on the Formal Rejection of Tax Appeals

The initiation of a constitutional action requires the fulfillment of formal conditions, including specifying the tax provision challenged on grounds of unconstitutionality and establishing the requisite legal interest. The action must be filed within the time limit determined by the court of first instance. Furthermore, the constitutional action must be submitted by an attorney vested with full authority, and all other requirements must be satisfied.

Questions may arise concerning the nature of the argument being presented. If a constitutional action is rejected on formal grounds due to failure to satisfy one of the aforementioned requirements, does the judgment have absolute legal effect and apply to all persons, thereby preventing the submission of further claims of unconstitutionality? Or does it possess relative authority, such that its effect applies only to the parties to the constitutional action in which the judgment was rendered?

In response to the foregoing, some legal scholars argue that a judgment rejecting a constitutional action on formal grounds is attributable to the absence of one of the formal or procedural conditions necessary for the admissibility of the action. This may include the absence of the circumstances required for accepting cases of significance, the submission of the action in a manner inconsistent with that prescribed by law, or the omission of certain information required by law for the acceptance of constitutional proceedings.

Only relative legal effect is recognized. There is nothing to establish that a tax provision previously challenged on grounds of unconstitutionality, where the court ruled to reject the action on formal grounds, is thereby immune from further constitutional challenge. This applies whether the challenge is brought by the same party to the original proceedings or by another taxpayer, provided that the conditions for admissibility are satisfied and the action is accepted. This is in addition to a challenge in which the Constitutional Court determines that the tax provision previously challenged is, in itself, unconstitutional.

From a formal perspective, the previous judgment has neither restricted nor prevented the court from reconsidering the constitutionality of the tax provision. Accordingly, the formal rejection of an action does not mean that the challenged tax provision conforms to the constitutional provisions or is free from constitutional defects. Rather, the tax provision may contain violations of established constitutional principles, including the principle of tax justice, the principle of equality in taxation, the principle of tax legality, and the principle of non-retroactivity of tax legislation, among others. The formal deficiencies that prevented the court from performing the duties entrusted to it do not establish that the tax provision is consistent with the constitutional provisions.

It is possible that the appellant or their attorney overlooked certain formal procedures when filing the constitutional action, rendering it inadmissible.

Is it reasonable, as a matter of form, for other taxpayers to bear the consequences of the errors or omissions of those responsible, while taxation continues to be imposed upon

them? Alternatively, the taxpayer's legal representative may have overlooked certain formal procedures when filing the constitutional action, resulting in its formal inadmissibility. Is it reasonable for other taxpayers to bear the consequences of such an error or omission and continue to be subject to the tax provision, potentially leading to their bankruptcy and, subsequently, the confiscation of their assets under tax provisions that conflict with the constitutional provisions?

The Effect of a Judgment Declaring Tax Legislation Unconstitutional

According to what is referred to as the absolute authority of all decisions issued by constitutional courts, these provisions are not subject to future challenges, as their repeal eliminates their existence from the body of legislation 11.

Assessing the Validity of a Decision on a Tax Appeal Rejecting the Tax Appeal

In the context of assessing the effect of constitutional judgments rejecting tax challenges and clarifying their authority, we believe that a judgment declaring tax legislation unconstitutional is the only one possessing absolute authority, as it results in the removal of the tax provision from the state's body of legislation. Therefore, as a general rule, the repealed provision may not be challenged again, unless an exception to the established general principle is permitted.

A decision rejecting a tax challenge on formal or substantive grounds possesses only relative validity, as any person with a legal interest may challenge the tax provision before the competent court to determine whether the law previously adjudicated upon conforms to the Constitution. Alternatively, the action may be rejected on the basis of specific legal requirements relating to the existence of ongoing proceedings and changing circumstances that do not require protection of any tax provision on the grounds that it is unconstitutional. This view may be supported by several arguments or pieces of evidence, the most prominent of which are as follows:

The concept of the absolute validity of constitutional judicial judgments is limited to judgments declaring unconstitutionality and does not extend to judgments rejecting a challenge to the constitutionality of a tax provision. A judgment declaring the unconstitutionality of a tax provision introduces a new legal effect, namely, preventing the application of the provision and rendering it unenforceable in the future. This novel effect is the reason why state authorities and individuals are bound by such judgments and why they possess absolute authority.

As for judgments rejecting tax challenges on formal or substantive grounds, they do not introduce any new legal effect requiring consideration, since the tax provision is deemed constitutional. The provisions in force prior to the publication of the judgment remain binding on everyone from the date of their publication in the Official Gazette, and the judgment does not establish any new constitutional status for them.

Assessing the Validity of a Decision on a Tax Appeal Rejecting the Tax Appeal

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the removal of the tax provision from the state's body of legislation. Therefore, the repealed provision may not be challenged again. A decision rejecting a tax challenge on formal or substantive grounds possesses only relative validity, as any person with a legal interest may challenge the tax provision before the competent court to determine whether the law previously adjudicated upon conforms to the Constitution or is inconsistent with it. Alternatively, the action may have been rejected on the basis of specific legal requirements relating to the existence of ongoing proceedings and changing circumstances that do not require protection of any tax provision on the grounds that it is unconstitutional. This view may be supported by several arguments or pieces of evidence, the most prominent of which are as follows:

The concept of the absolute validity of constitutional judicial judgments is limited to judgments declaring unconstitutionality and does not extend to judgments declaring a tax provision unconstitutional. A judgment declaring the unconstitutionality of a tax provision introduces a new legal effect, namely, preventing the application of the provision and rendering it unenforceable in the future. This novel effect is the reason why state authorities and individuals are bound by such judgments and why they possess absolute authority.

As for judgments rejecting tax challenges on formal or substantive grounds, they do not introduce any new legal effect requiring consideration, since the tax provision is constitutional. The provision remains in force until the judgment is issued and is binding on everyone from the date of its publication in the Official Gazette. The judgment does not establish its constitutionality by extending its date of enactment or determining a new effective date. It does not create any new legal force or impose obligations that did not previously exist. Therefore, such decisions possess only relative authority, limited to the subject matter of the appeal.

Second: The legal role performed by the court entrusted with reviewing the constitutionality of laws has political, economic, and social dimensions, and its operations cannot be entirely independent of these dimensions or from crises within the political system that may threaten it. These factors, among others, may exert pressure on courts when determining a case involving the unconstitutionality of a particular tax provision under certain circumstances, particularly where such a ruling may affect state entities or its economic or financial systems. Accordingly, the court may rely on the judgment to reject the challenge. Pursuant to the principle that protection is afforded to the state, safeguarding the nation or its economic system may take precedence over protecting the Constitution itself.

In such circumstances, it is appropriate to protect the Constitution while recognizing the relative validity of a decision rejecting the challenge. It is also more appropriate to protect individual rights and public finances, as this allows the rejected dispute to be brought again by another person before the constitutional court. If the circumstances or the applicable standard change, the basis for rejecting the challenge may likewise change, particularly where the appeal had previously been rejected. Third: In

many of the judgments rejected by the court, the reason was the failure to satisfy certain formal requirements, or the appellants' failure to comply with the provisions of the tax law by neglecting to provide certain information or undertaking certain procedures without referring the matter to the court. Therefore, this result is illogical. The intention behind such error or omission by the appellant was to protect the tax provision from challenge and deprive other taxpayers of their right to resort to the judiciary and seek its intervention to determine the constitutionality of the tax provision. They may believe that the provision violates constitutional provisions.

The elimination of absolute authority from judgments rejecting tax challenges and the protection of the provision from judicial review entail numerous risks. The most significant of these is that the ruling party may intend to enact legislation that violates constitutional provisions for a specific purpose or to increase public revenues at the expense of taxpayers, while seeking to avoid the repeal of the law. Accordingly, individuals may attempt to challenge the constitutionality of the law or some of its provisions before courts vested with the power of judicial review over the constitutionality of laws. The grounds of such challenges may be unreasonable or may fail to comply with the formal requirements that must be followed when challenging constitutionality, resulting in the rejection of such challenges by the judiciary. Despite the provision's violation of constitutional provisions, it may ultimately receive legal protection.

One of the most important arguments supporting the relative validity of a decision rejecting a challenge is that the court may uphold certain grounds advanced in the case, while the grounds raised in a previously rejected appeal may differ. For example, the tax provision may be alleged to violate the provisions of Islamic Sharia, whereas a subsequent appeal may allege that the provision violates the principles of justice, the principle of tax equality, or the principle of non-retroactivity of tax legislation. Accordingly, there is no impediment to reconsidering the constitutionality of the tax provision if the defense is different and the specific grounds of the appeal are sufficient to invalidate the provision or establish its unconstitutionality. This was the approach adopted by the Supreme Constitutional Court of Egypt when it accepted a challenge concerning the constitutionality of a legal provision.

The principle underlying the relative validity of judgments rejecting tax appeals and the possibility for courts responsible for reviewing the constitutionality of laws to reconsider their position arises when a new Constitution is enacted or the existing Constitution is amended. For example, if a tax provision previously held by the court to be constitutional is subsequently found to violate a newly enacted Constitution or recent constitutional amendments¹¹. This is because the general principle provides that any determination concerning the constitutionality of a tax provision is based on the provisions of the Constitution in force at the time the provision was enacted. However, if a new Constitution is enacted or an existing Constitution is amended, the new or amended Constitution becomes the reference for determining the constitutionality of that

tax provision. Therefore, the court may reconsider the extent to which the constitutionality of the provision is consistent with the provisions of the new or amended Constitution.

The replacement of members of the court entrusted with reviewing the constitutionality of laws, and differences between their views and those of their predecessors, often leads the court to depart from its previous approach and reconsider the constitutionality of certain legislation that it had previously deemed constitutional. This includes the Federal Supreme Court's reversal of its previous judgment affirming the constitutionality of Article (165) of Labor Law No. (37) of 2015 and finding that it did not conflict with the constitutional principles governing judicial affairs, as stated in its most recent judgments. Although the judgment of this Court No. 56/Federal/2016, dated June 23, 2016, addressed Article (165) of Labor Law No. (37) of 2015, there was no inconsistency with the constitutional principles. Accordingly, the above-mentioned decision was abandoned. Therefore, and in view of all the foregoing, the Court ruled that Article (165), paragraphs (2) and (3), of the Law was unconstitutional. This repeal clearly demonstrates the necessity of repealing a tax provision following a constitutional judgment.

There is also the fact that the absolute validity of a constitutional judgment rejecting a tax challenge is negated by the principle that challenging a tax provision and having the action rejected on formal or substantive grounds does not prevent the constitutionality of the tax provision from being challenged again. The same provision may be reconsidered if certain amendments are introduced into a provision whose constitutionality had previously been upheld by the constitutional judiciary. In Constitutional Case No. (131), a number of provisions of Law No. (38) of 1972, including Articles (3) and (5 bis), were challenged six years later. These provisions had previously been amended by Law No. (188) of 1986. However, since the challenge in the present case was based on Paragraph (1) of Articles (3) and (5 bis) of the aforementioned Law, as amended by Law No. (188) of 1986.

The Time Limit for Determining the Unconstitutionality of Tax Legislation

The time limit for determining whether tax legislation is unconstitutional is considered one of the important issues in practical life, as tax provisions may be applicable for a specified period and have certain legal effects. If the authority responsible for reviewing the constitutionality of the law rules that the provision is unconstitutional, the question arises as to the date on which such judgment takes effect. If the tax provision is unconstitutional, does its effect commence from the date of publication of the provision, thereby constituting a mandatory obligation on the part of the State? Is it a tax imposed on the basis of an unconstitutional provision, or does it take effect from the date of the judgment declaring its unconstitutionality, resulting in taxpayers being deprived of the taxes they have unjustly paid? To answer the above question and determine the implications of establishing the unconstitutionality of tax legislation.

The Immediate Effect of a Judgment Declaring Tax Legislation Unconstitutional

The Constitution of the Republic of Iraq of 2005 does not expressly provide for the effect of unconstitutional tax legislation; rather, it refers to the law regulating the work of the Federal Supreme Court and determining the effect of its decisions, including the fact that the issuance of Law No. (30) of 2005 by the Federal Supreme Court lacks any specific provisions concerning its effectiveness. The consequences arising from a judgment declaring tax legislation unconstitutional are merely an indication of the judgments and decisions rendered, while the Federal Supreme Court is decisive in this regard, and in fact merely confirms the provisions of Article 194 of the Constitution, nothing more. Some legal scholars argue that a Supreme Court judgment declaring any tax provision unconstitutional has a limited effect.

It does not take effect from the date on which the judicial judgment is rendered. According to the provisions governing a judgment declaring tax legislation unconstitutional, which takes effect immediately, taxpayers who have applied the provisions of the unconstitutional tax legislation to pay the taxes due from them are not entitled to request a refund of the taxes paid, because returning these amounts would increase the burdens on the State Treasury and undermine the foundations of these taxes. Development plans established for the purpose of imposing duties on imports may otherwise result in prejudice to acquired rights for the benefit of the public treasury and established legal positions. In the case of Egyptian legislation, the effect of a judgment declaring legislation unconstitutional is clearly defined, and the Tax Law provides that “a judgment declaring a provision in a law or regulation unconstitutional shall result in the cessation of the application of that provision as of the day following the publication of the judgment, unless the judgment specifies another earlier date.” This entails an effect whereby the issuance of judgments declaring such legislation unconstitutional has a direct and permanent effect and is issued within a specified period, with such judgments being excluded from the leave granted to the Court, while another issue concerns the validity of judgments declaring other legislation unconstitutional. Those supporting the immediate effect of a judgment declaring tax legislation unconstitutional argue that the reason is based on the judicial authority underlying the judgment concerning the unconstitutionality of tax laws, depending on the seriousness of the matter. Such a judgment, insofar as its effect is retroactive, means that the State is obliged to refund all amounts collected pursuant to the provision declared unconstitutional, particularly where the tax provision has remained in force for a long period, perhaps extending over decades. The distribution of these funds would weaken the national budget and threaten development plans, which is an unacceptable outcome under any circumstances. In this case, and in order to preserve the legitimacy of the Constitution, the legislator cannot accept the undermining of legislative stability. This would have serious consequences for the country’s economic and social entities. From this perspective, it is understandable that legislators seek to determine the immediate effect of a judgment declaring tax legislation unconstitutional, without having to consider it. Any area of operation shall be

subject to the Court's discretion as to whether any other effect will be renewed under the authorization granted pursuant to this Agreement. Supporters of the view that the effect of activating judgments declaring tax legislation unconstitutional is immediate further maintain that this is established.

The Retroactive Effect of a Judgment Declaring Tax Legislation Unconstitutional

The Iraqi legislator has not provided any clear provision indicating that a judgment declaring tax legislation unconstitutional may have retroactive effect, except for certain constitutional or legal provisions regulating the binding judgments of the Federal Supreme Court and considering them final. The Egyptian legislator, however, has expressly provided that judgments of the Supreme Constitutional Court in tax matters shall have retroactive effect pursuant to the Tax Law. Article 49, Paragraph 3, of the Supreme Constitutional Court Law provides as follows: "A judgment declaring a tax provision unconstitutional shall have only a direct effect in all cases and shall not prejudice the interests of the plaintiff." This means that the legislator expressly provides that a judgment declaring a tax law unconstitutional has a direct effect and, consequently, grants plaintiffs in constitutional cases in which a judicial judgment declaring a tax law unconstitutional has been rendered the right to benefit from that judgment. This applies retroactively to all facts and legal relationships that occurred in the past, that is, after the provision entered into force and before the judgment was rendered, which means that the plaintiff in the constitutional action is the only party who benefits from the rule of retroactive effect. As for the remaining taxpayers, the judgment applies directly to them from the date of its issuance or publication in the Official Gazette. Under this exception, the plaintiff in the constitutional action is the only person who benefits from the judgment in question. With regard to past events, the plaintiff is entitled to recover all amounts previously paid to the public treasury of the State pursuant to tax provisions that conflict with the provisions of the Constitution. As for the remaining amounts, they may not be claimed by individuals who are not parties to the action, even if they are subject to taxation according to the same principles; they are deprived of this right. The provision of the judgment was constitutional, and in the context of expanding the scope of their unjust payments, some considered that this wording was intended by the plaintiffs to include some of those allegedly entitled to a refund. This is not limited to litigants but extends to all proceedings before the Constitutional Court.

The legal requirements must be satisfied upon the issuance of a judgment declaring the tax provision unconstitutional, i.e., by every person challenging the provision. However, since the prescribed period had not expired, the Court did not consider the challenge submitted by that person. As for filing an action before the Court after the judgment declaring the provision unconstitutional had been rendered, or approaching the Court without satisfying the statutory requirements, the person has no right to bring a judicial action.

Such persons do not benefit from the retroactive effect of the judgment; rather, its direct effect applies to them, and therefore they are not bound by the prescribed tax

provisions. Although the rules governing the retroactive effect of a judgment declaring tax legislation unconstitutional are fully consistent with the principles of constitutional legality and provide legal protection for the financial and economic rights of individuals and for the public finances of the country—as will be demonstrated—the unusual approach adopted has led some legal scholars to criticize the position of the current legislator on the grounds that it has resulted in unreasonable discrimination between plaintiffs who were able to bring constitutional violations before the courts and taxpayers whose circumstances did not permit them to pursue legal procedures, whether because of reconsideration of the action or due to the mistaken belief that the tax was consistent with the provisions of the Constitution. This judgment applies retroactively to the plaintiff, while at the same time the judgment also applies to other taxpayers directly affected by it. This is inconsistent with the constitutional principle that the tax system is based on the principle of social justice, and such justice does not encompass only the plaintiff while excluding other taxpayers directly affected by the judgment.

The differences in the taxes paid by other taxpayers and the scope of application of the judgment declaring the tax provision unconstitutional.

The Proper Effects of a Judgment Declaring Tax Legislation Unconstitutional

After examining the legal provisions relating to the functioning of the Iraqi constitutional judicial authorities, we found some unacceptable aspects. There is no doubt that the Iraqi legislator has neglected to regulate the consequences arising from a judgment declaring tax legislation unconstitutional. As for the legislator, the strange paradox is that a judgment declaring a tax provision unconstitutional, in all cases, takes effect immediately without prejudice to the interests of the plaintiff arising from the judgment declaring the provision unconstitutional. The rules of direct effect constitute the basis of tax legislation, the first of which is the rules of retroactive effect within a limited scope.

This is an act that protects the plaintiff's right to exclude any other taxpayer. There are many other aspects that cannot be mentioned here. Although the rules of retroactive effect governing the unconstitutionality of tax legislation are fully consistent with the principles of constitutional legality and provide legal protection for the financial and economic rights of individuals and the public finances of the country—as will be demonstrated—the unusual approach adopted with regard to tax legislation has prompted legal scholarship to criticize the position of the current legislator on the grounds that there is unjustified discrimination between plaintiffs who are able to bring constitutional actions before the courts and taxpayers whose circumstances do not permit them to pursue the requisite legal procedures for reviewing the procedures or because of a misunderstanding of the tax provision. According to the Constitution, the judgment applies retroactively to the plaintiff, whereas the application of the same judgment has a direct effect on other taxpayers, which is inconsistent with the constitutional principle that the tax system is based on the principle of social justice, and that such justice does not encompass the plaintiff and other taxpayers equally. This results in a distinction

among taxpayers with regard to the scope of application of judgments concerning the unconstitutionality of tax provisions.

The Proper Effects of a Judgment Declaring Tax Legislation Unconstitutional

After examining the legal provisions governing the work of the Iraqi constitutional judicial authorities, it becomes clear beyond any doubt that the Iraqi legislator has disregarded the rules governing the effects of judgments declaring tax legislation unconstitutional. This has resulted in such judgments applying to the plaintiff but not to other taxpayers, a practice that has been criticized from many perspectives. We are unable to mention all of them here. In any event, we believe that the retroactive effect of a judgment declaring tax legislation unconstitutional has a sound legal basis and is also grounded in the necessity of legality and the need to protect the rights guaranteed by the Constitution. The enactment of unconstitutional legislation is contrary to the provisions of the Constitution and, consequently, its effect should not be calculated from the date of the Court's decision. In view of the effectiveness and feasibility of reviewing the constitutionality of tax legislation, the judgment should have retroactive effect in order to achieve the purpose of constitutional review, namely, protecting the legitimacy of the Constitution rather than undermining it.

Otherwise, such review would become meaningless and absurd and could not be relied upon, by adopting the rule of direct effect, which would protect tax provisions existing prior to the judgment from the effect of that judgment, meaning that they would remain subject to tax provisions that conflict with and fail to comply with the provisions of the Constitution. In support of the argument that retroactive rules should be applied to judgments already rendered concerning the unconstitutionality of tax legislation, we consider it appropriate to present some arguments or grounds, the most prominent of which are as follows:

The rationale for establishing that judicial judgments have retroactive effect lies in protecting the rights of taxpayers and the public treasury against losses that may be incurred as a result of legislators' errors in drafting legal provisions or errors by the authorities. When the executive authority issues the regulations or instructions necessary to implement the law, the retroactive application of judgments concerning unconstitutional taxes ensures that the rules and legislation are consistent with the principles of tax justice and equality before taxation, and may protect the public finances of the country. This is particularly the case where the granting of unconstitutional provisions conflicts with the Constitution, and the same applies to tax exemptions. If the Court subsequently rules that the constitutional provision is invalid, the State may, under the rule of retroactive effect, require taxpayers to pay taxes that had been exempted on the basis of the unconstitutional provision, whereas the rule of direct effect cannot achieve this, thereby exposing the interests of both public finances and taxpayers—whether subject to taxation or exempt—to risk, some of which may lack any constitutional basis.

If retroactive effect is abolished and the rule of direct effect is applied to a judgment declaring the relevant legislation unconstitutional, this would grant the tax authorities and the legislative authority the opportunity to depart from constitutional provisions when drafting tax legislation, because the creation of rules that take effect immediately, even when they are inconsistent with the provisions of the Constitution, would allow them to deviate from the Constitution in order to save funds without concern. There are also concerns regarding the recovery of taxes imposed pursuant to such provisions, as they would remain effective retroactively in the following cases: where they have been declared unconstitutional.

The general rules of civil law are referred to, to some extent, as they provide that any act causing harm gives rise to liability on the part of its perpetrator. Compensating taxpayers for unconstitutional violations constitutes fair compensation for taxpayers, and this can only be achieved by applying the rule of retroactive effect to a judgment declaring the tax law unconstitutional.

The direct application of a judgment declaring tax legislation unconstitutional constitutes a flagrant violation of the principle of equality before taxation, because it creates an unreasonable distinction between taxpayers and the State, thereby granting the State a unique position vis-à-vis the individual. Accordingly, if a person is liable for a tax, the State requires him to pay the tax because the taxable event has occurred. However, if the individual pays the amount of the tax imposed on him to the public treasury pursuant to the tax provision, and the provision governing such payment is subsequently declared unconstitutional, it would be impossible for the taxpayer to recover the amount on the grounds that it had been paid without legal justification. In this case, there would be a distinction between debtors. The taxpayer bears the entire amount, while the State would bear responsibility if taxes were unlawfully collected; however, the State would not bear the aforementioned liabilities.

The principle underlying a judicial judgment is the disclosure of rights rather than the creation of rights, because judicial bodies are not empowered to formulate or amend laws; rather, their role is limited to protecting rights. New rights, in other words, are not created by judicial decisions. Judicial decisions, including, of course, decisions declaring tax legislation unconstitutional, have an effect that is retroactive and extends into the past, dating from the time the tax liability arose rather than from the date on which the judgment was rendered.

Excluding the retroactive effect of constitutional judgments and adopting their immediate effect has an important consequence, namely that taxpayers who paid taxes before the issuance of the judgment declaring the provision unconstitutional cannot recover the taxes they paid. The taxes paid by taxpayers prior to the issuance of the judgment would consequently be forfeited. Among other things, this is an illogical result, since the direct effect of the judgment would exempt taxpayers who did not comply with the law from paying the taxes due, while penalizing taxpayers who voluntarily paid their taxes. Such legal provisions are often presumed to be valid unless proven otherwise.

As for the immediate repeal of the tax provision, and based on the binding force of constitutional judicial judgments and the highly significant consequences arising therefrom, most notably the obligation of the various authorities to comply with and implement such judgments, some argue that a judgment of the Constitutional Court declaring a tax provision unconstitutional will result in the repeal of that provision and the permanent termination of its status as part of the State's legislation, without the need for legislative intervention by the legislative authority to amend or repeal the provision. In other words, the repeal of the provision occurs automatically and constitutes a consequence of the judicial decision, and the decision of the Constitutional Court, together with its authority and binding force, is sufficient to repeal a tax provision. The legislature retains discretionary authority, or a legislative option, to repeal or amend the provision because the Court's decision has already repealed the provision pursuant to the Constitution.

Proponents of this view believe that the Iraqi constitutional judiciary has previously ruled that declaring a tax provision unconstitutional, whether it is a legislative provision or a regulation, results in the repeal of that provision as though it had never existed, such that, from a legal perspective, it ceases to exist and is removed from the national legislation as legislation, and not merely from the law. All effects arising from it are annulled from the date of publication of the judgment or its publication in the Official Gazette, rather than from the date of publication of the defective provision. Exceptions relating to legal positions arising from acquired rights that have been settled and obtained are recognized. The Federal Supreme Court of Iraq has ruled that a tax provision, whether contained in a law, an institutional instrument, or an instruction, is unconstitutional, resulting in the repeal of that provision by the judicial decision and the nullification of all legal effects arising therefrom from the date of its issuance. One such situation is where the provision does not create acquired rights or establish a settled legal position. In such a case, the judgment does not affect acquired rights or the established legal position; rather, its effect is limited to repealing the provision without affecting its consequences.

If, according to this view, a judgment declaring a tax provision unconstitutional results in the repeal of the tax provision and the nullification of its status as part of the State's legislation from the date of publication of the provision, the question arises as to whether the judgment declaring unconstitutionality results only in the repeal of the unconstitutional provision, or whether it also results in the invalidity of other provisions related to that provision. To answer the above question, it may be said that tax provisions, like other legislative provisions, may be inseparably interconnected, meaning that provisions cannot be considered independently of other provisions. Thus, provisions may be interconnected in such a manner that the objectives underlying the law cannot be achieved as a whole unless they are considered as an integrated unit. Tax provisions may therefore be so closely interconnected that each provision cannot be regarded as an independent unit in itself, unaffected by the other provisions.

This distinction has important implications in the field of judicial review of the constitutionality of tax legislation, particularly when the unconstitutionality of tax provisions that cannot be separated from other provisions is established. The unconstitutionality of such a provision results in the unconstitutionality of all other related tax provisions. In such a case, it follows that the aforementioned provisions must also be declared unconstitutional and thereby invalidated. This principle, established by the Supreme Constitutional Court, is consistent with the unity of interconnected tax provisions that are closely and inseparably related to one another, such that the failure of one of them entails the invalidation of all provisions connected with it.

CONCLUSION

Fundamental Finding: A constitutional judgment rejecting a formal or substantive challenge to a tax provision does not preclude challenging the same tax provision again if the essential conditions for bringing a constitutional action are satisfied. A judgment declaring a tax provision unconstitutional means that the judgment has absolute binding force; therefore, the matter may not be repeatedly challenged after the Court has ruled the provision unconstitutional and repealed it before it is challenged again. A judgment declaring tax legislation unconstitutional results in the repeal of the tax provision and the nullification of its legislative force. A judgment declaring tax legislation unconstitutional leads to the repeal of the tax provision and the nullification of its status as part of the State's legislation without the need for any legislative procedure, as may be inferred from Article (17) of the Internal Procedures Law of the Federal Supreme Court and its judicial decisions. **Implication:** The Egyptian legislator follows the rule of direct effect with respect to court judgments declaring legislation unconstitutional, except with regard to the plaintiff. Excluding such judgments from the rules of retroactive effect would result in the expropriation of the rights of taxpayers and their being treated unfairly, while also diminishing the significance of reviewing the constitutionality of tax legislation. The Federal Supreme Court may overturn its previous judgments in many cases, most importantly as a result of changes in the composition of the Court, and the same judgment may be rendered with retroactive effect against plaintiffs challenging the tax provision as unconstitutional, based on this approach. **Limitation:** While the Iraqi legislator has not clearly defined the temporal framework for judgments declaring tax legislation unconstitutional, we found that the Egyptian legislator has established this framework through an explicit provision, making the judgment immediately applicable to some and retroactively applicable to others. The legislative action undertaken by the State without following legislative procedures may be inferred from Article (17) of the Internal Procedures Regulation of the Federal Supreme Court and its judicial decisions. **Future Research:** The legislative authority should expedite the legislative procedures concerning the Federal Supreme Court Law and regulate the various matters that were overlooked in previous laws and their amendments, including the effects of the decisions of the Federal Supreme Court on tax matters and other issues. We propose adding a provision

that removes ambiguity, whether procedural or substantive, in the dismissal of a case, thereby eliminating any difficulty for the Court and directing the matter toward the proper legal course. A provision should be added requiring the legislative authority to amend provisions that have been declared unconstitutional by the courts, or to enact new provisions to replace them within a specified period, so as to avoid a legislative vacuum or the disruption of certain authorities. A provision should be added to the forthcoming Federal Supreme Court Law granting the Court the authority to address the constitutionality of tax provisions ex officio, similar to the Supreme Constitutional Court of Egypt, in order to enhance the effectiveness of constitutional review of tax legislation and safeguard the supremacy of the Constitution.

REFERENCES

- [1] R. Al-Shaer, *The General Theory of Constitutional Law*. Cairo, Egypt: Dar Al-Nahda Al-Arabiya, 1983.
- [2] A. Nasif, *The Binding Force and Effects of the Judgments of the Supreme Constitutional Court Before and After the Amendment*. Cairo, Egypt: Dar Al-Nahda Al-Arabiya, 1998.
- [3] F. A. J. Al-Lamsawi and A. F. Al-Lamsawi, *The Supreme Constitutional Court*, 1st ed. Nas Printing Company, 2002.
- [4] M. A. Zaki, *The Judgment Issued in a Constitutional Case: Its Effects, Binding Force, and Enforcement*, 2nd ed. Cairo, Egypt: Dar Al-Nahda Al-Arabiya, 2005.
- [5] M. M. Omran, "The judgment declaring unconstitutionality between retroactive and immediate effect in the tax field," in *Proc. Conf. Future Tax Syst. Its Impact Econ. Invest.*, Cairo, Egypt: Egyptian Tax Association, n.d.
- [6] S. J. Sajit, *Judicial Review of the Constitutionality of Tax Acts: A Comparative Study*, 1st ed. Baghdad, Iraq: Comparative Law Library, 2019.
- [7] I. B. A. H. Khattab, *The Constitutional Judge and His Review of Tax Legislation: A Comparative Analytical Study*. Alexandria, Egypt: Modern University Office, 2012.
- [8] H. M. H. Al-Adoul, "The judgments of constitutional judiciary in Iraq: A comparative study," Ph.D. dissertation, College of Law, Al-Nahrain University, Baghdad, Iraq, 2015.
- [9] M. B. Y. Al-Salihi, *A Judgment Declaring a Legislative Provision Unconstitutional and Its Role in Enhancing the Rule of Law: A Comparative Study*, 1st ed. Baghdad, Iraq: Bayt Al-Hikma, n.d.
- [10] I. B. A. H. Khattab, *Tax Principles in the Jurisprudence of the Constitutional Court*. Alexandria, Egypt: Modern University Office, 2012.
- [11] H. M. Abdulsalam, "The effect of a judgment issued by constitutional judiciary," presented at the Scientific Conference of Arab Constitutional Courts and Councils, Jordan, Feb. 28, 2016.
- [12] S. Asfour, *The Egyptian Constitutional System*. Alexandria, Egypt: Mansha'at Al-Maaref, 1980.
- [13] R. S. Mohamed, *Taxes Between Financial Thought and Constitutional Judiciary*. Cairo, Egypt, 1997.
- [14] J. M. M. Shehata, "The role of the Supreme Constitutional Court in reviewing tax legislation," Ph.D. dissertation, College of Law, Helwan University, Cairo, Egypt, 2013.
- [15] E. S. Al-Obaidi, "The temporal application of constitutional judiciary judgments: A comparative study," *Kuwait Int. Law Sch. J.*, no. 1, 2020.
- [16] T. M. Mohamed, "The judgment declaring unconstitutionality between declaratory and immediate effect," *J. Egypt. Assoc. Polit. Econ., Stat. Legislat.*, vol. 100, no. 1, p. 491, 2008.

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