

# Procedural Considerations for Raising Constitutional Challenges in Louisiana State Courts

By Mel Dugas



**B**ecause constitutional challenges to statutes are relatively uncommon in ordinary practice, many lawyers may not be aware of the unique procedural requirements for raising such a challenge in a Louisiana state court. Failure to comply with proper procedures may result in the court dismissing the constitutional challenge without reaching the merits. The intent of this article is to provide some practical tips for avoiding these pitfalls.<sup>1</sup>

## General Requirements

The jurisprudence has recognized that, in order to successfully challenge the constitutionality of a statute, the party attacking the statute has a three-tier procedural burden. These requirements may be summarized as follows: (1) the constitutionality of a statute must first be questioned in the trial court, not the appellate courts; (2) the unconstitutionality of a statute must be specially pleaded; and (3) the grounds for the claim particularized.<sup>2</sup>

The requirement that the constitution-

al challenge must be first raised in the trial court is based on the policy that “it is preferred that the parties to a dispute uncover any constitutional defects in a statute through the dialectic of our adversarial system . . .”<sup>3</sup> However, the court has recognized exceptions to this general rule in cases where the statute is clearly unconstitutional on its face,<sup>4</sup> where circumstances make it impossible for the party to raise the challenge in the trial court,<sup>5</sup> or where the matter involves the constitutionality of a statute which interferes with or curtails the plenary power vested in the court by the state constitution.<sup>6</sup>

The remaining factors (specific pleading of unconstitutionality and particularization of the ground of unconstitutionality) flow from the longstanding principle that statutes are presumed to be constitutional and the party challenging the statute bears the burden of proving its unconstitutionality.<sup>7</sup> Applying this presumption, the case law has held a party “who urges the unconstitutionality of a law must specially plead its unconstitutionality, and show specifically wherein it is unconstitutional.”<sup>8</sup>

The jurisprudence has recognized that the Code of Civil Procedure does not require a single procedure or type of proceeding for challenging or assailing the constitutionality of a statute.<sup>9</sup> However, in 2024, the Legislature enacted La. C.C.P. art. 855.1, which provides, “[a] ll civil actions alleging that a law is unconstitutional shall be in writing and be brought in an ordinary proceeding.”<sup>10</sup> At the same time, the Legislature enacted La. C.C.P. art. 1845, which provides “[a] judgment rendering a law unconstitutional is absolutely null and shall be void and unenforceable if the provisions of Article 855.1 have not been met.”

The 2024 legislation does not appear to significantly alter the jurisprudential requirement holding the constitutional challenge must be raised in a civil pleading under La. C.C.P. art. 852, which recognizes the pleadings allowed as petitions, exceptions, written motions and answers, and cannot be raised in a memorandum, opposition or brief as those documents do not constitute pleadings.<sup>11</sup> The new legislation also

appears to codify earlier decisions finding constitutionality should not be raised in a summary proceeding such as a request for a preliminary injunction.<sup>12</sup>

## Service on the Attorney General

As originally enacted, La. C.C.P. art. 1880 provided that, in an action for declaratory relief where a statute, ordinance or franchise is alleged to be unconstitutional, “the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.” The decisions interpreting this article have recognized that it did not require the attorney general to be joined as an actual party, but instead “contemplated that the attorney general be served and be given an opportunity to be heard and to participate in the case in a representative capacity.”<sup>13</sup>

In 2024, La. C.C.P. art. 1880 was amended to add the following language: “[i]f the law is alleged to be unconstitutional, pleadings shall be made pursuant to the requirements in Articles 855.1 and 1845.”<sup>14</sup> At the same time, La. C.C.P. art. 855.1 was enacted, providing that, in a civil action alleging unconstitutionality, “[t]he pleading shall be served upon the attorney general of the state in accordance with Article 1314.” Upon proper service, “the attorney general shall have thirty days to respond to the allegations or represent or supervise the interests of the state.” As noted, La. C.C.P. art. 1845 mandates that any judgment of unconstitutionality is null and void if the provisions of La. C.C.P. art. 855.1 have not been satisfied.

The 2024 amendments broaden the scope of the service requirements. While the original version of La. C.C.P. art 1880 was limited to declaratory judgments, La. C.C.P. art. 855.1 now requires the attorney general to be served in all civil actions in which a law is alleged to be unconstitutional.<sup>15</sup> Additionally, the new legislation establishes a specific time limit for the attorney general to respond and nullifies any judgment of unconstitutionality where the attorney general has not been served. However, the new



articles do not appear to overrule the earlier jurisprudential pronouncements which held the attorney general need not be made an actual party, but instead may elect to appear in a representative or supervisory capacity.<sup>16</sup>

Finally, La. R.S. 13:4448 provides an additional safeguard to protect the attorney general’s interests. That statute mandates that, prior to adjudicating the constitutionality of a state statute, the courts of appeal and the Louisiana Supreme Court shall provide notice by certified mail to the attorney general and afford the attorney general an opportunity to be heard. In the event of failure to comply with this requirement, the statute provides the court must hold adjudication of the case open, pending notification to the attorney general.

## Appeals

Article V, §5(D) of the Louisiana Constitution provides a case shall be appealable to the Louisiana Supreme Court when “a law or ordinance has been declared unconstitutional.” The courts of appeal lack jurisdiction to review an appeal of a judgment of unconstitution-

ality.<sup>17</sup> If the appeal is taken to a court which lacks jurisdiction, it may be transferred to the proper court under the provisions of La. C.C.P. art. 2162 and La. R.S. 13:4441.

Once the Supreme Court assumes appellate jurisdiction over the judgment of unconstitutionality, it “has appellate jurisdiction over all issues involved in a civil action properly before it.”<sup>18</sup> The Court has interpreted this provision as applying only to those issues which have been ruled on by the trial court.<sup>19</sup> The Supreme Court’s appellate jurisdiction does not attach unless there is a substantive declaration of unconstitutionality.<sup>20</sup> In deciding jurisdiction, the Court has looked to whether the constitutional determination was essential to the judgment.<sup>21</sup> This analysis developed from the well-settled principle that “courts should refrain from reaching or determining the constitutionality of legislation unless, in the context of a particular case, the resolution of the constitutional issue is essential to the decision of the case or controversy.”<sup>22</sup> Thus, if the trial court’s reference to unconstitutionality is in the nature of *obiter dictum*, the Supreme Court’s appellate jurisdiction will not attach.<sup>23</sup>

A frequent problem arises when the trial court's reasons for judgment indicate a statute is unconstitutional, but the written judgment does not contain a formal declaration of unconstitutionality. In such instances, the Supreme Court has frequently found it lacks appellate jurisdiction on the ground that a trial court's oral or written reasons form no part of the judgment.<sup>24</sup> However, in cases where the record contains detailed reasons that can fairly be characterized as a substantive declaration of unconstitutionality, the Court has found the judgment falls within its appellate jurisdiction.<sup>25</sup>

If the Supreme Court finds it lacks appellate jurisdiction, it may still exercise its supervisory jurisdiction pursuant to Article V, §5(A) of the Louisiana Constitution. The constitutional grant of supervisory authority to the Supreme Court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.<sup>26</sup> In determining whether to exercise its discretionary supervisory authority, the Court considers factors such as whether resolution of the issue would greatly aid the parties and the courts, and whether it would avoid further delay in the disposition of the matter.<sup>27</sup>

An unusual situation may arise when a declaration of unconstitutionality is rendered by the court of appeal rather than the trial court. This scenario can occur when the trial court finds a statute to be constitutional, but the court of appeal reverses this judgment on appeal. In such a case, the court of appeal's judgment should be appealable to the Supreme Court, but the proceeding may not fall within the code's definition of appeal.<sup>28</sup> To address this procedural conundrum, the Supreme Court has developed a practice in which it grants a party's application for certiorari as a matter of right in a case where the appellate court has declared a law unconstitutional.<sup>29</sup>

## Conclusion

As seen by this brief overview, the procedural requirements for raising a constitutional challenge can be rather complex. However, compliance with

these requirements is necessary in ensuring the constitutional issue is properly postured for review on the merits.

## FOOTNOTES

1. This article focuses primarily on constitutionality challenges in civil proceedings. However, some of these same requirements may be applicable in criminal proceedings.

2. *Williams v. State, Dep't of Health & Hosps.*, 1995-0713 (La. 1/26/96), 671 So.2d 899, 902; *Vallo v. Gayle Oil Co.*, 1994-1238 (La. 11/30/94), 646 So.2d 859, 864-65.

3. *Prejean v. Barousse*, 2012-1177 (La. 1/29/13), 107 So.3d 569, 571.

4. *Board of Comm'r's of Orleans Levee Dist. v. Connick*, 1994-3161 (La. 3/9/95), 654 So.2d 1073, 1076.

5. See, e.g., *Long v. Northeast Soil Conservation Dist. of La.*, 226 La. 824, 831, 77 So.2d 408, 410 (1954) (explaining "in view of the fact that the act became effective after this case was lodged in this court, it was impossible for relator to urge and plead its unconstitutionality in the lower court").

6. *City of Baton Rouge v. Stauffer Chem. Co.*, 500 So.2d 397, 400 at n. 7 (La. 1987).

7. *Fransen v. City of New Orleans*, 2008-0076 (La. 7/1/08), 988 So.2d 225, 234.

8. *City of Shreveport v. Pedro*, 170 La. 351, 353, 127 So. 865, 865 (1930).

9. *Vallo v. Gayle Oil Co.*, 1994-1238 (La. 11/30/94), 646 So.2d 859, 864.

10. This article also provides for service on the attorney general, which will be discussed in more detail in the next section.

11. *Marcile v. Dauzat*, 2010-1822 (La. 9/24/10), 44 So.3d 678, 679 (quoting *Vallo v. Gayle Oil Co.*, 94-1238 (La. 11/30/94), 646 So.2d 859, 865).

12. See *Farmer's Seafood Co. v. State ex rel. Dep't of Pub. Safety*, 2010-1534 (La. 9/3/10), 44 So.3d 676; *Women's Health Clinic v. State*, 2001-2645 (La. 11/9/01), 804 So.2d 625; and *Kruger v. Garden Dist. Ass'n*, 1999-3344 (La. 3/24/00), 756 So.2d 309.

13. *Chamberlain v. State Through Dep't of Transp. & Dev.*, 624 So.2d 874, 877 (La. 1993).

14. La. Acts 2024, 2nd Ex. Sess., No. 12.

15. While criminal proceedings are outside the scope of this article, it is noteworthy that a corresponding provision was added in 2024 to La. C.Cr.P. art. 62(D), which provides:

D. Any pleading containing an allegation of unconstitutionality of a criminal law shall be in writing and served upon the attorney general of the state. Upon proper service, the attorney general shall have thirty days to respond to the allegations or represent or supervise the interests of the state. The attorney general shall have a right to directly appeal adverse rulings to the Supreme Court of Louisiana for supervisory review whether or not the attorney general participated in the underlying proceeding.

This amendment may call into question the validity of *State in Int. of A.N.*, 2018-01571 (La. 10/22/19), 286 So.3d 969, 973-74, in which the court declined to apply the notice provisions of the

Code of Civil Procedure to a post-conviction criminal proceeding established by and defined in the Code of Criminal Procedure.

16. Pursuant to La. R.S. 49:257, "[t]he attorney general, at his discretion, shall be permitted to present, represent, or supervise the representation of the state's interest in the proceeding if the proceeding is in accordance with Code of Civil Procedure Articles 855.1 and 1845 and Code of Criminal Procedure Article 62(D)."

17. See, e.g., *Cartesian Co., Inc. v. Div. of Admin. L. Ethics Adjudicatory Bd. Panel A*, 2022-0158 (La. App. 1 Cir. 9/16/22), 352 So.3d 1021.

18. La. Const. Art. V, §5(F).

19. *Church Point Wholesale Beverage Co. v. Tarver*, 614 So.2d 697, 701 (La. 1993).

20. *Twin Parish Port Comm'n v. Berry Bros.*, 1994-2594 (La. 2/20/95), 650 So.2d 748, 749.

21. *Marcile v. Dauzat*, 2011-1509 (La. 10/16/12), 103 So.3d 335, 338.

22. *Ring v. State, Dep't of Transp. & Dev.*, 2002-1367 (La. 1/14/03), 835 So.2d 423, 426.

23. *Blocker v. City of New Orleans*, 218 La. 669, 670-71, 50 So.2d 643, 643 (1951).

24. *Lillie v. Stanford Trust Co.*, 2022-00328 (La. 4/12/22), 335 So.3d 828, 829; *Barber v. Louisiana Workforce Comm'n*, 17-0750 (La. 6/5/17), 221 So.3d 38; *Perez v. Evenstar, Inc.*, 2012-1003 (La. 6/22/12), 91 So.3d 288; *Fla. Gas Transmission Co. v. Louisiana Tax Comm'n*, 09-0729 (La. 5/15/09), 10 So.3d 1219; *Meaux v. Galtier*, 07-2474 (La. 1/25/08), 972 So.2d 1137; *Burmaster v. Plaquemines Par. Gov't*, 2007-1311 (La. 8/31/07), 963 So.2d 378; *Carmena v. East Baton Rouge Parish Sheriff's Office*, 2006-0260 (La. 2/2/07), 947 So.2d 715.

25. *State v. Williams*, 2011-0958 (La. 7/2/12), 94 So.3d 770, 777; *St. Charles Gaming Co. v. River Boat Gaming Comm'n*, 1994-2697 (La. 11/10/94), 645 So.2d 208.

26. *Unwired Telecom Corp. v. Par. of Calcasieu*, 2003-0732 (La. 1/19/05), 903 So.2d 392, 400.

27. *Mayeux v. Charlet*, 2016-1463 (La. 10/28/16), 203 So.3d 1030, 1035.

28. La. C.C.P. art. 2082 defines "appeal" as "the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." [emphasis added].

29. *Bradford v. Dep't of Hosps.*, 255 La. 888, 894, 233 So.2d 553, 555 (1970).

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