

**In the Name of God, the Merciful, the Compassionate**

**Arab Republic of Egypt**

**The Egyptian Presidency**

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**In the Name of the People**

**The Supreme Constitutional Court**

In the open session convened Thursday, the Fourteenth of June 2012 A.D., corresponding to the Twenty-Fourth of Rajab 1433 A.H.

Presided by the Honorable Counselor Farouk Ahmed Sultan.....Chief Justice

Composed of the Honorable Counselors Maher al-Beheiry, Dr. Hanafi Ali Gabali, Mohamed Abdel Aziz al-Shenawi, Maher Sami Youssef, Mohamed Khater Khairy Taha, Dr. Adel Omar Sherif. Associate Justices

Attended by Dr. Abdel Aziz Salman...Chairman of the State Commissioner's Authority

And Mr Nasser Imam Mohamed.....Court Secretary

The Court issued the following:

In the Case recorded as Constitutional Case No. 20/24 in the register of the Supreme Constitutional Court

Filed by:

Anwar Subh Darwish Mustafa

Against:

- 1- The Chairman of the Supreme Council of the Armed Forces
- 2- The Prime Minister
- 3- The Minister of Justice
- 4- The Chairman of the Supreme Election Commission
- 5- The Minister of the Interior
- 6- The Governor of Qalyubia

**Proceedings**

On 21 February 2012, the court clerk received Supreme Constitutional Court Appeal File No. 6414/58, after the Appeals Division of the Supreme Administrative Court, in the hearing convened on 20/2/2012, ruled to refer the case to the Supreme Constitutional Court to decide on the constitutionality of Article 3, Paragraph 1 of Law No. 38/1972 concerning the People's Assembly, which was replaced by Decree-law No. 12/2011, and Article 6, Paragraph 1 of said law, which was replaced by Decree-law No. 108/2011, and Article 9 *bis* of the aforementioned law, which was supplemented by Decree-law No. 108/2011. The State Cases Authority submitted a brief in which its

primary request was for a ruling that the Court lacks jurisdiction to hear the case, and its alternative request was that the Court not accept the case, and as a secondary alternative request, that the case be dismissed.

After the case was prepared, the State Commissioner's Authority filed a report giving its opinion.

The case was examined openly in the minutes of the session, and the Court decided to issue a ruling in the same session.

### **The Court**

After consideration of the documents and deliberation,

Whereas the facts, as ascertained from the statement of claim and the other documents, may be summarized as follows: Anwar Subh Darwish Mustafa filed Case No. 2656/13 before the Administrative Judiciary Court in the Qalyubia Circuit requesting a ruling to halt and then cancel the Supreme Election Commission's decision to announce People's Assembly election results for the individual seat in Qalyubia's third electoral district – the content of which was a run-off between the Freedom and Justice Party candidate and the Nour Party candidate over the professional seat in said district. The petition also requested that both candidates be excluded from the contest, along with several other Freedom and Justice Party candidates for the worker seat in this district in the individual system, and the resulting effects. Explaining his lawsuit, Mustafa said that he was one of the candidates under the individual system (professional – independent) in the Third District in Qalyubia. Elections took place and the Supreme Elections Commission announced the result that he did not win, and that a run-off would take place between the candidates of the Freedom and Justice Party and the Nour Party. The plaintiff blamed the Commission's decision as being a violation of the legal statutes for reasons to the effect that the electoral process and the vote count were invalid, and that the text of Article 3, Paragraph 1 of Law No. 38/1972, which was replaced by Decree-law No. 120/2011, and the text of Article 1 of Decree-Law No. 123/2011, which amended some provisions of Decree-law No. 120/2011, upon which the appealed decision was based, were unconstitutional. This is due to the fact that both texts violate the principle of equality guaranteed by Article 7 of the Constitutional Declaration issued on the Thirtieth of March 2011, since they discriminated between those belonging to political parties, who number thirty million, and independents, who number fifty million, in that they allotted two-thirds of the seats of the People's Assembly to political parties, and limited the rights of independents to the remaining one-third, over which they faced competition from political parties. Furthermore, said texts violate rulings of the Supreme Constitutional Court on a number of statutes. In the hearing of 9/1/2012, this Court ruled

on the summary portion of the claim, dismissing the motion to halt the appealed decision. Since the plaintiff was not satisfied by this ruling, he appealed before the Supreme Administrative Court in Administrative Appeal No. 6414/58. In the hearing of 20/2/2012, the Appeals Division of the Supreme Administrative Court ruled to halt the appeal, and referred the documents to the Supreme Constitutional Court to rule on the constitutionality of the texts mentioned in the referral decision, since they both seemed to the court to violate the provisions of the aforementioned Constitutional Declaration.

Whereas the State Cases Authority filed a plea to the jurisdiction of this Court to hear the case, on the basis that the appealed provisions are considered a political action, and that the motion to rule on their constitutionality would in its essence be based on a ruling on the constitutionality of the text of Article 38 of the Constitutional Declaration. This plea is denied, since the judicial supervision of the constitutionality of laws and regulations exercised by the Supreme Constitutional Court in accordance with the text of Article 49 of the Constitutional Declaration, and the Law of the Court issued as Law No. 48/1979, has its general basis in the principle of the legitimacy and the sovereignty of the law and the subordination of the state to the law. On this basis and in accordance with the ruling of this Court, excluding political actions from the scope of this judicial supervision is denied, based on the fact that the nature of such actions cannot be subject to litigation, and the criterion for determining the legal character of such actions is by the nature of the action itself and not the characterizations that the legislator may attribute to it -- when its nature may be inconsistent with such characterizations. This is because excluding such actions from the competence of the constitutional judiciary is rather meant to further political considerations that – due to the nature of such actions and their close linkage to the political order of the state or its domestic or international sovereignty – must be kept outside the scope of judicial supervision in order to preserve the state, defend its sovereignty, and uphold its higher interests. This requires that the body undertaking such actions – whether the legislative or executive authority – be given a wider range and broader scope of discretionary power to act in the interest of the nation and its safety, and not entrust the judiciary with the power to review measures taken in such matters, because examination and review necessitate information, controls, and scales of assessment that are not available to the judiciary, and it is not appropriate to raise such issues publicly in its forum. The Supreme Constitutional Court alone is entrusted with examining the nature of the issues regulated by the appealed provisions. If these provisions are political actions, then they fall outside the Court's competence to conduct judicial supervision of constitutionality; if they are not, then the Court is free to oversee them. For this reason, and because the appealed provisions organize the stipulations governing running for office in the People's Assembly, which must be examined alongside the rest of the stipulations of the aforementioned Law No. 38/1972, in so far as

they are interwoven and interconnected to form an inseparable whole, and in light of the fact that said stipulations specify the nature, framework and content of the legal system adopted and enacted by the legislator to regulate the entire electoral process, which according to its legislative nature and aforementioned content is not among the political issues that fall outside judicial supervision over constitutionality. This Court's exercise of judicial supervision over the constitutionality [of these provisions] is not an infringement of, or challenge to the text of Article 38 of the Constitutional Declaration, or an extension of its supervision over them, so this text and the rest of the other provisions of the Constitutional Declaration remain the rules governing this supervision. The plea to the jurisdiction of the Court to examine the case does not rest on a sound basis, and so it must be denied.

Whereas the motion by the State Cases Authority that the case not be accepted in order to unify the venue of the merits case and the constitutional case is also denied, since it is established that the jurisdiction of this Court is only connected with the case in so far as it corresponds to conditions fixed by Article 29 of the [law establishing the Court]. Hence, to realize the legislator's intention in this matter, the merits case must rely solely on petitions other than the ruling that certain legal provisions are unconstitutional; otherwise, the case would in fact be a constitutional case that had been filed in a way other than that prescribed by law. For this reason, and because the merits case is founded on a motion to halt and then cancel the decision of the Supreme Elections Commission to announce People's Assembly election results for Qalyubia's third individual-candidacy electoral district, which are motions independent in their substance and content from those specified in the present constitutional case, which is concerned with the constitutionality of the appealed texts, this means that the aforementioned plea is not in its appropriate venue, and so it is fitting to rule that it be denied.

Whereas Article 3, Paragraph 1 of Law No. 38/1972 concerning the People's Assembly, which was replaced by Decree-law No. 120/2011 stipulating that "Two-thirds of the members of the People's Assembly shall be elected according to a closed party-list system, and the other third by an individual candidacy system. The number of members representing each governorate through the closed party-list system shall be equal to two-thirds the number of seats allocated to the governorate, and the number of members representing the governorate through the individual candidacy system shall be equal to one-third the number of seats allocated to the governorate."

Article 6, Paragraph 1 of this law, which was replaced by Decree-law No. 108/2011 stipulates: " In the electoral districts allotted for individual candidacy elections, People's Assembly candidacy requests shall be submitted by the applicant in writing to

the election commission of the governorate where the electoral district in which he wishes to run is located. The requests shall be submitted within the time period determined by a decision of the Supreme Elections Commission, which shall be no shorter than five days from the opening of the candidacy registration window."

Article 9 *bis* of the aforementioned law, which is supplemented by Decree-law No. 108/2011, stipulates that: "After the commission in charge of settling objections referred to in the previous article concludes its task, the election commission in the governorate shall prepare two final lists, one of which shall contain the names of candidates under the individual candidacy system, and the other the names of party-list candidates. Each list shall contain the status that has been established for each candidate, the party that he belongs to (if applicable), and the ballot symbol assigned to each candidate or party list. The Supreme Elections Commission shall publish the names of the candidates, each in their own electoral district, in two broadsheet daily newspapers."

Before it was repealed, Article 5 of Decree-law No. 120/2011, which amended some provisions of the aforementioned Law No. 38/1972 and Law No. 120/1980 concerning the Shura Council, stipulated that: "Whoever submits a candidacy request for the People's Assembly or the Shura Council shall not belong to any political party, and it is a condition of his continued membership [in either body] that he remain unaffiliated with any political party. If he loses this status, then he shall be stripped of his membership by a two-thirds majority vote." This text was repealed under Article 1 of Decree-law No. 123/2011, which stipulates that: "Article 5 of Decree-law No. 120/2011 is hereby repealed."

Whereas the interest – which is the condition for accepting the constitutional case – has its basis in that there be a connection between it and the interest in the merits case, such that deciding the constitutional issue is necessary to rule on the related requests that have been submitted to the court hearing the case on its merits. For this reason, and because the substantial dispute has its basis on the request to halt and then cancel the Supreme Elections Commission's decision to announce People's Assembly election results for the third individual candidacy electoral district in the governorate of Qalyubia -- the content of which was a run-off between the Freedom and Justice Party candidate and the Nour Party candidate over the professional seat in said district. The motion also requested that both candidates be excluded from the contest, along with several other Freedom and Justice Party candidates for the worker seat in this district in the individual system, and the resulting effects. Article 3, Paragraph 1 of the aforementioned Law No. 38/1972 had specified the proportion fixed for the closed party-list system, and that allotted for the individual candidacy system, allotting two-thirds of the seats in the

People's Assembly to the former, and one-third to the latter. Article 6, Paragraph 1 of this law enumerated the rules pertaining to submission of candidacy requests for the People's Assembly in electoral districts allocated for the individual candidacy system. Article 9 *bis* A of the aforementioned Law No. 38/1972 dealt with the provisions concerning preparation of final candidate lists, and required that the final list of candidates running under the individual system specify the political party to which the candidate belongs. Article 5 of the aforementioned Decree-law No. 120/2011 stipulates that whoever submits a candidacy request for the People's Assembly under the individual candidacy system shall not belong to any political party, and not only was this a condition for submitting the candidacy request, but a condition also for his continued membership in the assembly. If he lost this status, then he would be stripped of his membership by a two-thirds majority vote. However, the legislator repealed this stipulation under Article 1 of the aforementioned Decree-law No. 123/2011, where the trend of the legislator's explicit intention is to limit the two-thirds elected under the closed party-list system to members of political parties, and to leave open the remaining one-third elected under the individual candidacy system to both political party members and independents not belonging to any party. There is no doubt that establishing this competition had a definite impact and reciprocal effect on the two-thirds allocated for closed party lists, since if political parties were not competing with independents over that other portion, then a rearrangement would have taken place within the party lists, taking into account the priorities within each party. Furthermore, political party members had the choice between two ways to run for the People's Assembly, the closed party-list system and the individual candidacy system. Independents were deprived of one of these ways, and their rights were limited to the portion allotted for the individual candidacy system, in which political party members also competed. Therefore, the interest in the present case is ascertained in the challenge to the text of the following articles: Article 3, Paragraph 1 of the aforementioned Law No. 38/1972, which was replaced by Decree-law No. 120/2011; the contents of Article 6, Paragraph 1 of this law, which was replaced by Decree-law No. 120/2011, which granted the right to submit a candidacy request for the People's Assembly in electoral districts allotted for the individual candidacy system to political party members as well as independents not belonging to any party; Article 9 *bis* A of this law, which was supplemented by Decree-law No. 120/2011, in that it stipulates that the final list of the names of candidates under the individual candidacy system specify the political party to which the candidate belongs. The interest here is because ruling on the constitutionality of these provisions would have an effect and impact on the merits case, the motions filed therein, and the court hearing the case. The scope of this case and the interest therein also extends to the text of Article 1 of the aforementioned Decree-law No. 123/2011, which is connected to the aforementioned provisions such that it may not be split or detached, which places it before this Court for judgment.

Whereas the referral judgment blamed the appealed provisions for their violation of the right to run for office, and the principle of equality and parity established by Article 7 of the Constitutional Declaration, since it allowed political party members to compete with independents not belonging to such parties over the one-third allotted for the individual candidacy system, despite their monopoly over the two-thirds allotted for election under the closed party-list system.

Whereas Article 1 of the Constitutional Declaration issued on the Thirtieth of March 2011 stipulates that: "The Arab Republic of Egypt is a democratic state based on the principle of citizenship," and Articles 32 to 41 of this Declaration specify the rules related to electing the People's Assembly and Shura Council. The significance and bases of that ruling are that the constitutional legislature is keen on guaranteeing the political rights of all citizens, the foundation of which are the right to candidacy, suffrage, and participation in referendums, and on enabling them to practice those rights in order to guarantee their participation in public life, considering them one of the democratic means of expressing opinions and choosing leaders and representatives steering the governing of the country and forming parliament. Hence, the practicing of citizens of their political rights, particularly the right to candidacy and suffrage, are considered one of the most important features and implementation, whether as voters who enjoy the right to elect their candidates in light of their satisfaction of their ability to express issues of importance to them, or as candidates striving, according to fair rules, to win the seats they are competing to occupy. Hence it was the practice of the legislatures of their discretionary authority to regulate those two rights, subject to abiding by the limits and measures provided by the Constitutional Declaration, in a way that does not allow the organization of the election process, whether its time, location, or way it is conducted, to be used as a pretext to violate the rights which the Constitutional Declaration provided for the process, in a way that would thwart its essence, discredit it, influence its presence, make it futile or seize it.

Whereas it is established in the administration of justice in this court that the principle of equality before the law - provided by Article 7 of the aforementioned Constitutional Declaration - is neither a dictating, static principle denying practical need, nor a hard rule that discards all forms of discrimination, nor is it a guarantee of the accuracy of measurement warranted by the absolute scale of justice between matters. If it was permissible for the State to itself undertake measures it deems appropriate to regulate a certain issue, or to avert an evil which it deems necessary to repel, and it was necessary that a major damage be warded off by a minor damage, its implementation of the principle of equality shall not reveal its whims, nor be stemming from the adoption of

unjust positions that would give rise to malevolence or hate that would disrupt its behavioural standards, nor an aggression denoting the power of its authority. Its position shall be moderate in dealing with the citizens, not discriminating between them forcibly or abusively. Consequently, it is permissible that the legislative authority would diverge from – according to logical standards – positions where facts are dissimilar or vary between themselves in the bases on which they are founded, provided that the differences between them are authentic and not artificial or imaginary. The guardian of the principle of equality, which does not undermine its significance, is the organization that establishes a legislative division where the legal provisions it contains are related to the legitimate intentions sought. If dissociation between those provisions and their goals is established, the discrimination shall be an un contemplated slip. So shall be the case if the relation between the means and the intentions was weak, where the discrimination shall be considered based on facts that cannot be taken into consideration, making it invalid constitutionally.

Whereas the core of the principle of equal opportunity, which derives from the principle of equality and is considered one of its elements, is related – as established in the administration of justice in this court - to the chances which the State undertakes to make available, and its implementation takes place when it is contested, and the constitutional protection of these opportunities aims to establish a priority that is determined according to subjective foundations required by public interest.

Whereas it is established that the political system in the Arab Republic of Egypt shall be a multi-partisan system – in light of the 1971 Constitution, and confirmed by Article 4 of the Constitutional Declaration – considering that this multiplicity aims primarily to deepen democracy and establish its foundations within the framework of the right to candidacy and suffrage, which are considered a primary portal and base for it, hence were guaranteed by the Constitutional Declaration to all citizens who hold public sovereignty in accordance with the provisions of Article 3 of the Constitutional Declaration, and exercise it according to the means indicated in that Declaration. There is no proof of this stronger than the fact that multi-partisanship is what carries between its folds a system in which opinions disagree or agree, while national interest remains its frame, measure for evaluation, and regulator of their activity. An interest that is maintained by the whole people. Hence, multi-partisanship was not a mean adopted by the constitutional legislature to replace one dominance with another, but was considered a straight path for national action through the democracy of the dialogue within which opinions are numerous and varied, with the role played by political parties connected in

the end to the wish of the voters in all their different congregations. It is a wish which manifests through their free election of their representatives for parliament, and by the weight they provide by their votes to those competing for the seats. This is what the Constitutional Declaration was keen to ensure, guarantee suffrage and the right candidacy, and make them equal in exercising those two rights. It did not permit discriminating between them in the bases on which they exercised, nor did it give preference to some citizens over others in any issue related to them. It granted these two rights to the citizens - who meet the conditions set for that – regardless of their varied affiliations and political opinions, in order to guarantee that national actions remained collective, with no preference of some citizens over others. Through this collaborative effort in building national actions, political parties shall work with those not affiliated to them, in order to establish the foundations of these actions, hence the true meaning of Article 3 of the Constitutional Declaration is realized, which does not grant public authority to one class, excluding the other, nor impose the authority of one group over the other. Within this framework lies the value of multi-partisanship as a constitutional purpose towards deepening the concept of democracy that offers political parties a role in national action that exceeds the margin of confidence granted by the voters to their candidates who compete with others according to subjective rules unlimited by a creed of any sort, and unrestricted by any form of affiliation, whether political or apolitical, and so that all citizens who fulfil the conditions set for this, would have the same chance – through which they influence, equally between themselves – the shaping of national policy and the determination of its final features. This is confirmed by the fact that Constitutional Declaration does not include a provision compelling citizens to join political parties, or any coupling of the exercising of political rights related to the right of candidacy and suffrage, to a party affiliation, which indicates the necessarily to establish the freedom of a citizen to join or not a political party, and to exercise their indicated political rights through political parties or away from them. Undoubtedly, the principles of equality and equal chances, which are the primary fundamentals and principles concerned in the matter, necessitate one legal treatment for all candidates, on the basis of equal opportunities for all, with no discriminating based on party affiliation. Discrimination in that case shall be based on the difference in political opinions, which is a matter prohibited constitutionally. The partisan system should not become a burden on freedoms and public rights originating from it, one of which is the right to candidacy, which is one of the public rights stipulated by the nature of parliamentary democratic systems, and imposed by its main cornerstone which is based on submitting to the authority of the people, in accordance with the provision of Article 3 of the Constitutional Declaration.

Whereas it is established that the interpretation of the Constitutional Declaration articles shall be by considering them a unit, each complementing the other, and that the meanings evolving from them should be interrelated with each other in a way that wards off any discordance, with no provision interpreted separately from the other provisions, but should be interpreted in cohesion with them and understood in a way that would bring harmony between them and distance them from any contradiction.

Whereas Article 38 of the Constitutional Declaration issued on 30 March, 2011, amended by the Constitutional Declaration issued on 25 September, 2011, provides that: “The law shall regulate the right to candidacy for the People's Assembly and the Shoura Council according to an election system that includes the closed party list system, and the first past the post voting system, at the ratio of two thirds for the former, and one third for the latter.” The significance of the wording of that provision, in light of the principles of equality and equal opportunity and the rules of justice, was that limiting candidacy for the membership of the People's Assembly within the two thirds allocated for closed party lists voting system to members of political parties was set against limiting the right to candidacy for the remaining one third allocated for first past the post voting system to independents who were not affiliated with political parties. This is because the constitutional legislature adopted this division, aiming to establish intellectual and political diversity within the People’s Assembly, so that the Assembly, in its final formation shall represent society’s visions, all its varied spectra, streams, and inclinations, and encompass them, so that they can carry out their active role in the Assembly performing its constitutional duty provided in Article 33 of the Constitutional Declaration. What contradicts this aim and collides with it is the course taken by the legislature in the provisions appealed against, where they limited candidacy for the two thirds allocated to election by the closed party lists voting system, to those affiliated with political parties, as confirmed by the provisions of Article 6, para.4, of the aforementioned Law 38, of the year 1972, substituted by the Decree Law 108, of the year 2011, for the relevant body in the party or parties to undertake their nomination by an application submitted on the form prepared by the Elections Supreme Committee, whereas they did not make applying for the third allocated for the first past the post voting system limited to independent candidates unaffiliated with political parties. They rather left it open for completion between themselves and others members of those parties – contrary to what the constitutional legislature intended – as expressed by Article 1 of the Decree Law 123, of the year 2011, by repelling the provision of Article 5 of the aforementioned Decree Law 120, of the year 2011, and confirmed by the rest of provisions appealed against - as mentioned previously. Hence, they have allowed political party candidates one of two opportunities to obtain the membership of the

People's Assembly, one through closed party lists, and the second through first past the post voting system candidacy, while the only opportunity that was available for independent candidates not affiliated to those parties was limited to the third allocated to the first past the post voting system, where they are competed against and rivaled by candidates belonging to political parties, who enjoy the financial and moral support of the parties to which they belong, which exploit all their available capabilities in supporting them. Something which is not available to independent candidates unaffiliated with any parties, is in violation of the provision of Article 38 of the Constitutional Declaration, and poses an infringement of the content, elements, and guarantee of right to candidacy, and a discrimination between two classes of citizens, which violates the principles of equality and equal opportunity, as it entails discrimination between the two classes in treatment and in the opportunities available to win the membership, without this discrimination being, in all its aforementioned aspects, justified by a subjective rule related in origin to the nature of the right to candidacy and the requirements of practicing it, through which and with which equality and equal opportunity are achieved. This is in addition to the course of the legislature representing a violation of the bases for justice, which are confirmed by Article 5 of the Constitutional Declaration, which does not deviate in aim from the Law as – as established in the administration of justice in this court – an instrument of realizing it. The law shall not be just unless it establishes its goals. If the legislature deviates from them, and violates the true values they embrace, as pursued in the provisions appealed against, they would terminate the accord within the scope of their implementation, and shed in vain every value of their presence, and contradict – accordingly - the bases of justice. This constitutional defect extends to the election system determined by the legislature and included in the provisions appealed against, whether it is the two thirds allocated to closed party lists, or the one third allocated to first past the post voting system.

Whereas in the light of all the above, it is evident that the whole of the first paragraph of Article 3, the first paragraph of Article 6, and Article 9 bis (a) determining their extent as stated before, and Article 1 of the Decree Law 123, of the year 2011, appealed against, are in violation of the aforementioned provisions of the Constitutional Declaration, which requires ruling them unconstitutional.

Whereas ruling Article 1 of the Decree Law 123, of the year 2011, unconstitutional is definitely followed by and necessitates repealing the provision of Article 2 of the Decree Law, which is closely related to it in a way that does not allow any separation or division.

Whereas this had occurred, and the elections for the People’s Assembly had taken place based on provisions established to be unconstitutional, the significance and necessity of this – as established in the administration of justice in this court - are that the formation of the whole Assembly is null and void since it was elected, with the its resulting dissolution by the power of the law as of the indicated date, and without the need for any other measure, as a result of ruling the aforementioned provision unconstitutional, and in implementation of the absolute obligation and binding force of decisions issued in constitutional suits verses the people, and in relation to the State with its different bodies, in accordance with the clear provision of Article 49 of the Supreme Constitutional Court Law, issued by Law 48, of the year 1979. However, this does not absolutely lead to voiding the laws and decisions taken by the Assembly, and the procedures taken during the previous period, and until the date of publishing this decision in the Egyptian Gazette. These laws, decisions and procedures shall retain their validity, and hence, shall remain correct and enforceable, unless they are annulled or amended by the constitutionally relevant authority, or ruled unconstitutional by a Supreme Constitutional Court decision in case of other grounds on which this decision was based.

#### **For the above reasons**

##### The court rules:

**First.** The unconstitutionality of the provision of Article 38, para. 1, of the Law 38, of the year 1972, concerning the People’s Assembly, substituted by the Decree Law 120, of the year 2011.

**Second.** The unconstitutionality of the provision of Article 6, para.1, of that Law, substituted by the Decree Law 108, of the year 2011, providing a general right to submit candidacy applications for the People’s Assembly elections within constituencies subject to the first past the post voting system, to those affiliated to political parties, in addition to independent candidates not affiliate to those parties.

**Third.** The unconstitutionality of the provision of Article 9 bis (a) of the indicated Law, added by the Decree Law 108, of the year 2011, providing for the inclusion of the final lists of names of first past the post voting system candidates, of the names of their affiliated parties.

**Fourth.** The unconstitutionality of the provision of Article 1, of the Decree Law 123, of the year 2011, amending some of the provisions of the Decree Law 120, of the year 2011, and annulling the provision of Article 2 thereof.

**Secretary**

**Deputy President of the Court**

**In the name of the people  
Supreme Constitutional Court**

In the public hearing held on Thursday 14<sup>th</sup> June 2012 AD, corresponding to 14<sup>th</sup> Rajab 1433 AH

With the president: the advisor / Mr Abdul Wahab Abdul Razaq...**Vice President of the Court**

With the members: the advisors / Mr Abdul Moneim Hashish, Dr Adil Amr Sharif, Mr Rajab Abdul Hakim Salim, Mr Boulos Fahmi Iskander, Mr Mahmoud Muhammad Ghanaim, and Dr Hassan Abdul Moneim Al Badrawi.....**Vice Presidents of the Court**

Attended by: the advisor / Mr Muhammad Emad Al Najar....**President of the College of Commissioners**

Attended by: Mr Nasir Imam  
Muhammad.....**Secretary**

**The following ruling was issued:**

In the issue registered in the schedule of the Supreme Constitutional Court under number 57 of the “constitutional” judicial year 34,

Referred by the Presidential Electoral Commission by virtue of its decree issued on 25/4/2012

**Filed by:**

Mr / Ahmed Muhammad Shafiq Zaki

**Against:**

The Presidential Electoral Commission

## Proceedings

On 30<sup>th</sup> April 2012, the clerical office of the Supreme Constitutional Court was presented with an official copy of the decision of the Presidential Electoral Commission, issued on 25/4/2012, the third clause of which referred the text of Clause (4) of Article (3) of the Law on the Exercise of Political Rights promulgated by Law No. 73 of 1956, added to Law No. 17 of 2012, to the Supreme Constitutional Court for a ruling on its constitutionality.

The State Lawsuits Authority presented a first memorandum of defence, in which it requested a ruling rejecting the petition. On 20/5/2012, the lawyer Dr Ali Fahmi Ali Sharif lodged a request asking that he be allowed to intervene in the petition as a plaintiff, and that the constitutional petition not be accepted because of the illegality of the method followed by the Presidential Electoral Commission in requesting the rule of the Supreme Constitutional Court. He also requested that the petition papers be referred to the public prosecutor in relation to the brazen intervention committed by the aforementioned Commission into the affairs of this court, assuming the power to rule on the unconstitutionality of Law No. 17 of 2012, and ensuring that it is not implemented with regards to the presidential nominees. The State Lawsuits Authority presented a second memorandum requesting a ruling rejecting this intervention request. Mr Ahmed Muhammad Shafiq Zaki submitted a memorandum requesting a ruling on the unconstitutionality of the aforementioned Law No. 17 of 2012.

Once the petition had been drawn up, the College of Commissioners submitted a report presenting its opinion.

During the hearing set to review the petition, Mr Ahmed Muhammad Shafiq Zaki was represented by a lawyer, who submitted a memorandum presenting his request. The applicant for a contesting intervention was also represented. Those attending with him presented two memoranda upholding his request. The lawyer Mr Wail Bahjat Mamoun Zakri was also represented, and requested permission to intervene alongside the Presidential Electoral Commission in requesting a ruling on the unconstitutionality of the aforementioned Law No. 17 of 2012. The members of the State Cases Body were also represented, and submitted a memorandum calling for a ruling on the unacceptability of the intervention and the rejection of the petition on grounds of substance.

The petition was reviewed as described in the minutes of the hearing. The Court decided to issue its ruling in today's hearing.

## The Court

After reviewing and deliberating the documents,

Whereby the facts - as set out in the ruling for referral, the documents attached thereto and the rest of the documents – reveal that Mr Ahmed Muhammad Shafiq Zaki had as a nominee for the position of President of the Republic submitted a request to the Presidential Electoral Commission to participate in the elections set to be held on 23 and 24 May 2012, and that the Commission decided on 13/4/2012 to accept his nomination papers. In light of the fact that the provisions of Law No. 17 of 2012 came into effect on 24/4/2012, modifying certain provisions of Law No. 73 of 1956 regulating the exercise of political rights and adding a new clause numbered (4) to Article (3) of this law to cover the suspension of the exercise of political rights of “anyone who served within the ten years prior to 11/2/2011 as the President of the Republic, or Vice President of the Republic, or Prime Minister or...” for a period of ten years starting from the aforementioned date, and in implementation of this law, on 24/4/2012 the Presidential Electoral Commission issued a ruling to annul the nomination of the aforementioned person for the post of President of the Republic, since he had held the post of Prime Minister during the final days of the rule of the former president. He appealed this ruling on 25/4/2012, requesting that it be abolished in principle and that his name remain on the list of nominees, and requesting provisionally that the implementation of the appealed decision be suspended and the papers referred to the Supreme Constitutional Court for a ruling on the constitutionality of the aforementioned Law No. 17 of 2012 to permit him to lodge a petition against its unconstitutionality. After hearing the defence of appellant, the Commission decided that there was uncertainty regarding the unconstitutionality of this law. It decided on the same date to accept the appeal in form, and to urgently request the suspension of the implementation of the appealed decision and the effects arising therefrom, the most important of which were the inclusion of the appellant’s name in the final list of nominees, the continuation of the electoral process on the specified dates, and the referral of Clause (4) of Article (3) of Law No. 73 of 1956 added to the aforementioned Law No. 17 of 2012 to the Supreme Constitutional Court for a ruling on its constitutionality. The Commission requested a ruling on this matter.

Whereby the Court has ruled that the content of the text of Article (29) of the law promulgated by Law No. 48 of 1979 means that the legislation has specified therein a way for constitutional petitions to be filed before this court, namely through the direct referral of papers to the Court from one of the courts or bodies with jurisdiction if there is significant uncertainty regarding the violation of any text of the law or statute - in regards

to which the presented dispute must be settled – of the provisions of the Constitution, or through the petition being filed by one of the adversaries as a substantive action in which the litigant defends the unconstitutionality of the legislative text, and if this court or body with jurisdiction believes the defence to be worthy, it shall be permitted to lodge a constitutional petition. These procedures relate to public order, as they are an essential form of legal action through which the legislation aims to uphold the public interest, regulating the filing of accusations on constitutional issues within the procedures it has drawn up.

Whereby the Court has also ruled that the distinction between legislative operations and other operations mistaken for legislative operations is based on a number of elements, the factors of which cannot be definitively determined, but which mostly involve highlighting the main characteristics of the legislative process and what is deemed to be the legal body, including: when attributing a legislative classification to the operations of any body which the law has charged with ruling on particular disputes, it is supposed that the jurisdiction of this body is specified by law and not by an inferior legislative instrument, and that the legislative element which must be fulfilled by its members in terms of guarantees of ability, neutrality and independence take precedence over its form, and that it has been entrusted with the authority to resolve disputes by virtue of decisive resolutions which are not subject to the review of any non-legislative authority, without prejudice to the main legislative guarantees which cannot be waived and which in essence grant sufficient opportunities for the arguments of the parties involved to be considered and for their claims to be examined in light of the legal framework stipulated for previously by the legislation, so that rulings issued in disputes shall give assurance of the legal facts, crystallising the substance thereof with regards to the rights of the defendant or disputed party.

This being so, the Constitutional Declaration issued on 30/3/2011 described the legal nature of the Presidential Electoral Commission as stipulated at the start of the first paragraph of Article (28) which states, “A supreme judicial commission named the Presidential Elections Commission will supervise the election of the President of the Republic beginning with the announcement of the opening of candidate nominations and ending with the announcement of the election result.” The second paragraph of the same article gives details of the composition of the commission, limiting it to judicial elements, in contrast to the situation of Article (76) of the Constitution of 1971 which is no longer in force. It stipulated that “The Commission will be composed of the President of the Supreme Constitutional Court as the president, and a membership made up of the President of the Cairo Court of Appeals, the most senior deputies of the President of the Supreme Constitutional Court, the most senior deputies of the President the Court of

Cassation and the most senior deputies of the president of the State Council.” This is also repeated in the first paragraph of Article (5) of Law No. 174 of 2005 regulating presidential elections, modified by Legislative Decree No. 12 of 2012. In this manner, this composition provides guarantees of capability, neutrality and independence, since the members of the Commission are restricted to purely judicial elements which are not selected on a personal basis but by virtue of functionary position. From another angle, the jurisdiction of this Commission, both administrative and legislative, has been decided by the articles of the aforementioned Law No. 174 of 2005. The Commission enjoys full independence when exercising all of its prerogatives. It has public legal personhood, and its own budget which is incorporated within the public budget of the State, as stipulated for in Article (6) of the same law. The Commission resolves legislative disputes which fall within its jurisdiction, represented by appeals submitted by those whose nomination papers have not been accepted, and appeals submitted by candidates against the decisions of the public committees, in accordance with the text of Clause (11) of the first paragraph of Article (8), the second paragraph of Article (16), and the second paragraph of Article (36) of the aforementioned law, once the evidence of the appellant has been heard, or the appellant has been notified to appear before the Commission but has failed to do so. This offers the main legislative guarantees by granting sufficient opportunities to candidates to appeal and to offer a defence before the Commission, in light of the legal framework stipulated for previously by the legislation, so that rulings issued in disputes shall give assurance of the legal facts, crystallising the substance thereof with regards to the rights of the defendant or disputed party. Rulings issued by the Commission, in line with the stipulations of the third paragraph of Article (28) of the Constitutional Declaration and the second paragraph of Article (8) of the aforementioned Law No. 174 of 2005, shall be final and automatically executable and not subject to appeal by any means or before any body. It shall not be permissible to object to the Commission’s rulings in order to suspend the execution thereof or to have them revoked.

Following on from this, the Presidential Electoral Commission – with regards to its legislative jurisdiction – fulfils the formative and subjective standards for a body with legislative jurisdiction, which the legislation considers in the text of Article (29) of the aforementioned Law No. 48 of 1979. The decision to refer the papers to this Court to resolve the constitutionality of the referred text meets all the formative stipulated requirements for associating the submitted petition with the Supreme Constitutional Court. This association and the circumstances in effect were thus approved by the Court.

With regards to the two requests for intervention, one combative and one associative, in the submitted petition, the ruling of this Court states that the condition for accepting an intervention is that it be submitted by a person who is a party to the

substantive action the ruling on which is affected by the ruling on the constitutional issue. If the person requesting to intervene is not represented in this petition, they shall not be considered a concerned party to the constitutional petition and their intervention shall not be accepted. In this case, and if the person requesting to intervene is not represented in the appeal submitted to the Presidential Electoral Commission, they shall accordingly not be considered a concerned party to the submitted constitutional petition and their intervention shall not be accepted.

Whereby Article (3) of Law No. 73 of 1956, modified by virtue of Article (1) of the aforementioned Law No. 17 of 2012, stipulates that:

“The exercise of the political rights of the following persons shall be suspended:

1. Prisoners, during the period of imprisonment
2. Confined persons afflicted with mental illnesses, during the period of confinement
3. Those who have been declared bankrupt, for a period of five years from the date they posted for bankruptcy, unless their capacity is restored before this time
4. Anyone who during the ten years prior to 11 February 2011 served as the President of the Republic, the Vice President of the Republic, the Prime Minister, or President or General Secretary of the dissolved National Democratic Party or member of its political office or general secretariat, for a period of ten years starting from the aforementioned date” (the referred clause)

Whereby direct interest – a condition of acceptance for the constitutional petition – is of the essence, and in line with what has been decided by this Court with regards to the interest upon which the dispute in question has been raised, since the ruling on the constitutional issue is necessary for settling the requests in question related to it, whenever this may be, the decision of the Presidential Electoral Commission issued on 24/4/2012 to remove Mr Ahmed Muhammad Shafiq Zaki from the list of nominees taking part in the presidential elections was based on the text of Clause (4) of Article (3) of Law No. 73 of 1956, modified by virtue of Article (1) of the aforementioned Law No. 17 of 2012. The ruling on the degree of constitutionality of the text of the first article of this law shall certainly have an effect and be reflected in the subject of the dispute put forward to the Commission and in its ruling thereon. Accordingly, the interest in the submitted petition must be certain.

Whereby the ruling of this Court has been taken on the basis that the preemptory nature of the constitutional framework, which is of a higher nature than less important legal frameworks, and its adherence to values which must be upheld by everyone, necessitate the entire legal framework, whatever its date of implementation, from being

submitted to the provisions of the existing Constitution, to ensure its harmony with the concepts thereof. This framework does not differentiate in its contents between different systems which contradict each other, which prevents them being followed according to the same subjective standards required by the existing Constitution as a condition for its constitutional legitimacy.

This being the case, and whereby the immunity invoked by the referral decision regarding the referred text, was integrated with the subjective appeals based in essence on a violation of a particular legislative text of a framework in the constitutional text in terms of its subjective contents. Accordingly, this court performed its judicial oversight of this text in light of the contents of the provisions of the Constitutional Declaration issued on 30<sup>th</sup> March 2011, considering this the constitutional document governing the affairs of the country during the transitional period through which the country is currently passing after the suspension of the provisions of the Constitution of 1971, by virtue of the first Constitutional Declaration issued on 13<sup>th</sup> February 2011.

The referral decision relates to the fact the referred text introduces the penalty of the deprivation of the exercise of political rights for events which happened before the issue of the text, in violation of the general principal to avoid retrospective penalties. In addition, it establishes a legal presumption upon which it imposes a penalty, without a legal ruling following legal proceedings which guarantee the right to a defence. The penalty contained therein is based solely on attributes and circumstances, not on specific actions. Finally, this text violates the principle of equality before the law, in that it arbitrarily distinguishes between those who have occupied certain positions through appointment and others who have not, without basing this on significant subjective criteria.

The ruling of this Court has been taken on the basis that the Constitution is the supreme essential law which anchors the frameworks and principles upon which the system of rule is based. It awards freedoms and general rights, and offers the essential guarantees to protect them. It determines the functions and powers of each legislative, executive and judicial authority, and sets the controlling limits and restrictions for their activities. In this way it sets the limits and restrictions governing the powers of each authority, to prevent any authority interfering in the operations of another, and to prevent them disputing the powers awarded to them by the Constitution. This being so, Article (33) of the Constitutional Declaration awards the legislative authority the power to introduce laws, whilst Article (46) awards the judicial authority the power to settle disputes and arguments. This must mean that the legislative authority's power to introduce laws does not permit it to interfere in those operations entrusted by the

Constitutional Declaration to the judicial authority and restricted thereto, or else it would violate such operations and the principle of separation between the legislative and judicial authorities, and unduly assume those powers designed by the legislation to be wielded by the judicial authority.

The text of the second paragraph of Article (19) of the aforementioned Constitutional Declaration states, “All crimes and all penalties shall be based on the law; penalties shall only be imposed by virtue of a legal verdict...” This shows that it is not possible to impose a penalty except by virtue of a legal verdict, with the aim of realising the independence of the judicial authority in this regard. The scope of the text of Article (19) of the Constitutional Declaration is not restricted to criminal penalties, but also covers other penalties which can be ruled for and which may be of a different type, such as the deprivation of particular rights or freedoms. It is not necessary for the stipulated penalty to be of a punitive or reformatory nature; it may just be preventative; none of these penalties may be imposed except by virtue of a legal verdict.

This being the case, the referred text calls for the deprivation of the exercise of political rights for a period of ten years as of 11/2/2011 for anyone who held any of the positions named therein exclusively, in this manner calling for a penalty to be imposed upon such persons automatically without a legal verdict, which represents a violation by the legislative authority of the power of the judicial authority, and an undue assumption of those powers from the legislation, in violation of the text of Articles (19 and 46) of the aforementioned Constitutional Declaration.

Article (1) of the aforementioned Constitutional Declaration (which promulgated the law containing the referred text as part of the implementation of its provisions) stipulated that, “The Arab Republic of Egypt is a democratic state based on citizenship...” Articles (26 to 28) of the declaration stipulate the conditions which must be met by those elected as President of the Republic. Articles (32 to 41) of the declaration set out the rules relating to the election of members of the People’s Assembly and the Advisory Council. The stipulations of these articles collectively show that the Constitutional Declaration, as with all Egyptian constitutions, insists upon upholding the political rights of all citizens, who shall properly be entitled to be nominated and elected, in addition to being consulted and asked to offer an opinion. It enables them to practice these rights, thus ensuring their participation in public life, as a democratic way of expressing opinions, selecting a leader and representatives to manage the affairs of state, and forming parliaments charged with serving the common good.

The term “citizenship” used by the constitutional document as the basis of the democratic system in the state opens the way for practising political rights. It allows for all citizens to wield and protect popular sovereignty, as stated and emphasised by Article (3) of the aforementioned Constitutional Declaration which says, “Only the people have sovereignty and are the source of all powers, the people exercise and protect this sovereignty ...”

The concept of citizens exercising their political rights, particularly the right to be nominated and elected, is one of the most important features and applications of the practising of popular sovereignty, whether they do so as voters enjoying the right to select candidates in light of a conviction of the candidates’ abilities to express the issues with which they are concerned, or as candidates competing, within an equitable framework, to win seats. These two rights are linked and complementary, and mutually affect each other. Accordingly the legislation’s exercise of its discretionary authority to regulate these rights is dependent upon it abiding by the limits and controls stipulated for in the constitutional document, offering its guarantee, and ensuring the right of each citizen to practice these powers in accordance with a subjective framework which does not affect the essence thereof, detract from them, affect their continuance, or damage, squander or confiscate them as a constitutional obligation on the part of the legislator which cannot be avoided, or else the legislator will violate the constitution he himself is implementing.

Given the above, the stipulation of the referred text to suspend the exercise of political rights during the specified period for each individual who has held the specified posts, represents in truth a deprivation of the practice of these rights and of participation in public life throughout the specified period, without an expediency or justification accepted by the provisions of the Constitutional Declaration. It involves the destruction of the principle of these rights and represents an attack thereon, a confiscation thereof, and a restriction on the exercising thereof, in excess of the limits of the circle of regulation of the rights possessed by the legislation, an issue which is made apparent by the text and the contents of the provisions, in contradiction of the text of Articles (1, 26, 27, 31, 32, 35, 38 and 39) of the aforementioned Constitutional Declaration.

The ruling of this court has decided that the outcome of the principle of equality before the law – reiterated by all the Egyptian constitutions and emphasised by Article (7) of the Constitutional Declaration which considers it to be an essential support of all different rights and freedoms and the basis of justice and social peace – is the safeguarding of rights and freedoms in the face of the forms of discrimination which arise therefrom or restrict the practice thereof, since it is a means of conferring commensurate

freedom wherein no distinction is made between similar legal positions. The state may therefore take the measures it deems necessary to regulate a particular issue or to prevent an evil to which it deems it necessary to respond. The state's implementation of the principle of equality may not be used as a cover for its desires, or a platform for its convictions on unjust situations which arouse ill will or hatred which transpose the controls on its behaviour, or which arouse significant animosity to the power of its authority. Rather, its position when dealing with citizens must be just and it must not discriminate through imposition or despotism. Even though it is possible for the legislative authority to differ – in accordance with logical standards – from positions which are not delimited by fixed qualities, or which differ in terms of the principals on which they are based, the condition is that the differences between them must be real and not artificial or imaginary, since the principle of equality which does not contradict the contents thereof is upheld by that system which assesses the legislative division linking the legal texts of the system with the legitimate purposes to which it aspires. If it is proven that the texts are separated from their aims, and this distinction creates meaningless disorder, as if the connection between the method and the aim were illusory, then the distinction shall be considered to rely upon unfounded events and shall not be legitimate in terms of the constitution.

The essence of the principle of providing opportunities, which stems from the principle of equality and which is one of the elements thereof, is linked, in terms of the decision taken by this Court, to the opportunities which the State is entrusted to provide. The operations thereof will occur in the event of competition. The aim of constitutional protection for these opportunities is represented in the report of priorities determined in accordance with subjective principles necessitated by the common good.

The referred text contains a deprivation barring a group of citizens from exercising their political rights, on the basis that they previously held the specified posts during the ten years prior to 11/2/2011, during the rule of the previous regime. These posts have been defined as “the President of the Republic, the Vice President of the Republic, the Prime Minister, or President or General Secretary of the dissolved National Democratic Party or member of its political office or general secretariat” exclusively, applicable only to those who held these posts during the aforementioned ten year period and not to anyone who held such posts before this period. The deprivation also applies to anyone who held a post similar in nature and responsibilities to those posts set out in the text during the specified period, such as the Deputy Prime Minister, ministers, assistant general secretaries of the dissolved National Party. The referred text thus contains an arbitrary discrimination which is not dependent on or justified by a subjective basis. It also adopts a legislative division between citizens which is not based on logical principles

or criteria, which engenders a separation between the rulings and the aims thereof, making the connection between them illusory, and feeding the distinction which is presented as depending on unfounded events and as artificially creating an unreal distinction between the holders of similar legal positions, rendering it an absolute violation of the principle of equality and the provision of equal opportunities stipulated for in Article (7) of the Constitutional Declaration.

The State's subjugation to the law, determined in light of the concept of democracy, ensures that it does not violate legislation on the rights received in a democratic state, assuming firstly the existence of a state of law and its essential guarantee to uphold the rights and dignity of the people and their complete personhood, under which is integrated a host of rights which are very strongly related to the personal freedom ensured by the Constitutional Declaration in Article (8), which are considered natural infrangible rights. It contradicts the concept of the state of law if the State should decide upon a punishment, either criminal, disciplinary or of a civil nature, with retrospective force, which is implemented for actions which were not considered to constitute a criminal offence, an administrative wrong or a violation requiring compensation at the time when they were committed.

Accordingly, the referred text imposes the penalty of deprivation of the exercise of political rights for a period of ten years solely for holding any of the specified posts only, without it being necessary to prove that the person who held any of these positions took any action or course of behaviour that merits this penalty. It has been adopted on the basis of an assumption that does not accord with the nature of things or pay heed to notions of justice, and which thus violates the concept of the state of law. From another angle, the imposition of this penalty upon anyone who has held any of these posts during the ten years prior to 11/2/2011 constitutes the imposition of a retrospective penalty. All the provisions of Article (1) of the aforementioned Law No. 17 of 2012 contradict the provisions of the Constitutional Declaration, and this being the case constitute a constitutional violation.

If each constitutional violation distorted this text as shown, this in itself would be sufficient for it to be annulled, even without considering the total of all these constitutional defects and without the matter being concealed from the members of the legislative council, as revealed in the relevant minutes of the People's Assembly, and the inclination of the majority of the council to ignore the issue and its adoption of the draft law which deliberately shuns the purposes which the legislation must intend, a matter which loses its public character and neutrality, and which tarnishes it with the disgrace of legislative distortion.

Accordingly, Article (2) of the aforementioned Law No. 17 of 2012 which relates to the publication of this law in the Official Gazette and the date on which it shall come into effect, cannot be conceived to be independent and separate from the first article whose unconstitutionality has already been decided, given the inseparable connection between the two. Accordingly it therefore becomes invalid along with the first article.

**For these reasons**

The Court has ruled upon the unconstitutionality of the text of Article (1) of Law No. 17 of 2012 modifying certain provisions of Law No. 73 of 1956 regulating the exercise of political rights, and the annulment of Article (2).

**Secretary**

**Deputy President of the Court**

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