

EGYPT UPDATE NUMBER 16



CHRONICLES OF THE CONTINUED EGYPTIAN REVOLUTION OF 25 JANUARY 2011

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Contents

I. The Presidential Elections (First Round) 3
 Introduction 3
 Analysis of the First Round..... 4
II. Pending Constitutional Questions 7
III. What Lies Ahead 9
IV. Conclusion 11

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I. The Presidential Elections (First Round)¹

Introduction

1. After six decades of existence as a Republic Egypt is holding its first democratic presidential elections since the abolition of the Monarchy on 18 June 1953. Every referendum and election since 1953 resulted in the election of the candidate nominated by the military: first Gamal Abdel Nasser, then Anwar Sadat and lastly Hosni Mubarak. In all the three were in power for 60 years. Previous electoral results were no more believable as representing the will of the people than “fairy tales”, for they did not represent the peoples’ free expression of opinion. The Egyptian people even joked about the presidential results as a means of escaping a reality which they were unable to alter. A popular joke tells how former U.S. President Jimmy Carter asked Anwar Sadat in 1980 for assistance to help him win the presidential elections. But despite Egyptian assistance, Carter lost the elections. Instead, as the joke narrates, Sadat won the election with 99.1% of the vote. The joke is, of course, a striking parable of Egyptian elections; reality was less humorous. Since 1954 the Egyptian presidential elections have been nothing more than the coronation of three successive modern pharaohs.
2. The 25 January 2011 “revolution” was able to force President Mubarak from his post through peaceful means, though with the aid of the Supreme Council of Armed Forces (SCAF). The SCAF enabled the revolutionaries to remove Mubarak, and then took control of the country themselves, assuming both executive and legislative powers. Despite the fact that Mubarak was removed from power, the military regime that assumed power in 1952 survived his demise and organized the 2011 legislative election² and the ongoing presidential elections. The continuing power of the military is evident in the 2011 Constitutional Declaration the SCAF promulgated which suspended the 1971 Constitution, thereby transferring to it all presidential powers, although it has promised to return them to the elected president after the upcoming election. But the earlier transfer of power raises a question about the legal basis of the SCAF promulgated Constitutional Declaration, especially considering the absence of any provisions in the suspended 1971 Constitution for the transfer of legislative and executive power to the SCAF in case of the resignation of the president. (See Section II below on the Pending Constitutional Questions.)

¹ See M. Cherif Bassiouni, *Egypt's Future Hangs between Constitutional Declarations and the Elections*, AL AHRAM, available at <http://www.ahram.org.eg/899/2012/05/14/10/149304/219.aspx>.

² See Egypt Update 13.

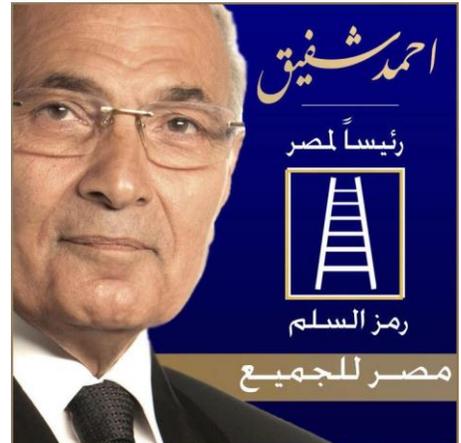
Analysis of the First Round

3. To the surprise of all the pundits, the top two vote getters in the first round were Mohamed Mursi and Ahmed Shafik. Mursi and Shafik’s campaigners have already started working on the run-off elections scheduled for June 16-17.

4. Unofficial results show that the Muslim Brotherhood (MB) candidate, Mursi, came in first with 25.5% of the vote, followed closely by Mubarak's last Prime Minister, Ahmed Shafik, who received 24.7 % of the vote. Hamdeen Sabahi came third, Abdel Mon^em Abol Fotouh fourth, Amr Moussa fifth, Mohamed Selim al-Awwa sixth, and Khaled Aly seventh among the thirteen candidates participating in the first round. The top seven candidates received the following number of votes:

1. Mohamed Mursi	5,657,649
2. Ahmed Shafik	5,538,324
3. Hamdeen Sabahi	4,818,217
4. Abdel Mon ^e m Abol Fotouh	3,958,388
5. Amr Moussa	2,598,779
6. Mohamed Selim al-Awwa	161,215
7. Khaled Aly	23,197

5. The Presidential Elections Committee will officially announce the results of the first round in a press conference which will be held no later than May 29, 2012. The runoff is scheduled for June 16-17,³ and will be between Mursi and Shafik. The outcome of the first free presidential elections has spawned a flood of comments and analyses by Egyptians. The “big five” candidates⁴ have all made headlines because the results in the first round were very different from the projections. To most Egyptians, Mursi's slim victory in the first round came as a surprise, since Abol Fotouh was considered the leading Islamist candidate, although he was



Ahmed Shafik, the last Prime Minister under Mubarak and one of two finalists in the 2012 Presidential elections



Mohamed Mursi, the Muslim Brotherhood Candidate, and one of two finalists in the 2012 Presidential elections

³ Egyptians abroad will start voting for the runoff on June 3, 2012.

⁴ These were Amr Moussa, Abdel Mon^em Abol Fotouh, Ahmed Shafik, Mohamed Mursi and Hamdeen Sabahi.

opposed by the MB's leadership for his more liberal and tolerant views. While it was clear that the MB were working hard to mobilize their supporters to vote for Mursi, especially through many show-of-strength parades in many cities during the past few weeks, Egyptians were almost certain that Mursi would not make it to the runoff. Unlike Abol Fotouh, who was also a member of the MB until last year, Mursi lacks charisma and appeared not to connect with Egyptians. This general perception was reflected in multiple surveys conducted until only a few days before the elections which placed Abol Fotouh ahead. But it seems, as David Kirkpatrick of the New York Times noted, that "Mr. Mursi's success was itself a testament to the depth of the MB's grass-roots network and popular appeal, which may make him hard to beat in the runoff."⁵ Speculations were therefore wrong about Mursi, just as they were regarding Moussa and Abol Fotouh, who were seen as the frontrunners in the race and favored in opinion polls.

6. Shafik was the unexpected success story of the first round. While Egyptians focused on Moussa and Abol Fotouh, the first round revealed overwhelming support for the former Lieutenant-General and commander of the Egyptian Air Force, who once held the same position within the military as did Mubarak many decades ago before he became Vice-President under Anwar Sadat. Many analysts attribute Shafik's success in the first round to his decent attitude, strong positions on law and order, his past accomplishments as Minister of Aviation, as well as the sympathy he received after his wife lost a battle against cancer a few weeks before the elections and he was physically attacked on one of his final stops by Mursi supporters. It is also worth noting that many Egyptians long for the calm that existed before January 25, 2011. Many also believe the country is the target of foreign plots and needs to be run by a strong leader. Finally, except for the revolutionaries of January 2011, most Egyptians believe that the country is not yet ready for democracy, and agree with a statement to that effect made by Omar Suleiman, the former head of the intelligence service, in an interview with CNN's Christiane Amanpour last year. In short, the "silent majority" of supporters of the former Mubarak regime and the military backed Shafik in the first round, as did those who oppose the Islamists.
7. Supporters of the January "revolution" have so far opposed Shafik because they see him as an extension of the Mubarak presidency who will perpetuate the power of the military. The Coalition of the Youth of the Revolution announced it was considering endorsing Mursi's candidacy if he provided them with "sufficient guarantees" concerning the MB government and the division of powers in Egypt. Among the proposed arrangements is dissolving the current parliament, giving more seats to secular powers in the Constituent Assembly framing Egypt's new Constitution, and appointing Sabahi and Abol Fotouh Vice-Presidents. The MB are open to such political negotiations in order to secure the presidency.
8. The Christian minority is rightfully concerned with the MB and the Salafi, and of course with the prospects of Mursi's election. They will back Shafik, though many are liberals and "pro-

⁵ David Kirkpatrick, *In Egypt's Likely Runoff, Islam Vies With the Past*, THE NEW YORK TIMES, available at http://www.nytimes.com/2012/05/26/world/middleeast/egypt-presidential-election-runoff.html?_r=2&hp.

revolution”. The dilemma for all of Egypt’s liberal/secular voters, which includes the 2011 revolutionaries, is how to avoid a return to a Mubarak like presidency and the consolidation of power by the military regime which has existed for the last 60 years and their replacement by the MB. In other words, the dilemma is between a new Islamic theocratic regime which by all appearances is not likely to be open and tolerant, but rather dogmatic and rigid, and a return to the *status quo ante*. But it also seems that if that is the price for Egypt’s stability they will support Shafik, while the MB and Salafi will support Mursi.

9. Hamdeen Sabahi proved to be the dark horse candidate in the race. He was a decided Nasserite, pro-labor socialist candidate with strong support in Alexandria and in industrial areas. Very close to winning a qualifying ticket for the runoff, Sabahi came third, ahead of Moussa and Abol Fotouh—something no one could have predicted. But his popularity was gaining so much momentum towards the end that analysts believed that if the elections had taken place only few weeks later, Sabahi might have made it into the second round. Sabahi was particularly successful with voters in Alexandria and along the Suez Canal where support for the revolution was extreme. He was able to present himself as a socialist candidate who would fight for the poor, and who had supported the revolution since day one. He was also a liberal candidate (who loves art) without the stain of being a *feloul*. Presenting himself as *the* successor of Nasser, he appealed to many sectors of the Egyptian population. His message focused constantly on the rights of the working class in Egypt, promising to raise salaries and pensions, as well as increasing subsidies on essential goods. But he did not elaborate sufficiently on how he would implement his economic promises other than raising taxes on the rich. Other concerns with Sabahi was his hard-line position towards Israel that may threaten the Camp David accords and the 33-year peace with the eastern neighbor, and which explains why many liberals refused to endorse his candidacy.
10. Amr Moussa's results are probably the most surprising among all the candidates. Not only did he not qualify for the runoff, but he came in last among the “big five”. Many surveys, including those commissioned by Al Ahram only a few days before the first round, put him in first place by a wide margin. But he seems to have lost support after he made comments in support of the revolution and he came out against Mubarak. Such comments gave the impression to many of his potential supporters that he was a flip-flopper. In trying to appeal to voters who would never vote for him, he lost many of his own supporters, who appear to have moved to Shafik in the first round. More importantly, he appeared not to stand for anything in specific, and was unable to muster a constituency other than a few liberals and what appears to be the Coptic vote. These voters will likely shift to Shafik in the runoff.
11. Analysts have attributed Moussa and Abol Fotouh's devastating results primarily to a television debate in which they appeared only 12 days before the first round of elections.⁶ Both candidates appeared “weak” and failed to convince Egyptian voters that they had true programs that would

⁶ This was the first television debate of its kind in the history of the Arab world.

give effect to their campaign promises. Both candidates' popularity was severely damaged as a result. But this impact was not fully noticed because the elections were set to take place only two weeks after the debate, which did not allow for accurate polling. Abol Fotouh was also punished by the MB, from whose leadership he was dismissed, for his open and tolerant views.

12. As to the other, first round candidates, it is expected that two-thirds of Abol Fotouh and Al-Awwa's votes will go to Mursi, while a third of their votes will switch to Shafik. Supporters of Sabahi and Aly are more likely to abstain, though a small portion, estimated at roughly one-third will be split between Mursi and Shafik.
13. The second round of the presidential elections will be held in an atmosphere of tension and anxiety which will persist despite the fact that Egyptian society is absorbed in predictions and projections about different political scenarios for the future depending on which candidate wins the presidential elections. The situation in Egypt is perhaps more suitable for the theater stage or sports arena than a country entering the most significant crossroads in its history. The Egyptian people look at the presidential elections as if they are a game between competing soccer teams, and the question remains: will it be Shafik or Mursi's team that wins? The coffee shops are beehives of predictions, and also home to not so Islamic betting on the final result. A substantial part of the discourse in the coffee shops is devoted to conspiracies, plots and secret deals to which it seems so many are privy. The SCAF, the MB and the Salafi appear prominently in these scenarios of deals and double deals, trickery and treachery. It seems that a large segment of the coffee shop population, and others, are all well connected to secret political operations rooms. In any event it is a great way for Egyptians to escape a grim reality into a make-up fantasy world that is at once emotionally and intellectually involving, while at the same time highly entertaining.

II. Pending Constitutional Questions

14. After Mubarak's resignation the SCAF formed a committee to draft amendments to the 1971 Constitution. On March 19, 2011 a referendum was held to vote on the amendments proposed by the SCAF. The proposed amendments were drafted by a committee chosen by the SCAF. The referendum approved the amendments with 77.8% of voters supporting the change. However, it is important to note that the number of actual voters participating in the popular referendum was less than 50% of the total number of those eligible to take part. In other words, the percentage of voters who supported the Constitutional Amendment constituted 35-40% of the total number of the eligible voters.
15. Following the popular referendum, a new Constitutional Declaration was issued in 2011 by the SCAF, containing 63 Articles of a new constitution. Some of the articles were new, including the six approved in the referendum, while a number of others were copied from the suspended

Constitution of 1971. The sequence of events and the manner in which the 1971 Constitution was suspended and substituted or supplemented by the 2011 Constitutional Declaration compels anyone with a legal background to wonder about the constitutionality of this endeavor.

16. The SCAF considered the 2011 Constitutional Declaration to be a source of legitimacy for its decisions regarding both its legislative and executive powers. In light of the SCAF's commitment to enforce the 2011 Constitutional Declaration, a new constitution should have been drafted and adapted by a popular referendum to replace the suspended SCAF Constitution of 1971 before the parliamentary and presidential elections were held. This did not happen.
17. A logical process for the adoption of a new constitution was never developed due to the conflicting opinions among SCAF members and its outside consultants. In the end parliamentary and presidential elections will have been held before the drafting of a new constitution is drafted, but let alone adopted. This methodology led to constitutional doubts about the parliamentary elections law which granted candidates two opportunities to get elected: first through election on the party's list and second as an independent candidate in direct elections, thus allowing the candidate to compete for individual seats as well party seats in Parliament. An independent candidate, however, is only able to compete for the individual seats and cannot get elected through his/her inclusion on a party list.
18. The legislative elections law contradicts one of the main principles of the 1971 Constitution, namely the principle of "equality", which is also contained in international treaties protecting human rights and in all constitutions of the world. This principle of "equality" was argued in the 1980s before the Supreme Constitutional Court and was upheld. According to that principle, the 1987 parliamentary elections were declared unconstitutional.⁷ In light of the suspension of the 1971 Constitution and the resulting uncertainties about the constitutionality of the legislative elections law, concerns will continue to be voiced about the legitimacy of the Parliament until the Supreme Constitutional Court finds a way out of the legal problems caused by the *ad hoc* decisions of the SCAF. Most likely the Supreme Constitutional Court will annul the law regulating the parliamentary elections, but when is the question. Considering that this would have several drastic consequences, the SCAF is likely to induce the Constitutional Court to postpone its decision until after the presidential elections of May-June 2012. The nullification of the parliamentary elections is likely to have serious political consequences for the country's stability. The election of Shafik would give him the right to declare a "State of Emergency", and call the military into action. Thus, the military regime will have a double victory: the presidency and the annulment of the legislative elections that gave the Islamists 60% of both houses of Parliament. The expectation is that new legislative elections would reduce the number of Islamists in parliament.

⁷ Case No. 37/1990/Egyptian Supreme Constitutional Court.

19. These developments provide comfort to external constituencies, and most particularly to the U.S., Europe and Israel.

III. What Lies Ahead

20. The internal political situation in Egypt is reaching a level that could result in major social disruptions, including the possibility of a direct violent confrontation between the Islamists and the SCAF if the Constitutional Court annuls the parliamentary election law that led to the electoral successes of the MB and the Salafi. The consequences of such an internal conflagration could be quite serious and deeply affect country's internal stability, the deterioration of its economy and its political future. As stated above, the election law in question allowed party representatives to run on both a party-list proportional representation basis as well as on an individual, direct election basis. This gave party candidates an unfair double opportunity to be elected either as members of their respective parties or as individuals. A similar law was quashed by the Constitutional Court on the grounds the ground that it violated equal opportunity protections in violation of the principle of equality contained in the 1971 Constitution; the quashed law was the basis upon which the 1987 parliamentary elections had taken place.⁸ This hybrid electoral regime also violates several provisions of the International Covenant on Civil and Political Rights which enshrine equality before the law, and to which Egypt is a State Party. It is quite obvious that giving party nominees a double chance to get elected, while not presenting the same opportunity to individual nominees, violates any elementary understanding of the principle of equality. If the Constitutional Court annuls the parliamentary elections law between now and the beginning of June it is likely to cause major violent reaction. The MB and Salafi have started the process of adapting a law that would alter the powers of the constitutional court in order to avoid that possibility by changing the Court's composition and the procedures by which its President is elected. The People's Assembly has already proposed such a draft legislation which is intended to "terrorize the court" in the words of Hatem Baggato, the Court's chief commissioner. If passed the law would prevent it from ruling on the constitutionality of the legislative elections. It should be noted that the presidential elections are to be administrated by a commission chaired by the president of the Constitutional Court.
21. Another contingency with potential consequences on the country's stability is the impending verdict in the corruption cases against former President Mubarak and his sons Gamal and Alaa. The judgments are due on June 2, 2012. The trial of the former President and his sons does not seem to have produced evidence sufficient for conviction. The former president was charged with having bank accounts containing unknown "contributions". But at trial it was established that he never used any of these funds. It is difficult to see how he could be convicted for

⁸ Case No. 37/1990/Egyptian Supreme Constitutional Court.

corruption when he never benefitted from these funds and when the prosecution never proved where these funds came from (the defense claimed they were legitimate donations). Mubarak's sons were charged with having received two villas in Sharm Al Sheikh at substantial discounts, thus implying that there was an unlawful kickback, or possibly that they paid the market price for them with illegally obtained funds from outside Egypt. Once again the prosecution appears to have failed to prove the illegal conduct with which Mubarak's sons were charged. What is obviously surprising to any observer is why the prosecution has limited itself and not brought other charges for all the presumed corrupt acts of the three defendants.

22. Former President Mubarak is also charged with ordering acts of violence against the Tahrir square demonstrators and giving orders to the Ministry of Interior to open fire on the demonstrators, which resulted in an estimated 800 person killed and a large number of person injured, including serious injuries estimated in the hundreds. It was surprising to jurists familiar with the Egyptian legal system that these charges of criminal violence, which are totally unrelated to the corruption allegations were tried together in the same case. The evidence presented in court does not connect Mubarak to the attacks on the demonstrators. The evidence presented does not show that Mubarak gave any such orders to the Minister of Interior or any of his subordinates. It also does not show that Mubarak was aware of these practices by the Ministry. Finally, the prosecutor charged Mubarak with having sold national gas from the Egyptian government to the East Mediterranean Gas Company below market rates, which is discussed in UPDATE 15. With respect to this matter there are clear indications of corruption in this transaction and Mubarak is likely to be convicted on these charges but not on other charges.
23. What will the reaction of the "street" be if Mubarak is only convicted in corruption in the Israel gas concession contract and acquitted of other charges? What would the street's reaction be if the convictions of the two sons are limited to the likelihood of corruption in obtaining two villas in Sharm Al Sheikh for a price that is far below the market price? How severe will the penalties be for such financial crimes? Judging by the street's mood it is likely that no matter what the judgment or penalties are there will be massive demonstrations.
24. It is likely also that these demonstrations will be organized by the MB and the Salafi as a way of causing a substantial disruption which would prevent the Constitutional Court from issuing a judgment against the constitutionality of the election law that brought them into power. In other words, protests against the judgments in these cases would be a diversion and ensure that their political position is not threatened.

IV. Conclusion

25. This writer's prediction is that Shafik will win the runoff in the second round of the presidential elections, and that the Constitutional Court will declare the parliamentary election law unconstitutional thus dissolving Parliament and ensuring that new parliamentary elections will take place. Under this scenario it is expected that the Islamists will not get more than 40% of the seats of both houses. Further, the military regime will survive the fallout and will emerge from this experience stronger and more entrenched. Presuming his victory in the second round, President Shafik will focus on the economy and on making the country more efficient. Egypt will need time to resolve its economic problems, but with Shafik as president the country will have the support of the U.S. and Europe. Relations with Israel will also stabilize and this will enhance peace prospects with Palestinians. In short, the Jan 2011 "revolution" will turn out not to have been a revolution, but it will nonetheless have been the catalyst for moving Egypt forward.