

Position Paper

Egypt on the Brink: The Perilous Path of the Presidential Elections

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Introduction

Cairo's usually crowded and bustling streets were practically empty on Saturday 2 June 2012. In homes, cafés and places of work, Egyptians were glued to their television screens, awaiting the verdict in the trial of former President Hosni Mubarak, his two sons, his interior minister, the minister's deputies and senior security officers.

After long rhetorical introductions, the ruling that was finally handed down was both mixed and surprising. Judge Ahmed Refaat, whose integrity very few would question, sentenced both the former President and the Minister of Interior to life in prison. The court, however, acquitted the security apparatus generals and Mubarak's two sons. As a result of the acquittals, angry protests erupted. These were in protest against the prosecutors and other state agencies, who the demonstrators felt had not done their duty in providing sufficient evidence to convict those who had been acquitted.

Within hours Tahrir Square and public spaces in more than a dozen Egyptian cities filled with hundreds of thousands of demonstrators. Despite the tough sentences meted to the former president and his interior minister, Egyptians did not expect the acquittal of the upper echelon of interior ministry generals whose orders had resulted in bloodshed and the loss of lives of hundreds of protesters killed on the streets in cities across Egypt during the days of the revolution. Given that the court's decision was issued a few days after the results of the first round of presidential elections were announced, results in which both the Muslim Brotherhood's candidate Mohamed Morsi and the former regime's candidate Ahmed Shafiq emerged as victors who would compete in the run-off of the presidential election, the new protest movement is suggestive of a second revolution.

The upsurge of tension and concern around developments in the days leading up to the second and final round of presidential elections (on 16 and 17 June) does not only stem from opposition to the court's decision or the surprise victory of Shafiq who made it into the run-off of the presidential elections. This concern and tension is also borne of the the upcoming announcement on the decision of the Constitutional Court about the legitimacy of a parliamentary election law, which has come to be known as the 'isolation' (or ineligibility) law. As such, it seems that the path to the presidential elections, including the handover of power, will be arduous and perilous.

The million person march for justice: A new popular movement

The popular protests continued over Saturday and Sunday. Activist youth groups then called for a million person demonstration for the evening of Tuesday, 5 June and another for Friday, 8 June. An important factor behind the success of these demonstrations in Cairo and other Egyptian cities was the staunch support, involvement and participation of the Muslim Brotherhood and Salafist movements. Indeed, the Muslim Brotherhood's candidate Mohamed Morsi personally visited Tahrir Square on Saturday night and joined the protesters there. Also present at Tahrir Square and participating in the protest activities were Hamdeen Sabahi and Abdel Monem Aboul Fotouh, the third and fourth place candidates from the first round of the presidential elections.

The protest movement raised many slogans, from which a number of demands were generated. These included:

1. The retrial of those acquitted, particularly the generals of the Interior Ministry and the implementation of ineligibility law, which was supposed to prevent Shafiq from participating in the presidential race. In a report of dubious legitimacy, the Higher Committee for elections had referred Shafiq's eligibility to run in the elections to the Supreme Constitutional Court to rule on its constitutionality. This allowed for Shafiq being able to take part in the presidential race.
2. The formation of a civilian presidency to take over power from the Supreme Council of the Armed Forces (SCAF). This would also see the re-launching of

the political process on a new basis that would exclude those associated with the former regime. It would also launch the process of the drafting and adoption of a permanent constitution for the post-revolution republic.

The Attorney General has already indicated that the prosecution will seek a retrial, and has stated that it will appeal the acquittal decision. Popular confidence, however, has been shaken regarding the credibility of the prosecution and state apparatuses. Confidence has also wavered with regards to the possibility, under the current regime, of an unbiased trial for the security forces accused of involvement in the killing of protesters during the revolution. This has led many Egyptian activists to demand the establishment of a Revolutionary Court that would deal with the legacy of the former regime. This demand, however, has not found sufficient popular or political support. It may have had a better chance of being implemented had it been raised during the few weeks following the resignation of the former President, when the climate was ripe for such a court.

Different names have been put forward for the formation of a civilian presidential council, including Mohamed El-Baradei (who was quick to return to Cairo from Vienna), Mohamed Morsi, Abdel Monem Aboul Fotouh, and Hamdeen Sabahi. The idea of such a council has been described as impractical; it also lacks constitutional legitimacy and furthermore suggests the possibility of an open confrontation between the street and the Supreme Council of the Armed Forces. The idea soon faded after Aboul Fotouh decided not to adopt it.

As the popular movement nears the end of its first week, the implementation of the ineligibility law has become a primary demand. The problem with this law lies not only in that it was not put into effect by the high electoral commission as soon as it was issued, but also that it has become a matter of deliberation in the Constitutional Court. Various people, including some members of the Legislative Committee of the People's Assembly that drafted the law, had raised doubts as to the constitutionality of the text from the outset. Naturally, the possibility that the judges of the Constitutional Court might respond to the pressure of public opinion should not be excluded. However, the major problem faced by the popular movement is that the law ultimately is dependant on a decision by the judges of the Constitutional Court. This is because it would be difficult, if not impossible, to expect that the Supreme Council of the Armed Forces give in to popular demands for the application of the law before the Constitutional Court's position is made clear. Convincing the Supreme Council and bending its will necessitate an ongoing battle of an intensity that would be no less than that of the first revolution. There is no unity in the political arena that would suggest that there is a readiness to engage in such a battle.

The parliament and presidential elections in the balance

The Law on the Exercise of Political Rights (or the 'ineligibility law') is not the only law that Egyptians are awaiting a decision on from the Constitutional Court on. The second law is the People's Assembly Elections Law, which was amended twice at the behest of the various political parties before elections were held. In its latest version, the Law distributes the contested parliamentary seats with two thirds going to party lists and one third to individual candidates, while also allowing members of licensed parties to compete against independent candidates. Concern over a lack of constitutionality has been raised on two aspects of the law.

Firstly, that the law should have allocated half, and not a third, of the parliamentary seats to candidates running individually; and

Secondly, that allowing members of political parties to compete for seats reserved for candidates running as individuals damages independents' chances of being elected.

On 7 June the content of Constitutional Court Commissioners' reports on the status of the two laws (the ineligibility law and the law on parliamentary elections) were leaked to the Egyptian press. The Court's report on the ineligibility law stated that the Electoral Commission had acted beyond its mandate when it referred the law to the Constitutional Court. Despite the fact that its members included some of the most senior judges in the country, the Commission is an administrative and not a judicial body. The same report, however, also confirmed the unconstitutionality of the ineligibility law. In the Court's second report, the one on the parliamentary election's law, the Court concluded that this law governing elections to the People's Assembly was also unconstitutional.

Constitutional Court sources have indicated that the Court will be hold session on Thursday 14 June to deliberate on the two laws on which it must pass judgement; just two days before the second round of the presidential elections. This raises added tension because the court is not bound by the commissioners' reports, therefore no one, not even the most seasoned experts, can anticipate what the court will decide. If the constitutional judges decide that the electoral commission's referral of the ineligibility law to the Constitutional Court was unlawful, this would see Shafiq excluded from run-off of the presidential election and would require a repeat of the first round of the elections with the remaining twelve candidates competing. If the court, however, rules the law to be unconstitutional, this would mean that Shafiq is eligible to run, and elections can be held as scheduled. The fate of the People's Assembly is also tied to the decision of the Constitutional Court judges. If they decide that the parliamentary elections that took place were unconstitutional, this would effect a dissolution of the current Assembly and require the holding of new parliamentary elections after several months. Alternatively it could result in new elections for just those seats contested by individual candidate members of political parties. Another possibility that should not be ruled out is that the judges of the Constitutional Court may find themselves unable to take a firm decision on one or both of the two laws in their 14 June session, and the Court would thus continue its deliberations for several more days whilst the final round of presidential elections takes place.

Each of these possibilities suggests a different constitutional fate and political and popular reaction, including the possibility that the current protest movement may escalate, becoming larger in size and momentum. The point is that all of these factors add more complexity to the Egyptian political scene and the transitional political process as a whole.

The Constituent Assembly: Agreement and questions

The only reassuring event was the agreement, after a long and heated discussion, between Egyptian political parties that took place on the evening of 7 June. This was an agreement that was reached on the criteria for the formation of the Constituent Assembly that will be charged with the drafting of the constitution. The Supreme Council of the Armed Forces had threatened that if parties could not resolve their differences on the formation of the Constituent Assembly it would issue a new constitutional announcement or return to the amended constitution of 1971. This threat had raised a storm of debate about the possibility that the Supreme Council had infringed on the authorities of the elected parliament that, since its first session, had taken over the legislative powers of the Supreme Council.

As a result of an agreement between political parties, a joint session of the People's Assembly and the Shura Council (the upper and lower houses of parliament) was held on Tuesday, 12 June where members of the Constituent Assembly were named. This positive development requests the posing of two important questions.

1. If the Constitutional Court issued a decision declaring that parliamentary elections were unconstitutional, what would the fate of this Assembly be?
2. What would the powers of the elected president be if the republican system of government were to be modified to become a parliamentary-presidential

system in place of one based on agreement between the various political forces?

Competing on a knife's edge

Recourse to the judicial system was one of the most outstanding features of Egyptian political life during the previous era of tyranny when the judiciary was the only refuge for justice available to political forces and figures in the face of a dominating and brutal regime. Now that this regime has fallen, it is perhaps difficult to wean Egyptians from the habit of resorting to administrative and constitutional courts for the resolution of every political dispute, large or small, even if on purely legislative matters that should be left to the parliamentary authority.

This is one of the causes for the high level of tension; the prevailing feeling that the country stands on a knife's edge as it awaits the very important step that comes after the transition phase. The second major reason for this tension is related to the enormous resistance to the old regime, a regime represented in the candidacy of Ahmed Shafiq and his making it to the run-off. While there is an opinion that has done the rounds of political circles that there was an element of fraud involved in the presidential primaries, there is a growing fear that such fraud may reappear in an expanded form in the run-off that would see Shafiq take the seat of the presidency.

A third reason for tension is the relatively long duration of the transitional period that has only complicated relations between the Supreme Council of the Armed Forces, on the one hand, and the revolutionary forces and the Muslim Brotherhood, on the other. Instead of the two camps finding a way to negotiate a consensual vision of the new republic, the long transition phase has raised the intensity of mutual suspicions about the intentions of each party.

What has become increasingly clear is that Egypt has arrived at a critical juncture in its transition towards a free, pluralistic and democratic republic. The next few days will provide conclusive evidence on whether the Supreme Council of the Armed Forces is working to reproduce a slightly improved version of the old regime, or whether it will accept a real and complete transfer of power to the new political forces that will determine whether Egypt is moving towards stability, or heading towards an eruption of new popular protests.

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