

## Political Quagmire in Afghanistan

### *Election Stalemate in Afghanistan*

Afghanistan's election paralysis shows no sign of ending and a constitutional vacuum, possibly lasting months, looms with no functioning government. The presidential election on August 20 was marked by heavy fraud and widespread manipulation. Nearly a month after the first round of voting, the independent Election Complaints Commission - tasked with investigating the irregularities - has ordered a partial recount and audit, of 2500 polling stations. ICOS believes an interim government is the only workable alternative, with international auditors appointed to enforce government accountability in the interim period.

### *Do the Math? Calculation Confusion*

The Afghan Constitution is unclear on the method used for counting the votes. It states only that "the President is elected by receiving more than 50% of votes cast through free, general, secret and direct voting".

It does not specify whether the calculation used is 50% of the total votes cast, or 50% of the votes declared valid, as determined by the Independent Election Commission and/or the Electoral Complaints Commission. The high number of votes being recounted means that the results of these two calculations could be very different.

#### ▪ **Calculation One: Based on Total Votes Cast**

Calculation One would involve counting all the votes cast, regardless of whether or not they are subsequently declared valid. There were 5,545,149 votes cast in the presidential election. A candidate must win "more than 50% of the votes" in order to win in the first round: 50% of this "Votes Cast" figure is 2,772,575. As of the morning of September 16, President Karzai has 3,009,559 votes, giving him 54.3% of the total.

However, at least 850,000 votes are being recounted and may be declared invalid, and perhaps more. To take President Karzai below the "more than 50% of votes cast " needed to secure a first-round victory, he would have to lose 236,984 votes in the recount, easily done in a recount and audit of the size currently underway.

#### ▪ **Calculation Two: Based on Total Votes Declared Valid**

This calculation cannot be made until the final number of recounted and invalidated votes is established. At least 850,000 votes are to be recounted, but EU election monitors in the country have assessed that 1.5 million votes could be suspicious.

If the calculation "of more than 50% votes cast" is to be based on votes that are declared valid, it is too early to determine what number of votes declared valid are necessary for President Karzai to secure victory on the first round, but it is clear it is quite possible for him to fall below the necessary level, and for the country to be forced into a run-off round.

The Afghan Constitution is unclear on which is the correct calculation to be used and there is not authority in either the Independent Electoral Commission, or the Elections Complaint Commission, to resolve the issue.

**ICOS argues that, in order for President Karzai to be declared a convincing winner, he needs to gain more than 50 percent of the vote under both calculations.** If one calculation yields a first round victory for President Karzai and another does not, his challenger Dr Abdullah Abdullah is likely to question the choice of calculation used. This would cast the legitimacy of the election into doubt. The complexity of the calculation issue, and the vague language in the Constitution, mean that a clear and unambiguous victory under both calculations is essential.

### ***A Second Round in the Spring?***

Afghanistan's electoral law states an election run-off must be held "within 2 weeks after the announcement of the election results". However, a modified schedule had been organised, with a second round taking place in the first days of October. As a result of the Electoral Complaints Commission stipulating recounts and audits, this schedule cannot be maintained and "final results" may well not be known for several weeks, or even months.

As ICOS warned in its August report, "Afghanistan Elections: Guns and Money", there is no clarity on how a second round could be properly organized in the short time period stipulated. To date there are no reports of the Election Commission ordering the printing of 17 million run off ballots; no reports of plans being made to (again) transport equipment and staff to remote polling stations; and most importantly no reports of plans made to combat the replay of the fraud which occurred last time.

These challenges, as well as the ongoing fraud investigation, mean that it may well be impossible to hold an election run-off before November. By this time, Afghanistan's harsh winter will have set in, making it impossible to hold a vote in many areas of the country. A second round would be delayed until spring – leaving Afghanistan in a constitutional vacuum, with no functioning government, for a period of up to eight months.

### ***Neither Loya Jirga, nor State of Emergency, Appealing Options***

There are few options available to help Afghanistan out of this political abyss.

Two options available under the Afghan Constitution are declaring a State of Emergency, and a Loya Jirga.

### Provisions on a State of Emergency

The Constitution of Afghanistan states that as part of the President's tasks and duties, the president can declare a state of emergency with the approval of the National Assembly.

**Article 143** states:

If due to war, threat of war, serious rebellion, natural disasters, or similar situation, the protection of the independence or survival of the nation becomes impossible by following the provision of this Constitution, the President, with the endorsement of the National Assembly may declare a state of emergency in some or all parts of the country. If the state of emergency continues for more than two months, the approval of the National Assembly shall be required for its extension. During the state of emergency, the President with the consent of the heads of the National Assembly and the Supreme Court, may suspend the following Articles or restrict them:

- **Paragraph 2 of Article 27:** No person can be pursued, arrested or detained except in accordance with the provisions of law.
- **Article 36:** The citizens of Afghanistan have the right to un-armed demonstrations for legitimate peaceful purposes.
- **Paragraph 2 of Article 37:** The state does not have the right to inspect personal correspondence and communication unless authorized by the provisions of law.
- **Paragraph 2 of Article 38:** Other than the situations and methods indicated in the law, no one, including the state, are allowed to enter or inspect a private residence without prior permission of the resident or holding a court order.

During the state of emergency no amendments can be made to the constitution. Should the presidential term of office end during a state of emergency, new elections are postponed and the presidential and legislative terms can be extended up to four months.

Should the state of emergency continue longer than four months a Loya Jirga needs to be called by the President for further decisions. After the state of emergency is lifted all constitutional provisions are valid again and new elections are to be held.

### Provisions on a Loya Jirga

**Article One Hundred and ten**

**Ch. 6. Art. 1**

Loya Jirga is the highest manifestation of the people of Afghanistan.

Loya Jirga consists of the following:

- 1) Members of the National Assembly.
- 2) Chairpersons of the provincial, and district councils.

The ministers, Chief Justice and members of the Supreme Court, can participate in the sessions of the Loya Jirga without the right to vote.

**Article One Hundred and eleven**

**Ch. 6. Art. 2**

Loya Jirga is convened in the following situations:

- 1) To take decision on the issues related to independence, national sovereignty, territorial integrity, and supreme interests of the country.
- 2) To amend the provisions of this Constitution.
- 3) To prosecute the President in accordance with the provisions of Article 69 of this Constitution.

**Article One Hundred and twelve**

**Ch. 6. Art. 3**

The Loya Jirga in its first session elects from among its members a chairperson, a deputy-chair, and a secretary and an assistant secretary.

**Article One Hundred and thirteen**

**Ch. 6. Art. 4**

The quorum of the Loya Jirga for voting is completed by the majority of members. The decisions of the Loya Jirga are taken by a majority of the present members except in cases as explicitly stated in this Constitution.

**Article One Hundred and fourteen**

**Ch. 6. Art.56**

Discussions of the Loya Jirga are open except when one –fourth of its members demand their secrecy, and the Loya Jirga accepts this demand.

**Article One Hundred and fifteen**

**Ch. 6. Art. 7**

During the session of a Loya Jirga, the provision of Articles 101 and 102 of this Constitution are applied on its members.

A State of Emergency would allow President Karzai to legally continue governing, but this option would exacerbate rather than calm the current political tensions, and could suspend other constitutional provisions. Additionally after four months of a state of emergency, the President is legally bound to hold a Loya Jirga, a Grand Council, in order to extend the suspension of the Constitution.

However, a Loya Jirga cannot be realistically used to solve this crisis.

- It is composed of the Afghan parliament, the heads of district councils, and the heads of provincial councils: but an election for provincial councils was held on the same day as the presidential elections, and those votes have not yet been counted. Until the presidential election results are verified, the existing heads of provincial councils are in legal limbo and would have no authority to attend a Loya Jirga.

- Even if the existing provincial councillors did attend, the time taken to organise and hold a meaningful Loya Jirga is prohibitive.
- Regardless of these two obstacles, it would be difficult to see what a Loya Jirga could do. Asking the Jirga to declare a winner, or prepare a new electoral system, would be very difficult and would create more opportunities for political infighting and tension.

Consequently holding a Loya Jirga does not provide a swift and effective solution to the crisis.

### ***Interim Government: The Way Out of the Quagmire?***

An interim government is the only real option left. A formula must be devised by the international community and the Afghan government. President Karzai's main challenger, Dr Abdullah Abdullah, has agreed to an interim government, but only if it did not contain President Karzai or himself.

To be acceptable in the context of the current political dynamics, any formula must receive the support of President Karzai and Dr Abdullah, as well as the international community and the United Nations.

There is currently no formula for an interim government on the table, or for any other solution to Afghanistan's quagmire. To generate debate and discussion on this critical issue, ICOS has prepared a formula for an interim administration, which would ensure a basis for a functioning government if a second round is needed in the spring.

### ***ICOS Formula for Interim Government***

ICOS recommends contingency plans be made for an interim administration which would govern until a second round of voting, based on the following formula:

- President Karzai retains his title, but Presidential powers are transferred to a "Supervised Cabinet". President Karzai becomes a ceremonial president, and in particular is prevented from using the machinery of government to facilitate his run-off election campaign.
- The Cabinet is given the authority to continue their work, in order to keep normal government functioning.
- Government accountability must be enforced. An independent team of international auditors and accountants should be contracted, (as PriceWaterhouseCoopers has been in Somalia) to oversee the operations of the government and to cut down on corruption and the diversion of aid money during the unsettled interim period. Cabinet ministers must demonstrate a fiscal 'clean bill of health'.
- The speaker of the Wolesi Jirga (the lower house of parliament), Mohammad Younis Qanooni, joins the Cabinet to provide democratic oversight and limit political tensions.

- President Karzai and Dr Abdullah should make a statement promising Afghan unity. Every effort must be made to prevent ethnic and tribal tensions from boiling over into political violence or civil unrest: both candidates must make clear to their supporters that the election cannot be decided in a run off on ethnic grounds, and that they support the work of the “Supervised Cabinet”.

This formula would allow an interim government to steer Afghanistan through the turbulent winter months ahead, and provide the international community with a functioning government to work with in dealing with the numerous critical issues facing the country.

### ***Start Planning Now for a Higher Standard of Monitoring for Spring Run Off***

In the meantime, the international community must begin serious preparations to support a legitimate spring run-off vote. Increasing the number of independent monitors is essential to preventing fraud in the second round. The international community must devote more effort and resources to deploying sufficient observers.

#### **ICOS THE INTERNATIONAL COUNCIL ON SECURITY AND DEVELOPMENT**

The International Council on Security and Development is an international policy think tank working to combine grassroots research and policy innovation at the intersections of security, development, counter-narcotics and public health issues, online at [www.icosgroup.net](http://www.icosgroup.net).

Through a unique mix of field research – from Afghanistan to Somalia - public reports, films and project implementation, ICOS examines the root causes of current crises, and works to challenge out-of-date perceptions to achieve measurable and direct policy results. ICOS’s objective is to promote open debate in order to alleviate current governance, development and economic crises and ensure that future policy-making in these areas is informed, humanitarian and delivers impact.

This work is organised into three programmes: Global Security, Public Security and Public Health as it relates to problematic drug use.

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