

## The response of the Afghan Constitution to the crisis

By Chibli Mallat

Daily Star staff

Monday, November 02, 2009

### Analysis

Afghanistan's presidential runner-up Abdullah Abdullah has withdrawn from the presidential race. Hamid Karzai will move on, like Parviz Musharraf, Ahmadinejad, Emile Lahoud, Hosni Mubarak, and the scores of little dictators in the Middle East, and declare himself president next Saturday. The Afghans will oppose him, as the decent people of Pakistan, Iran, Lebanon, Egypt have opposed their presidents manipulating their constitutions just to stay in power. Sometimes, as in Pakistan and, to a lesser extent, in Lebanon, the democrats win, sometimes they lose. But the battle lines are clear: democracy v. non-democracy.

Because of the world focus on Afghanistan since President Barack Obama made "Af-pak" the top priority of the new US administration foreign policy, Kabul is where the world order is shaped. The choice is simple: democracy or its nemesis, be it authoritarian as in Tunisia, exclusivist as in Israel (who remembers that the law was changed in 1996 to prevent Arab citizens like Azmeh Beshara from running for premier?), brutal as in Syria, Kafkaesque as in Libya, genocidal as in Khartoum. After India and South Africa, there is no longer a Third World. There are democracies where the top executive leader changes regularly in free and fair elections, and a world of non-democracy, where he stays in power at any cost.

Application to Kabul: Karzai must step down, an interim government must take over, and a national assembly must convene. No fig-leaf president next Saturday, as is being floated around the US State department. No backroom deal to see some fake unity government Zimbabwe-style.

For those who rightly fear a void, the remedy is dictated by the provisions of the Constitution. Like all constitutions, Afghanistan's 2004 text could not predict every single turn of events, including a president rigging his country's electoral system. Article 61 provides the nearest solution: "In case of death of one of the candidates before the first or second round, or prior to the announcement of the results of elections, new elections shall be held in accordance with the provisions of law." Now that the runner-up Abdullah has withdrawn between the two rounds, Article 61 suggests therefore that there should be new elections altogether.

Considering the widespread rigging by the incumbent president on August 20, free elections are not possible in the foreseeable future. Here is where the Afghan Constitution provides for a process that addresses emergencies, namely the convening of a Grand Assembly, the Loya Jirga. Successive Afghan constitutions were the fruit of the Loya Jirga, the latest after the Loya Jirga met in December 2003-January 2004. In the Constitution, a full Chapter Six is devoted to that time-honored institution

(Arts. 110-115). The Loya Jirga elects a chairperson when it convenes. As “the highest manifestation of the people’s will” (Art.110), it has wide powers: it can amend the Constitution, prosecute the president, and most appositely, it can “take measures” needed in such emergency situations as prevailing in Afghanistan (Art. 111).

Who holds the reins of the government until the Loya Jirga convenes? Article 68 says that “in case of deaths of the president and the vice president at the same time the presidents duties shall be assumed one after another by the second vice president, the chair of the Meshrano Jirga [the Upper House], chair of the Wolesi Jirga [the Lower House], the foreign minister.” Considering that the Karzai-led three-men presidential team is out of function, the chair of the Meshrano Jirga, the Afghani Senate/Council of Elders which is the equivalent of the US Senate, could take over as head of an interim government.

***Chibli Mallat*** is ***The Daily Star*** law editor. His latest books are *Introduction to Middle Eastern Law*, pbk Oxford 2009, and *Iraq: Guide to Law and Policy*, just published at Aspen.