

PEACE PROCESS AND THE CONSTITUTION OF AFGHANISTAN

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Constitution is a national document that specifies a country's political, economic, and social systems. When a country gains its independence, the first thing it will do is to structure its constitution because, without a constitution, there will be no political system in a country. For instance, when the United States of America won its independence from the Britain in 1776, Pakistan in 1947 from British India, Bangladesh in 1971 from Pakistan, Yugoslavia, Czechoslovakia and all other nations who obtained their independence before and after the second world war, they started their political journey by establishing their constitution which was a framework for their political systems. In short, a political system cannot be defined without a constitution.

When the Taliban regime ended, the Bonn conference was held to create a new political system which included three phases: first, to create an interim government, second, Transition period, and third was to conduct election. Now the question is, why there were three phases for the creation of a political system in Afghanistan? Why not elections right away? The reason for that was absence of a constitution. The main responsibility of the interim or transition period was to draft the constitution and approve it through Loya Jirga which turned helpful in creating an electoral government.

The Link between Interim Government and Constitution

Since the start of the peace talks with the Taliban, there have always been rumors about establishment of an interim government. They are due to the agreement of the US-Taliban in Doha, according to which, a share will be given to the Taliban in the upcoming government. Since it has now been confirmed that the Taliban will be a part of the next government, the Taliban will certainly have some conditions before their amalgamation with the Afghan government. Among their conditions, I believe one of them is amendment of the constitution. Discussions over the amendment and finding out the agreements and disagreement upon content, followed by a draft of the constitution by defining the new political system require a long period of time and may take years. In order to stop the war and ceasefire, the government and Taliban must agree on key issues and then create an interim government. The interim government must last until a draft of reformed constitution is approved by the Loya Jirga. The fact that a new political system cannot come into existence without constitution illustrates the link between interim government and constitution. The constitution amendment takes time and if we wait for its final result, the bloodshed and continuity of war will cost us more lives and destruction. If we want to end the bloodshed and enable ceasefire, then the only way out is establishment of an interim government, as we have previously experienced in 2002 before the establishment of a constitution.

Amendment of the Afghan Constitution

Reforms in the constitution means bringing change in its content. Such amendment in the constitution of Afghanistan can occur when there is a deficiency in the content or articles of the constitution. If the content is in contradiction with the Islamic values, there is a conflict within the content, or requires adding further necessary content, the constitution can be reformed or abrogated. This means that a constitution can be nullified and replaced if a revolt, revolution or establishment of a completely new government occurs in a country.

Here, the question is that whether the current negotiations require reformation or abrogation of the constitution? The constitution of Afghanistan is one the key achievements of the 20-year government and it can be considered one of the best constitutions in the region. It may truly have some shortcomings, but they are not adequate to be held as a reason for its abrogation. Shortcomings of the constitutions that are known to experts and the Taliban should be reformed

and restructured in today's constitution. This is because the Afghan government will never concord with the idea of abrogation of the constitution. Hence, the only way out is to reform the current constitution so that it can be in accordance with the demands of the Taliban and can be acceptable for both sides.

Shortcomings of the Current constitution

There are two aspects of the shortcomings in the constitution of Afghanistan. First, those which require reformation according to law experts. And second, those which the Taliban seek their amendment. Presently the second aspect is essential to be considered, as success of the peace process is connected to it.

Problems and shortcomings of the constitution can be divided into three parts i.e. content of the constitution that is not in accordance with Islamic law, legal and technical shortcomings, and literary and orthographic problems. Here, we cannot state and analyze all parts of the shortcomings but will state some as an example. Among the articles of the constitution that are in contradiction with the Islamic law, article 4, 6, 7 and 10 can be particularly considered. Article 4 and 7 seemingly contradict Islamic law due to absence of clear definition of terms. However, its legal purpose and analysis can be tolerable. For instance, article 4 talks about sovereignty of people which is criticized by Islamic scholars. They state that power and sovereignty is given to people in the article, but in fact, sovereignty is only for Allah s.w.t in Islam. However, if the whole article is considered, its context by any chance does not mean that sovereignty of Allah should be given to the people or sovereignty of people should be above everything else. Its purpose is point out its practical side, prevent despotism, and enable people to be directly or indirectly able to appoint government officials.

Another issue that the religious scholars object on and considers it in contradiction with the Islamic Shariah is the article 7 which requires unconditional recognition of the international human rights declaration. The scholars believe some of the articles in the human right declaration are in contrast with Islamic Shariah. In this regard, firstly it should be noticed that the international human rights declaration is a part of international customary law which is only a declaration and has no legal implications. The member nations have a moral duty of implementing the human right declaration and if a country does not implement it, there is no executive power in the world to force the country to implement it. Secondly, the contents of the

human rights declaration are not qualified for implementation unless they are mentioned in detail in national laws. The articles of the human rights declaration that are in contrast with Islam are not mentioned in national laws as rights. Thus, they have no legitimacy. For instance: the human right declaration grants people the right to change their religion. However, the afghan laws and courts do not grant such rights. Or the human right declaration gives women the right to divorce while it is not accepted in afghan courts and laws. It is recommended if these articles get amended and these reforms get clarified so that doubts and criticisms can be eliminated. In addition, article 6 and 10 which respectively states that the recognition of democracy is the duty of the state and the free market is the foundation of the economy, are both in contrast with Islam, and should be amended because they cannot be legally justified. Articles that have legal and technical flaws are article 22, 25, 62, 63, 67, 72, 79, 117, 143, and others. Articles with literary and spelling mistakes are more than a hundred¹.

The second type of problems in constitution are the ones that only Taliban sees them as problems. It is not clear that which articles exactly the Taliban disagree with. However, we can guess some of the articles as follows:

1. The political system mentioned in the constitution based on the republic principles.
2. Preferring national authority over that of God's and the absolute observation of international documents.
3. Some sensitivities in the resident's rights and obligations chapter such as: the equality of men and women in article 22nd, women running for president in article 33rd, the right to freedom of expression and so on.
4. The definition of council in fifth chapter which divide the council into parliament and senate house. They might object the framework of having the councils and have their own definition of the council.
5. The defined economic system in article ten of the constitution. The Taliban has always mentioned the Islamic economic system every time they mentioned an Islamic state.

¹ If our respected readers are interested to get in depth information with respect to the problems related to these articles, then you can refer to the following books:

1. Analysis of the constitution by Abdul Saboor Mubariz
2. Criticism and Analysis of the constitution by Mohammad Ashraf Rasooli
3. Analysis and Evaluation of Afghanistan's constitution (year-1382) by Mohammad Musa Rahimi (Head of research in Academy of Sciences of Afghanistan)

6. They might also demand some amendments in the judiciary system.

These are merely the cases which can be predicted up to some extent from the Taliban's viewpoints so far, but there are no formal and detailed explanations from the Taliban in this regard.

At the end, it must be stated that the constitution of Afghanistan (year-1382) besides some drawbacks, got some remarkable merits which can be rarely seen in other regional countries' constitutions. For instance, oppression and injustice have been prevented in a very good manner, the basic rights and duties of the people are very integral and comprehensive, the administrative and political system has been well defined and most significantly, and the rulings of Islam are prioritized and respected in majority of the cases. You can refer to the 1st, 2nd, 3rd, 17th, 18th, 19th, 20th, 62nd, 63rd, 74th, 109th, 130th, 149th and some other articles of the constitution in order to see that how Islamic rulings have been prioritized in Afghanistan's constitution.

Conclusion

This analysis is conducted while the negotiations are in progress between Taliban and the negotiator team of the Afghan government in Doha. As one of the substantial parts of the talks is discussion over the constitution of Afghanistan, hence, majority of the involved parties are anxious that involved sides will not reach into consensus over the cited issue. However, it is evident from our aforementioned analysis that discussion over the constitutional cases during peace talks is not a very complicated issue and the parties can easily reach into an agreement over the constitutional cases, as the dispute between the two sides is not that severe over contradictive matters.

It is surely very important that both sides should pay a crucial attention while adjusting the constitution in order to prevent repetition of previous faults, avoid any further need for re-modification of the constitution, and preclude criticisms of law experts. For now, priority should be given to an agreement over a government where all parties are involved, and the upcoming interim government should last until the draft of the constitution is finalized. After finalizing the draft, other stages of the national reconciliation and the establishment of Afghanistan must be carried out in light of the stated draft. We recommend that both parties may reach into an agreement if the following ideas and values take place in the new constitutional draft:

- 1- Divine sovereignty with respect to legislation and democracy with regards to executive part must be stated and accepted in a clear manner.
 - 2- In affairs of reconciliation, deliberation and reasoning, authority should be given to a national and elected council.
 - 3- Legitimacy and change of the government and power must take place solely through an independent, transparent, and fair elections.
 - 4- The fundamental rights and freedom of the citizens must be protected considering Islamic rulings, national laws, and relevant international documents on human rights.
 - 5- Consolidating power to one source must be prevented and power should be divided in a way that can hinder any kind of oppression.
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