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THE URGENT NEED FOR A CONSTITUTION IN THE CURRENT CIRCUMSTANCES IN AFGHANISTAN



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In this Issue:

The Urgent Need For A Constitution In The Current Circumstances In Afghanistan3

 Introduction..... 3

 Constitution as the Basis of Social Life..... 4

 Constitution as the Basis of Good Governance..... 4

 Constitution Paves the Way for International Legitimacy 5

 Governing a Society is Impossible without Constitution 5

 Competent Constitution for a Special Period 6

 Advantages and Disadvantages of the 1964 Constitution 7

 A: Advantages of the 1964 Constitution 7

 Structure 7

 Content 8

 Codification without Influence from Outside 8

 B: Disadvantages of the 1964 Constitution 9

 (a) Convergent Constitution 9

 (b) Backward-looking Constitution 9

 (c) Forward-looking Constitution 9

 Conclusion 10



THE URGENT NEED FOR A CONSTITUTION IN THE CURRENT CIRCUMSTANCES IN AFGHANISTAN

INTRODUCTION

The Constitution is the highest legal and political document of a state that guide the process of drafting local laws and legislations of a country. The constitution principally defines the basic political principles of the state, the structure, the hierarchy, the powers and duties of three branches of government and their relations, it also describes the position and limits of the political power of government in a society, and determines and guarantees the fundamental rights of citizens in a country.

In a response to a question of when a Constitution is being drafted in a society? Or what conditions pave the ground for drafting a new constitution in a country? The Jurists and lawyers described that a new Constitution is being drafted in certain conditions: such as; the "gradual transformation and evolution of societies," the "emergence of new states," or when a state gain its independence, or in any other "transformational and evolutionary events," such as revolutions, coups, and civil wars, which are led to the fall of the existing regime and the establishment of a new government in a country.

When a country reach to the stage of drafting a Constitution, it indicates the growth and development of that society and its people, rather than other factors. A country will generally reach this stage after the political independence or the victory of the revolution in a country, as the world's first codified constitution being adopted after the United States Revolution and Independence in 1776. In Afghanistan, the first Constitution was drafted and adopted in the fourth year after it gained its independence.

To that end, it seems that once again Afghanistan is at a stage that seriously need to draft a new Constitution.

Since the drafting a new Constitution is a time-consuming process and is not possible simultaneously with the establishment and stabilization of the new regime, we will endeavor to examine and explain the issue of how a society will be governed, with or without the Constitution from the establishment of the new regime to the adoption of a permanent Constitution, which is called a special time period. We will also endeavor to answer the



question that what would be the alternative and what should be done if it is not possible to lead the society in the mentioned period without the constitution?

CONSTITUTION AS THE BASIS OF SOCIAL LIFE

The need for rule of law has always been considered in societies from the earliest days of human life. Throughout history, individuals have enacted laws and legislations to establish order in society. Likewise, the Prophet Muhammad (SAWS) after his arrival at Medina and following the establishment of the political system, as one of the first steps he compiled the “Charter of Medina”, that in its turn emphasizes on the importance of regularity and rule of law in the political system and governance in Islam.

Taking into account the rapid change in social relations in modern societies, particularly the importance of limiting the boundaries of political power of governments, and likewise the importance of protection of individual rights and public freedoms as the foundations of constitutionalism and constitutional government, it seems necessary for any state to define its political system and clarify the powers and duties of the government in a clear document, and moreover, it should also define the relations between the people and the governments in a clear defined framework.

Most importantly, the Constitution provides a legitimate clear framework for the exercise of political power in a country and draw the scope of duties and responsibilities for the institutions and likewise it define the structures of political power to prevent the political system from interference of power, disorder and repetition of duties and responsibilities, and it also prevent from the abuse or waste of existing opportunities and capacities, with which such a Constitution becomes the basis for social life.

CONSTITUTION AS THE BASIS OF GOOD GOVERNANCE

In the present age, one of the most important indicators for recognizing a good governance is the rule of law. The extent to which degree laws of a country, particularly the Constitution, are real in a society and whose implementation can be assured is generally assessed by the rule of law index. Certainly, the Constitution, and domestic legislations are viewed as the key source for assessing the quality of contract execution, the performance of the police and the courts, as well as the degree of likelihood of commission of a crime and violence in a society.



If after the enactment of laws in a society, we could not have much hope for its implementation, and crime and misconduct could not be properly prosecuted due to the poor performance of the police and courts, it indicates the existence of poor governance in the country. But if a society basically lack a Constitution, it is natural that there is no criteria for good governance. To this end, without a Constitution in a country, the claim of good governance will not be justified.

CONSTITUTION PAVES THE WAY FOR INTERNATIONAL LEGITIMACY

The Constitution, as the first and most important source of fundamental rights, consists of a set of rules and general principles that determine the form of government, the structure and powers of the three branches of the government and their relationship with each other, and the rights and freedoms of the people towards the government. A country's obligations towards international treaties and conventions, its commitment to good relations with its neighbors, the nature of its relations with the world, the respect to human rights, and the level of respect for international laws are all enshrined in the Constitution of a country.

Therefore, the Constitution is the first instrument of introducing the legal face of the country and is considered a key document for recognizing a government. That is why, today, almost all UN member states have a written constitution.

Thus, the Constitution helps governments to gain international legitimacy and is seen as paving the way for governments to be recognized internationally.

GOVERNING A SOCIETY IS IMPOSSIBLE WITHOUT CONSTITUTION

The social development of individuals in a society can be measured by the regular and lawful behaviors indicators. The most developed human societies are the most law-abiding societies. In a society without the rule of law, any behavior is deemed possible and expected from everyone, and this is one of the worst situation and conditions in a country. Chaos, turmoil, disorder and disturbing and violating the rights of others is a natural consequence of the lack of law.

The Constitution is the basis of political authority and legitimacy, and without a Constitution the authority and legitimacy of political systems are unstable. The Constitution is the axis of



the circulation of society, and in absence of which disorder and turmoil will arise and the public order of society will be destroyed. That is why no society, country or state can be found without a Constitution.

Since the Constitution is tied with the fate of a nation which must really meet its current and future needs, the Constitution could not be enacted and implemented in a hurry. The administrative structure of a country, the basic institutions of government, organization, foreign relations, economy, legislation, the scope of individual freedoms and the rights and duties of citizens needs an in-depth and careful study. The Constitution can produce the desired result when the real facts are well reflected in it and are future oriented. Therefore, the process of drafting and enacting a constitution takes more time, which is why most of the constitutional process in most countries has taken more than a year.

Knowing the fact, that since the needed timeframe between the establishment of the new regime to the enactment and implementation of the new Constitution is a considerable period of time, and as stated above, it is not possible to lead and govern a society without a Constitution during this period. Therefore, governments have to implement one of the previous Constitutions at this time-period, indeed the previous constitutions, however, may not meet the current needs and in some cases it might contradict the current changes, but in principle, a bad law or Constitution is better than no law and Constitution. Inevitably, in such circumstances, the order of society must be addressed even relatively.

COMPETENT CONSTITUTION FOR A SPECIAL PERIOD

Our country, Afghanistan, is at the mentioned time-period; the previous regime was overthrown, and the new regime was established and now rules over all Afghanistan. Naturally, the new regime will make an endeavor to draft and enact its own constitution. However, considering the fact, that making a good Constitution in accordance with the conditions of time and place is a time consuming process, and at the same time requires a national consensus of different segments of society to become a national Covenant that is to be respected by all the nation. Thus, there is a need to temporarily implement one of the previous Constitutions for a certain period of time, to that end, it must be seen that which of the previous constitutions is more competent to current situation in order to regulate the affairs of the country and get out the country from ambiguity and lack of rule of law? So that the new government can temporarily perform its powers and functions based on its articles. To answer this question, it



is better to choose the right Constitution based on criteria, rather than personal tastes. The structure of the Constitution, the Content of the constitution and the conditions in which the constitution is drafted can be considered as the main criteria for choosing a competent Constitution for a specific period of time.

With an overview of the past 8 Constitutions of Afghanistan, we come to the conclusion that according to the first two criteria; Structure and Content; the 1964 Constitution and the 2004 Constitution are different from all other constitutions. These two, both in structure and content, are more in line with the standards of modern law in today's world. And among these two, the Constitution adopted in 2004, regardless of highlighting the articles included in this constitution due to the conditions of the time, simply drafting it under the shadow of occupation is enough to lose its superiority over the 1964 constitution. Therefore, the only competent Constitution for the current special period is the Constitution of 1964. So, until the new Constitution is drafted and enters into force, the 1964 Constitution after reviewing by a competent and diverse commission, and after correcting the deficiencies and shortcomings and modifying those articles that are not applicable in the current situation, and after the agreement of a nationwide Loya Jirga, it should enter into force as a Constitution for a special period of time.

ADVANTAGES AND DISADVANTAGES OF THE 1964 CONSTITUTION

Constitutionalism and drafting a constitution is a human experience, and human experience is always fraught with shortcomings. Constitutions, similar to any other social phenomenon, have their pros and cons. When we consider the superiority of this constitution among others, it is good to explain its advantages and disadvantages.

A: ADVANTAGES OF THE 1964 CONSTITUTION

Structure: The 1964 Constitution is the first constitution of Afghanistan that bears the title of the Constitution, before that, two other constitutions were referred to as the "Nizamnama of the Government of Afghanistan" and the "Principles of the Government of Afghanistan".

In this Constitution, the structural model of the French constitution is included in the text of the Afghan constitution and is considered to be the most structurally accurate constitution among all Afghan constitutions in the last century. The 2004 Constitution of has also been



largely affected by the 1964 Constitution. Studies show that almost 80% of the constitution of 2004 is derived from the Constitution of 1964.

Therefore, in terms of structure, wording, chaptering and order of articles, this Constitution is one of the best Constitutions of Afghanistan.

Content: The constitution of 1964 is also one of the best constitutions of Afghanistan in terms of content. This constitution, despite its shortfalls, it has a great capacity to address the problems of the society and is considered the best constitution in the last century. That is why studies show that about 80% of the constitution of 2004 is derived from this constitution.

The provisions concerning the separation of power, powers and duties of the three branches of the state, the state of emergency, the Loya Jirga, the rights and freedoms of citizens, and the administrative system have been incorporated in the 2004 Constitution with minor changes and modifications. So, having a rich content is another advantage of this constitution, which makes the implementation and validity of this constitution possible for an interim period of time, providing that certain amendments and modification to be made by the current regime.

Codification without Influence from Outside: As mentioned above, "gradual transformation of societies", "emergence of new state" and "transformational events" like revolutions and coups and civil wars that lead to the fall of the existing regime and the establishment of a new regime, pave the ground for drafting a new constitution, or modifying the existing constitution. However, the constitution of a country shall be drafted away from external interference and pressure. The demands of the people shall be incorporated according to the needs of time, in order that the constitution reflects the independence, sovereignty and autonomy of a country.

In Afghanistan, constitutions have often been drafted under the direct intervention of, or at least under the pressure from, foreigners. The constitutions of the communist regimes and the 2004 constitution were drafted in a situation in which other countries used their leverage to incorporate their desires in these constitutions.

However, the Constitution of 1964 is one of the few constitutions that has been drafted without the intervention of foreign countries and in a completely independent and internal atmosphere.



B: DISADVANTAGES OF THE 1964 CONSTITUTION

The Constitution to be in line with the time, we come across with three categories of Constitutions in the legislative process:

(a) Convergent Constitution: A Constitution that is in line with its age and is in accordance with the requirements of the age and time, the provisions of the Constitution are formulated in the language of the time, and the demands and requirements of the time are properly considered.

(b) Backward-looking Constitution: Refers to a Constitution that has fallen behind the standards of its time and does not meet the needs of its time. The language of the Constitution is outdated and contains many provisions that should have been legalized according to the requirements of the time. In short, the backward-looking Constitution has lagged behind its time and is not very effective in the present.

(c) Forward-looking Constitution: A Constitution that has been made for societies more advanced than its time, considering the present society and its future, the Constitution has gone beyond its time, and is not in line with its time.

However, the only law or constitution that can have a practical aspect to a large extent is the Constitution that is convergent and has been enacted in accordance with the real conditions, religious and cultural values and time requirements of society. In other words, the farther a Constitution is from the past and the future and is in harmony with the present, the more it would be enforceable and the more its goals would be achievable that intended by the legislator.

In a general view, it is very easy to conclude that the "1964 Constitution" was drafted 57 years before today, which may have been in line with the requirements of its time and was a successful Constitution in its time. But there is no doubt that the Constitution of that time is definitely an outdated Constitution for today, which could not be in line with the real conditions of today's society.

According to constitutional experts, in stable countries, the useful life of the constitution is 19 years, while 57 years have passed since the adoption of 1964 constitution, which it was only 11 years valid and another 46 years was suspended. But as it is said, laws change according to the needs of society, and this change is necessary in the sense that many laws may not be compatible with the evolution of society.



However, societies that rely on the old laws and govern themselves according to those laws naturally confuse and disturb society, because outdated and inefficient laws naturally is not compatible with the new spirit of society and its needs, and therefore leads society in the opposite direction, and thus collective breach the law prevails in society. But if the law is in accordance with the needs of the day or is so-called up-to-date, it will be naturally accepted and well-received by the society, and since it is desirable for an individual in a society, there will be no problem in enforcing it, and people will not feel alienated from the law.

However, this shortfalls can be solved very easily for a special period of time, because the mentioned constitution is not fully applicable, so an inclusive commission must be formed for eliminating its shortfalls and necessary amendments. Following its modification, it must be approved by a National Loya Jirga in order to enter into force.

CONCLUSION

From this discussion, we reach the following conclusions:

- Our society, like any other society, needs a constitution. According to the rule, bad law is better than no law, enforcing the 1964 constitution is better than this confusing situation and governance in the absence of law.
- In order that the 1964 Constitution have the desired function, it is better to lay the groundwork by setting special conditions to facilitate its implementation.
- In order to eliminate the shortfalls of this Constitution and to amend the articles that are not applicable in the present era, it is necessary to appoint a commission to amend this Constitution for a certain period of time so that the Constitution will be applicable for the interim period, and after the approval of a National Loya Jirga, it would be implemented.
- At the same time, given the importance of the constitution and our country's need for a constitution, practical measures should be taken to draft a new constitution as a national pact acceptable to all as soon as possible.

The new constitution should have the following features:

The Islamic nature of the law: In a religious society, laws must be approved by religion. Furthermore, human experience has shown that human-made laws have been incapable of creating a law-abiding society that determines the full well-being of human beings, and also



law enforcers have not taken the necessary care to protect and enforce the Constitution. The only laws that can create a healthy and law-abiding society are the laws that are derived from the spirit of religion.

Convergence with time: A constitution shall meet the requirements and real conditions of its time.

Acceptable for all: The constitution is a national pact, and its importance lies in its inclusiveness, which means that it must be acceptable to all segments of the nation, and that all segments of the nation shall be involved in its drafting. If all segments of society do not accept it as a national covenant, it is difficult to be properly implemented and respected by all.

Structured and with desirable content: A good Constitution is the one that is structurally well-organized and have an enrich content.

The end

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