

The Study of Liberalism in the Context of Afghanistan's 2004 Constitution

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Abstract: *The 9/11 events brought dramatic changes to the legal and political territory of Afghanistan. In 2004, this country enacted new liberal constitution on the base of democracy. So, this article explores briefly liberalism, Afghanistan's 2004 Constitution, and it will also determine in which parts this constitution has compatibility with liberalism, and in which parts it is opposite of that. At the end of the research I found that majority elements of liberalism have been inflected in this constitution, in another word the majority parts of Afghanistan's 2004 Constitution are on the base of liberalism. But in some parts it violates some of the elements of liberalism for instance; liberalism emphasizes on religious liberty which will conduce to secularism, but article three of Afghanistan Constitution rejects this claim and emphasized that no law can be enacted which is opposite of Islam religion. Same situation is existed for the individualism. Liberalism gives priority to individuals upon society, but Afghanistan constitution gives priority to society upon individual.*

Keywords: Liberalism, Afghanistan, Constitution, Boon agreement

1. Introduction

Nowadays liberalism has priority in the legal and political systems of each country. Because it is the natural demand of individuals to be free, and no one is eager to let others include state or government to interfere in his or her private affairs. Most of the countries have enacted their constitutions on the base of liberal principles. Consideration of Afghanistan's 2004 Constitution on the base of liberalism enumerates very important. So, since 2004 until date, there is a question between people as follow; does Afghanistan's 2004 Constitution is a liberal one or no? In order to find a better answer for this question I have decided to do a research. The word Liberalism is derived from Latin word liberal which means freedom. Liberal means the authority of an individual which he can do every things which he wants in the case of doesn't harm others. In another word it means freedom of individuals, or nonintervention of state in the private life of people. Liberalism is a very important key of success for the first world countries especially for USA. During the cold war there was a huge competition between USA and Russia regarding liberalism and socialism. Liberalism was supported by USA and its allies, and socialism was supported by Russia and its allies. At the end of the cold war liberalism dominated upon socialism. Thereafter liberalism was welcomed by majority of the countries. When terrorists attacked on New York buildings and Pentagon in USA on 11 September 2001 (Johnson, Maley, Their & Wardak, 2003), this country determined that, these attacks happened by Al Qaeda group. USA demanded this group's leader from Taliban, but they rejected USA's suggestion regarding the submission of Osama to US government. Finally USA has attacked on Afghanistan in order to end the Taliban regime (Ehler, Lewis, Espinosa, Farrington & Ledeen, 2015). By November 2001, US with the cooperation of Northern Alliance got the control of Afghanistan (Sugarman et al, 2011). By the hardworking of USA, Afghan political leaders, scholars and other cooperators Afghanistan enacted its liberal constitution in 2004 with the protection of nation

rights and democracy. Thereafter Afghanistan became a liberal democratic country.

2. Brief information about Liberalism

In the beginning of the context it is important to know what liberalism is. Liberalism as a political and moral phenomenon has two important principles they are individualism and liberty. First, it gives priority to individuals upon society. Second, gives the individuals liberty as much as possible (Chau, 2009). The word liberal is derived from the Latin word *liber* which means free men which is originally refer to the philosophy of freedom (Mises, 1985 edited by Greaves, 2005). John Rawls gave the liberalism a political shape, and he claimed that right has priority than good (Rawls, 1993). Since 14th century, this word has been using with range of meaning. But the term of liberalism has used most lately (Heywood, 2014). The dominated view in 21st century regarding the history of liberalism was that, its history is refer back to the mid-seventeenth century or before that (Wolin, 1995). In fact this word was used in the beginning part of the 19th century. The first country which used this terminology was Spain in 1812. Thereafter in 1840s, this word was used in whole Europe. In reality, liberalism replaced feudalism in the Europe, and developed in the capitalist societies. Liberalism was developed as a reaction against the absolute monarchs which was well-known as king's divine right. In place on, it suggested government on the base of representation. It criticized the political and social recruitment on the base of inheritance, and defense from the religion freedom. This is why 19th century is a liberal century (Heywood, 2014).

But 21st century is well-known as a modern liberal era. Further development of industrialization pushed the world toward modern liberalism. The classical liberalism was emphasized on the nonintervention of state in the market, but when the percentage of injustice and inequality became so high in the society and this conception was not able to solve the problem, thereafter the theory of the modern

liberalism emerged on the base of the intervention of state in the market.

a) *Brief history of Afghanistan's 2004 Constitution*

Since independence until date Afghanistan has had much more and much less experience of constitutions. It means that this country has lots of constitutions with less implementation (Their, 2006). So, from 1923 when Afghanistan enacted its first constitution until 2004, this country has been experienced ten different constitutions including the 1993 *mujahidin* draft constitution (Pasarlay, 2018). Afghanistan enacted its last constitution in 2004, three years after the Bonn agreement. On 11 September 2001 terrorists attacked New York and Pentagon of USA, this country lost its two important business centers in New York alongside thousands of people were died (Hashimi, 2016). Thereafter Bush administration gave priority to combat against terrorism in its foreign policy (Sazmand, 2013). On 19 September 2001 some witnesses indicated that the 9/11 attack has been done by Al Qaeda group whose leader was Bin Laden. In that time he was in Afghanistan (Al Greener, 2016). Bush administration demand Bin Laden from Taliban, but Taliban rejected this suggestion (Katzman, 2008). This is why on 7 October 2001, USA with the cooperation of the Northern Alliance started its attack on Afghanistan. Finally in 12 November 2001 Taliban lost its control on Kabul. (Danish, 2012). Thereafter the Bonn agreement conducted on 17 November 2001 in order to create the new legal and political regime for Afghanistan (Tamanna, 2008). Among other decisions in Bonn's agreement the creation of commission in order to enact new constitution for Afghanistan was also included (Danish, 2012). After this agreement the specified commission started its work to draft the constitution, by the executive order of Hamid Karzi on October 2002 (Their, 2006). When commission completed its work the *Loya Jirga* conducted to enact the new constitution for Afghanistan with democratic manner (Hashimi, 2012). 502 representatives across the country participated in this *Loya Jirga* (Rubin, 2013). Finally, on January 4, 2004 constitution was approved by these representatives (Ehler et al., 2015). Zalmay Khalilzad (2016) mentioned on his book (*The Envoy*) "It stands as one of the most enlightened constitutions in the Islamic world" (Khalilzad, 2016, P. 207). It was democratic because during the draft process of this constitution the opinions of people were inflexed on it. People shared their thought in two ways. First, through straight questions. Second, by asking the opinions of people on the alternatives of a constitutional system (Ahmadi, Mohammadi & Erfani, 2016). Thereafter Hamid Karzi signed it through the executive order number 103 (Rasoli, 2014).

The Afghanistan's 2004 constitution has 12 chapters with 162 articles. Its structure is as follow; Preamble, Chapter One the State (21 Articles), Chapter Two the Fundamental Rights and Duties of Citizens (38 Articles), Chapter Three the President (11 Articles), Chapter Four the Government (10 Articles), Chapter Five the National Assembly (29 Articles), Chapter Six the Loya Jirga (6 Articles), Chapter Seven the Judiciary (20 Articles), Chapter Eight the Administrative Division (7 Articles), Chapter Nine the State of Emergency (6 Articles), Chapter Ten Amendments (2 Articles), Chapter Eleven the Miscellaneous Provisions (7

Articles), Chapter Twelve the Transitional Provisions (5 Articles) (Afghanistan Constitution, 2004).

b) *Liberalism and Afghanistan's 2004 Constitution*

1) **Individualism**

The conception of individualism is a very important element of liberalism. This conception has rooted on John Locke's opinion when he claims that the natural rights of each individual has priority upon collective civil society (Reimer, 2006). He also added that because of humanity individuals have the rights (Chau, 2009). Individualism also means that gives priority to individual in the field of rights, needs and interests upon society. The conception of individualism during the feudal era was different than market-oriented era and thereafter. During the feudal era few individuals had their own interests but, when feudalism breakdown individuals got lots of possibilities like; they got the right to think for themselves, and also they got liberty regarding wherever they want to work and for whom they want to work or don't want to work (Heywood, 2014). Liberalism indicates that when a political regime consists individuals, in this case the right of these individuals will be protected and capable to do their own job (Nitisha, 0). But when we consider individualism in the context of Afghanistan's 2004 constitution, the result is opposite. This constitution gives priority to the society upon individual. Following articles prove this issue. Article 8 gives priority to the national interests than individuals'. It also emphasized on state to formulate the policy on the base of national interests (Afghanistan Constitution, 2004). Article 40 gives some authority to the state regarding acquisition of private property of individuals for public interests which mentioned that no one has authority to prohibit people for acquiring and making property, but state can acquire the private property of people for the public purpose according to law. Beside on state should compensate it again (Afghanistan Constitution, 2004). Article 81 also mentioned that each member of the national assembly should give priority to the supreme interest upon individual interest (Afghanistan Constitution, 2004). Above mentioned articles prove that Afghanistan's constitution gives priority society upon individuals.

2) **Freedom or Liberty**

Freedom or Liberty are interchangeable with each other which means the authority of a person who can do everything which he wants but in the case of doesn't harm others. The conception of the supreme important of individual lead the society toward freedom. But there are difference between classical or early liberalism and modern or later liberalism regarding the freedom. Early liberalism consider freedom as a natural rights and believes on negative freedom on the other hand the later liberalism consider it as a condition which people can promote their talents and skills and believes on the positive freedom (Heywood, 2014). Liberals consider liberty as a very important issues because in the case of lack, individual will be a unit without any personality (Nitisha, 0). According to Afghanistan's current constitution, everybody has the right of expression freedom, and government cannot restrict it (Ehler et al., 2015). So, right to liberty is another fundamental right of nation among other rights (Ehler et al., 2015). Article 24 of constitution consider liberty as a natural right of human beings. It also added that there is no limitation for the liberty of

people. Beside on this article mentioned two limitation for the right to liberty. First, it should not violate the rights of others. Second, it should not be opposite of the public interest which are declared in the law. More over state is responsible to protect this right for the people. (Ehler et al., 2015). Article 49 (1& 3) prohibited forced labor especially by children (Ehler et al., 2015). The right to express your own thought is also very important aspect of the state this is why article 34 mentioned about the freedom of expression which is stipulated that no one can violate the right to freedom of expression. Everybody has the right to manifest its own thought through speech, writing and illustration, but he or she should observe the provisions of the constitution and other laws. Printing and publishing topics are also allowed for the people (Afghanistan Constitution, 2004). Article 16 (4) mentioned about the press liberty. Publication and broadcasting of television and radio by all spoken languages are allowed (Afghanistan Constitution, 2004). Article 39 mentioned about the freedom of movement inside of the country from one place to another, but it also mentioned one exception that no one can enter to a place which is forbidden by law (Ehler et al., 2015). Article 2 mentioned about the religion performance freedom. According to this article the official religion of the people of Afghanistan is Islam, but it also permitted to other religions follower to do their religious rites (Afghanistan Constitution, 2004).

3) Equality

Another very important principle of liberalism is equality. Equality means access of men and women to equal legal and political rights. Alongside political it is religious and moral principle also. It is religion principle because it indicated that everybody is born equally. "It is unreligious to deprive him of his equal status with others" (Nitisha, 0). There are two types of equality: (1) when people have equal rights before the law, for instance equal personality it is called equality before the law. (2) When law treats the people equally it is called equal treatment of the law (Ehler et al., 2015). Article 22 mentioned about the equality. From one side this article prohibited the discrimination which is the first step for the equality, from another side it gives the equal rights to men and women. It means that those activities which men can do, women can also do for instance, men can become ministers, and same to that women can also be. Moreover, equality is a core element of civil rights, and it will achieve when there is no discrimination (Ehler et al., 2015). Article 33 mentioned the equal political rights of men and women. This article used the statement "The citizens of Afghanistan have the right to elect and be elected" (Afghanistan Constitution, 2004). So, the word citizens include all men and women. As a result, it indicates that Afghanistan's 2004 constitution granted the political equal rights of its nation (Ehler et al., 2015).

4) Justice and social liberalism

Both liberalism and socialism have the social principle (Nitisha, 0). Justice mostly relates to the moral judgment of rewards' and punishments' distribution. Liberals believe justice on the base of equality because of the following reasons. First, all of the human being born equally. Second, they believe on formal equality which include legal and political equality. Third, they also believe on equality of

opportunity which means that the government should pave the way equally for all of the people of the society. This step is the fundamental step toward meritocracy (Heywood, 2014). The intervention of state in the market was more developed in the 20th century, it paved the way for the social welfare which means overcome on poverty and provide welfare to the society. So, modern liberals consider welfare on the base of equality of opportunity. Thereafter people got the social rights like; the right to work, right to education and right to decent housing. Modern liberals called this process as the social liberalism (Heywood, 2014). Article 6 mentioned about the social justice. It indicates that the state is responsible to create prosperous society on the base of social justice. Article 42 (3) mentioned about the justice in the case of taxes. It indicates that the rate and payment of taxes which has been determined by law should be on the base of justice (Afghanistan Constitution, 2004).

5) Economic Management

The classical liberals believe on the conception of *laissez-faire*, whom believed on the nonintervention of state in the market. When *Keynes* challenged the nonintervention idea, thereafter the modern liberal has accepted the idea of intervention of state in the market in order to reduce poverty, inequality and injustice in the society (Heywood, 2014). Article 40 of constitution mentioned:

Property is immune from invasion. No person shall be forbidden from acquiring and making use of a property except within the limits of law. No body's property shall be confiscated without the provisions of law and the order of an authorized court. Acquisition of a person's property, in return for a prior and just compensation within the bounds of law, is permitted only for securing public interests in accordance with the provisions of law. Inspection and disclosure of a private property are carried out only in accordance with the provisions of law (Afghanistan Constitution, 2004).

This article generally accepts the nonintervention of state in the private property of individuals, but it also accepts one exception that is called securing public interests. So, in the case of public interests according to this article state has authority to intervene in the private property. Article 10 also protect the private investments and enterprises on the market economy base (Afghanistan Constitution, 2004).

6) Consent

The modern idea of consent has been presented by Thomas Hobbes and John Locke. Both of them argued that, the state was created by the consent of the people. This is way consent is the primary element of liberalism. The main reason of American Revolution was that, people of America congregated with each other and said that we don't have a consent from the British rule in America. This is why consent is a very important element of democratic countries (Nitisha, 0). Article 61(1) mentioned that when a presidential nomination win more than 50% of the votes, he will become the president of Afghanistan. So, for the president position the consent of majority people is obliged (Afghanistan Constitution, 2004).

7) Constitutionalism

Another very important element of liberalism is constitutionalism. It has two meanings as follows; when constitution mentioned some limitation of the government it is the narrow meaning of constitutionalism. When constitution acts as guide to the government is the broader meaning of constitutionalism. Zoe Bernadette Sherman directly narrated from Stanford Encyclopedia which it mentioned about the constitutionalism as “the idea, often associated with the political theories of John Locke and the “founders” of the American republic, that government can and should be legally limited in its powers,” (Sherman, 2006, P. 17). As a result, constitutionalism is the limited state or government theory (Nitisha, 0). More over rule of law is a very important part of constitutionalism (Kamali, 2014). Article 37 of constitution mentioned that nobody include state has the authority to examine the personal conversation and correspondence, but according to law. So, article limited the authority of the government in order to interfere in the private sphere of the people (Ehler et al., 2015). Article 4 (4) mentioned that, no one has authority to deprive Afghans from their nationality. Even the state cannot do that. So, this is also a limitation of constitution on the government (Afghanistan Constitution, 2004). Article 23 mentioned another limitation for the government regarding the life of people. It means that no one include state has the authority to deprive people from the right of life because life is one of the most fundamental and meaningful right of individual. This is why state doesn't have the authority to suspend it (Ehler et al., 2015). Article 27 mentioned that state or other organ doesn't have the right to arrest, and punishment. This article gave this authority to the court according to law. Article 28 limited the authority of the government regarding the extradition of Afghan citizens to other countries, but according to mutual agreement. Article 29 mentioned that state doesn't have the right to torture human beings even in the time of investigation for truth. Article 30 limited the authority of government for obtaining testimony from accused person by compulsion. Article 40 limited the power of state to obtain private property, but for the public interest state can do it, this is an expectation. Article 42 (2) mentioned that state cannot impose the taxes but according to law. Articles 22 and 50 of constitution also limited the authority of the state which stipulated that the government of Afghanistan cannot discriminate among its nation (Afghanistan Constitution, 2004).

8) Secularism

The important element of liberalism is religions freedom which push society toward secularism. Afghanistan constitution is opposite of this statement. According to 2004 Constitution, Afghanistan is an Islamic Republic country (Lee, Jonathan L. 2018. P 132). Beside on article 3 of this constitution mentioned that no law can be enacted in Afghanistan which is opposite to the beliefs of Islam. Article 2(1) also announced Islam as the official religion of Afghanistan. Article 45 also limited the educational curricula to the religion of Islam. It means that the educational curricula cannot be opposite of the Islam religion (Ehler et al., 2015).

3. Conclusion

After this research I found that the word liberalism is derived from Latin liber which means free men whom never become slaves. Its history is refer back to the western countries. The 9/11 terrorist attack paved the way for US to come to Afghanistan and end up the Taliban regime in this country. In 2001 by hardworking of USA, European countries, Afghan political leaders and scholars, Afghanistan has started another new political and legal life. In 2004, this country enacted a democratic constitution which 12 very important chapters and 162 articles. For the first time in the history of Afghanistan, this country became a democratic country with liberal ideas. The majority part of Afghanistan's 2004 constitution is liberal. But one thing is for mentionable that in some part this constitution violates some of the elements of liberalism for instance; liberalism emphasizes on religious liberty which will conduce to secularism, but article three of Afghanistan Constitution rejects this claim and emphasized that no law can be enacted which is opposite of Islam religion. Liberalism gives priority to individuals upon society, but Afghanistan constitution gives priority to society upon individual.

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Author Profile



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